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⁶ Term expired January 1, 1903.

⁷ Term began January 1, 1903.

⁸ Deceased January 12, 1903.

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On August 8, 1902, rule 10 was so amended as to read as follows:

§ 5609. RULE 10. Bills of Exceptions and Transcripts, How Prepared. Every bill of exceptions or transcript of record shall be plainly written or printed upon white paper, with ample spacing between the lines, so as to be read without more than ordinary strain or effort. If written with pen or typewriter, the same must be done on only one side of each sheet, and a margin of at least one and one-quarter inches shall be left at the top

of each page. The paper of pen or typewritten bills of exceptions and transcripts shall measure not less than seven and three-quarters by twelve and one-half, nor more than eight and one-half by fourteen inches. Photographs shall not be mounted upon cardboard, but upon cloth or paper. All written or printed matter shall be fully exposed to view, and no writing or printing shall be hidden by metallic fasteners or binding of bills of exceptions or transcripts. Any violation of this rule will be dealt with as a contempt of court.

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**SAVANNAH, F. & W. RY. CO. v. POSTAL
TEL. CABLE CO.**

(Supreme Court of Georgia. June 11, 1902.)
**CONSTITUTIONAL LAW—DUE PROCESS OF LAW
—EMINENT DOMAIN—PROCEDURE.**

1. The act approved December 18, 1894 (Acts 1894, p. 95), "to provide a uniform method of exercising the right of condemning, taking, or damaging private property" (Civ. Code, §§ 4657-4686), is general in its nature, and applies to all persons, natural and artificial, who come within its purview. The act approved December 20, 1898 (Acts 1898, p. 54), amended the existing law, which provided a uniform method for exercising such right of condemnation, only as to telegraph companies which seek to condemn rights of way of railroad companies for the purpose of erecting thereon lines of telegraph. As amended, the law is general, and by its provisions due process of law is afforded to the railroad companies whose property is sought to be condemned.

2. The necessity for taking private property for public use is a question for legislative determination, and the provisions of the Code relating to such taking are not, because they fail to provide for a special tribunal to pass upon such necessity, violative of the constitutional inhibition against taking the property of the citizen without due process of law.

3. The description of the property sought to be condemned, as made in the original notice, was not open to the objection that it was vague and indefinite. The amendment to the original notice was properly allowed, and inured to the benefit of the railway company.

4. Construing section 4679 of the Civil Code as amended by the act of 1898, a telegraph company which has proceeded to condemn a sufficiency of the right of way of a railway company for the purpose of erecting a line of telegraph may, pending an appeal from the award of the assessors, lawfully proceed to construct its line on such right of way after it has deposited the amount of the award in the office of the clerk of the superior court of the county where such proceedings were had. The record does not show any error committed by the trial judge in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Proceedings for injunction, brought by the Postal Telegraph Cable Company against the Savannah, Florida & Western Railway Company. From an order granting the injunction, defendant brings error. Affirmed.

W. L. Clay, for plaintiff in error. Garrard & Meldrim and J. R. McIntosh, for defendant in error.

LITTLE, J. The Postal Telegraph Cable Company instituted a proceeding in Chatham county, where the principal office of the Savannah, Florida & Western Railway Company was located, to condemn a portion of the right of way of that company, extending through the counties of Dougherty, Mitchell, Thomas, Brooks, and Lowndes. The proceeding was instituted under the provisions of an act approved December 20, 1898 (Acts 1898, p. 54), which are codified in sections 4657 to 4686, inclusive, of the Civil Code. Subsequently the railroad company filed an equitable petition, in which it prayed that the condemnation proceeding instituted by the telegraph company be enjoined. That prayer was denied in the court below, and the judgment refusing an injunction was brought to this court for review, where it was affirmed, as reported in 112 Ga. 941, 38 S. E. 353. By this decision two legal propositions which are res adjudicata as to the parties in this case were ruled. The first was that, although a statute which authorized the exercise of the power of eminent domain for the purpose of condemning private property for public use may not provide for an appeal from the award of the assessors of the compensation to be paid for the property condemned, it is not, for this reason, unconstitutional; and the second, that in a proceeding instituted by a telegraph company under the provisions of an act of the legislature of Georgia approved December 20, 1898, to condemn so much of the right of way of a railway company as may be necessary to erect, maintain, and operate a telegraph line between certain points, it is not essential that the telegraph company should affirmatively show that, in order to do so, it is necessary for it to condemn such right of way, nor to show that it is necessary for it to use the particular portion of the right of way that it proposes to condemn. After this the railroad company, having amended its petition, again applied for the injunction for which it originally prayed.

¶ 2. See Eminent Domain, vol. 18, Cent. Dig. § 163.
42 S.E.—1

The injunction was for the second time refused by the court below, and that judgment was also affirmed by this court in a ruling which is reported in 113 Ga. 916, 39 S. E. 390. The proceeding to condemn the right of way of the plaintiff in error resulted in an award which assessed the damages to be paid to the railway company at \$6,000. After this award had been made, and during the pendency of the petition under which the injunction had been refused, the telegraph company commenced the work of constructing a telegraph line over the right of way of the railway company by erecting poles on which to place its wires, having first paid into the registry of the superior court of Chatham county the amount of the award made by the assessors. The railway company met this work of construction with force, and cut down, dug up, and removed from its right of way the poles which were erected by the telegraph company. Then the latter, by an independent proceeding, asked that the railway company be enjoined from interfering with the construction of its telegraph line, from obstructing such construction, and from injuring the property of the telegraph company on the right of way of the railway company. An interlocutory injunction was granted according to the prayer of the petition. To the grant of this injunction the railway company excepted, and the question for us to determine is whether the judge who heard the case and granted the injunction committed error in doing so.

1. It is contended by counsel for the plaintiff in error that the grant of the injunction was error, and that the provisions of the Code of Georgia and of the acts of the legislature under which the condemnation proceedings were had are unconstitutional—First, because the Code provisions and the acts “lack due process of law”; and, second, because they deny to the railway company (in this case) the equal protection of the law. The reasons urged in the brief of counsel why due process of law is not afforded by the Code and the statutes of this state are that they are deficient (1) in “failing to provide for effective creation of competent tribunal”; (2) “failing to make provision empowering and requiring tribunal to pass upon and adjudicate every material question involved, and to consider and pass upon every material defense”; (3) “failing to provide machinery for enforcing award”; (4) “failing to provide just compensation for property taken.” Under the second title of our Civil Code, which refers to special rights, remedies, and proceedings, is contained the general law of force in this state in reference to the condemnation of private property. Section 4657, which is the first section in this article, declares that all corporations or persons authorized to take or damage private property for public purposes shall proceed as indicated in said chapter. Article 2 of that chapter provides for the appointment of assessors. Article 3 provides for

the hearing before the assessors. Article 4 provides for an appeal from the award of such assessors to the superior court of the county where the award is filed; and other sections of this chapter make particular provision for ascertaining the value of the property condemned and the issuance of executions for the amount of the award; and, as we think, inaugurates a constitutional system which provides for just compensation to be paid for property taken under the exercise of the right of eminent domain. By the provisions of this chapter, which is general in its terms, it is expressly provided in section 4685 that the method of condemnation therein set out applies to telegraph companies as well as to all persons, natural or artificial. This chapter is a reproduction in codified form of an act approved December 18, 1894 (Acts 1894, p. 95). Besides an act approved in 1897, the terms of which it is not necessary to consider here, an amending act approved December 20, 1898 (Acts 1898, p. 54), was passed, “so as to provide for the contents, direction and service of the notice contemplated by section 13 of said act, and by section 4609 of said Code [of 1895], when a telegraph company undertakes to condemn a portion of the right of way of a railroad for the purpose of constructing, maintaining and operating its telegraph lines along and upon such right of way,” etc. By the terms of this act certain sections of the Code embodied in chapter 9 were in cases where telegraph companies should undertake to condemn the right of way of a railroad company for the purpose of constructing thereon telegraph lines. These changes refer, among other things, to the notice which the chapter required to be given, and declare that in such cases there need be but one condemnation proceeding against the same railroad company, and that, if the railroad company has a main or principal office in this state, the proceedings (for condemnation) shall be had in the county in which the main or principal office is located. They give to the assessors which were provided by the act of 1894 power to make their findings as to the damages on the testimony of witnesses, etc. By this amending act of 1898 no change was made in the provision of chapter 9 of the Code in relation to the condemnation of private property, except in proceedings instituted by a telegraph company to condemn the right of way of a railroad company; and, as amended, the act is general in its terms. The provisions incorporated by the act of 1898 became a part of the law in relation to the condemnation of private property, and was an addition to the law existing at the time of the passage of the act.

It is urged by counsel for the plaintiff in error that the act of 1898 is unconstitutional, because it makes no provision for the appointment of assessors, and to provide special machinery, in cases to which it is applicable, for enforcing the award made, and the conclusion is drawn that for these rea-

sions the act does not provide just compensation to be paid to the owner of the property taken. This contention is not sound. The act of 1898 is not to be taken independently of and disconnected from the provisions of the act of 1894. The latter act, as amended by the act of 1898, in our opinion, meets every objection urged by counsel that the Georgia statutes relating to the condemnation of private property for public purposes are unconstitutional in that they lack due process of law. It is neither necessary nor proper to incorporate into an amending act the provisions of the act sought to be amended. When the Code provisions, as amended, are fairly construed, and the scheme of the existing law in relation to condemnation proceedings is put into operation, it will be found that provision for creating a competent tribunal, invested with power to assess damages, has been made; that the award of this tribunal shall be made on evidence; that an appeal from the award to the superior court has been provided for; and, finally, that the method of enforcing it is declared to be by writ of execution. It is true that the Code designates the ordinary of the county where the land lies, or the franchise sought to be condemned is exercised, as the officer to select the arbitrator for the company, if it refuses to select one; and that the award, when made, is to be filed in the office of the clerk of the superior court of the county where the land lies, or the franchise sought to be condemned is exercised. It is further true that the amending act does not in direct terms change the provisions of the Code in these (and similar) particulars; but when the scheme of the amending act is considered, and the whole act is fairly construed, it is evidence that it was the intention of the legislature to designate the ordinary and office of the clerk of the superior court of the county where the proceedings to condemn were instituted as the officer to select the assessor and as the office in which the award shall be filed. So construed, effect is given to the amending act. The right of condemnation is preserved, and a system which will afford just compensation for property taken for public purposes is adopted, which in all respects affords to the owner of the land due process of law. By the construction we give to the act as a whole, no violence is done to the words which it contains. The original and amendatory acts, so construed, furnish a complete scheme for the condemnation of private property. Without it, the particular condemnation provided in the amending act must fail. Treating the latter as making an addition to the original act, regarding its purposes, and giving to the words which it contains their full signification, it must be evident that the legislative intent is expressed by such construction, and the uniformity of the plan of condemnation devised is preserved.

2. One of the principal reasons urged by

counsel for the plaintiff in error in support of the contention that the law under which the condemnation proceedings in the present case took place is unconstitutional is that in neither the act of 1894 nor the amendatory act of 1898 is any provision made for a hearing, preliminary to the condemnation, upon the question of the necessity of the seizure sought to be made, and it is argued at considerable length that this failure renders the law repugnant to the constitution of the United States and of the state of Georgia, in that it is a taking of private property without due process of law. Without going into the constitutionality of the law now under consideration, Fish, J., in the case of Savannah, F. & W. Ry. Co. v. Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353, discussed exhaustively the question here made, and his reasoning in the case cited applies with irresistible force to the present case. We quote from the opinion on page 944, 112 Ga., and page 354, 38 S. E., as follows: "When the general assembly passed the act authorizing and empowering a telegraph company to condemn so much of the right of way of a railroad company as might be necessary for the purpose of erecting, maintaining, and operating its telegraph lines through and upon such right of way, and gave to the telegraph company the right, in one proceeding instituted in a single county, to condemn the right of way in any number of counties through which the same might extend, it passed upon the necessity of condemning such a right of way for such a purpose. When it, in effect, enacted that a telegraph company could, in one proceeding, condemn a strip of land extending through the entire length of a railroad right of way, it impliedly declared that it was necessary for the public good that a telegraph company should not be compelled to seek a route for the erection of its telegraph line other than through and upon the right of way of a railroad company. * * * Nor was it necessary for the telegraph company to show that the particular portion of the right of way specified in the notice was necessary for the telegraph company's use in constructing, maintaining, and operating its proposed telegraph line. When the right to condemn the right of way of the railway company was conferred upon the telegraph company, the power to select such portion and so much of the right of way as might be necessary for erecting, maintaining, and operating its telegraph lines was conferred upon it subject to the limitation that it could not select and condemn such portion of the right of way as would essentially injure or interfere with the public use to which the property was already devoted. It was not obliged to show there was an absolute necessity for it to take the particular strip of land described in its notice." In 1 Lewis, Em. Dom. §§ 162, 238, the rule is laid down that in cases where the right of eminent domain is exercised the

necessity for taking the particular land in question is one exclusively for the legislature; and in section 238 a quotation is made from the case of *Boom Co. v. Patterson*, 98 U. S. 406, 25 L. Ed. 206, where the following language is used: "When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested." See, also, the cases cited in the note to section 238 of 1 *Lewis, Em. Dom.*, and the authorities reviewed by Mr. Justice Fish in the case of *Savannah, F. & W. Ry. Co. v. Postal Tel. Cable Co.*, *supra*. Under the constitution of this state (Civ. Code, § 5729) private property cannot be taken for public purposes except in cases of necessity, and the laws authorizing the condemnation of private property and providing a means for its accomplishment permit the seizure of only so much property as may be necessary for the purposes authorized. See Civ. Code, § 4658, and Acts 1898, p. 54. When the legislature grants to a corporation the right to exercise the power of eminent domain, it alone, according to all authority, is the judge of the necessity for the exercise of the right. If the corporation should exceed the powers granted it, and take more land than is authorized, or if it should otherwise exceed the powers granted to it by the legislature, it would place itself without the pale of authority, and be amenable to a court of equity. As the necessity for the exercise of the power to condemn private property is passed on by the legislature, and as there is always open a tribunal to pass upon the lawfulness of the manner in which the right is exercised, it cannot be said that the law of Georgia, which authorizes the taking of private property for public purposes, does not provide "due process of law" in rendering such taking effectual.

3. The original notice of condemnation served by the telegraph company on the railroad company stated that the proposed line would be constructed "with poles about twenty-five feet in length, and one foot in diameter at the base, and planted at a depth of five feet in the ground, and about one hundred and sixty-seven feet apart on said right of way, making about thirty-one poles to the mile; and said poles will be situated about thirty feet from the center of the railroad track, which is located about the center of your right of way, being on an average of one hundred and fifty feet in width. * * * Said poles will nowhere be planted upon any of the embankments of said railway company, nor will said wires be attached or fastened to any of the bridges or trestlework of said railway company." We fail to see how, under the circumstances, a more

definite description could be given as to the location of the proposed line. The railroad company, however, demurred to the notice, and the telegraph company amended, by inserting at a suitable point in the description of the proposed location of its line the words: "Or at such other distance from the tracks as may be preferred and designated by your company, not nearer the outer edge of the right of way than six feet." It needs no argument to show that the amendment, offering as it did to allow the railroad company to select the line which should be followed, even had it been indefinite, was not one of which the railroad company can justly complain. The amendment was germane, and properly allowed.

4. It is provided by section 4679 of the Civil Code that the entering of an appeal and the proceedings thereon in condemnation cases "shall not hinder or delay in any way the work or the progress thereon, if the applicant to condemn shall pay or tender to the owner the amount of the award, and in case of the refusal of the owner to accept the same, deposit the amount awarded with the clerk of the superior court for the benefit of the owner." It appears that in the present case the telegraph company appealed from the award of the assessors, depositing with the clerk of Chatham superior court the sum of \$6,000 (the amount of the award), and proceeded with the work of erecting the line. It is contended by the railway company that this was not a compliance with the law upon the subject, because the Code section above quoted had no reference to telegraph companies condemning the right of way of railroad companies; and that, even if section 4679 is applicable to such a case, the words "clerk of the superior court," therein used, are applicable to the clerk of the superior court of the county where the land lies which is sought to be condemned, and consequently a single deposit in the county where the proceedings were had is not sufficient to meet the requirements of the law. We do not think that there is any merit in this contention. It is true that section 4679 of the Civil Code, as originally enacted, had reference to appeals in condemnation proceedings brought in the county where the land sought to be condemned was located. But the act of 1898, as we have before said, made provision, in a case where a telegraph company sought to condemn portions of the right of way of a railroad company, for the condemnation proceedings to be had in a single county. We know of no good reason why this method should not be effectual in protecting the landowners. The law in regard to appeals was left unchanged, and, reading section 4679 of the Civil Code as amended by the act of 1898, and giving the words "clerk of the superior court" that meaning which is most consonant with the evident legislative intent, it is clear that, in order to enable the telegraph company to

proceed with its work pending the appeal, it is only necessary for it, after the refusal of the railroad company to accept its tender of the amount of the award, to deposit that amount in the office of the clerk of the superior court of the county where the condemnation proceedings were had.

In the elaborate brief filed by the able counsel for the plaintiff in error many points are presented which are to a large extent reiterations of those disposed of in the foregoing discussion. We have gone carefully and laboriously over the voluminous record and the briefs of counsel on each side of the case, and have reached the conclusion that the court below did not err, for any reasons assigned in the bill of exceptions. In granting the injunction which is the subject-matter of review.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 519)

COLEMAN & BURDEN CO. v. RICE.

(Supreme Court of Georgia. June 6, 1902.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATIONS—VALIDITY—SALE UNDER POWER—RIGHTS OF PURCHASERS.

1. The provisions of sections 2710 and 2711 of the Civil Code, which provide that no assignment shall be set aside except in a direct proceeding for that purpose, to which the assignee and assignor shall be parties, refer to such assignments as are made under Act 1894, the law relating to which is codified in section 2696 et seq. of the Civil Code.

2. An assignment or transfer by a debtor, insolvent at the time, of any kind or character of property, when any trust or benefit is reserved to the assignor, is fraudulent and void. Civ. Code, § 2695 (1). Being void, such transfer or assignment may be attacked, by a party interested, in either a direct or collateral legal proceeding, when it is sought to be set up.

3. If an assignment or transfer of this character is made to a named trustee, with power of sale, an execution of the power conveys no title to a purchaser, and a deed purporting to convey to him any part of the property so transferred is likewise void.

4. If, however, the purchaser at such attempted sale, at the time of the transfer, held a valid lien by mortgage on the property he sought to purchase, and neither before nor after such sale gave up, relinquished, or canceled his lien or agreed or intended to do so, there was no merger of the lien with the title sought to be conveyed, but the same remained intact and capable of enforcement. Aliter, if he did, as a consequence of his purchase, cancel and relinquish his lien, or if he intended to do so. *Woodside v. Lippold*, 39 S. E. 400, 113 Ga. 877, and cases cited.

5. As such lien created no title, it was, under the pleadings and agreed statement of facts in this case, error to rule that the property was not subject to the execution of a creditor whose judgment was junior to the lien of the mortgage; but the court should, under the pleadings and the facts which appear in the record, have entered a decree, establishing and enforcing the lien of the mortgage against the property which it described, superior in dignity to the judgment of the plaintiff in *fl. fa.*

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between the Coleman & Burden Company and one Rice. From a judgment, the Coleman & Burden Company brings error. Reversed.

Geo. S. Jones, for plaintiff in error. Hardean, Davis & Turner, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness

(115 Ga. 629)

WILSON et al. v. PARR et al.

(Supreme Court of Georgia. June 7, 1902.)

JUDGMENT—COLLATERAL ATTACK—BANKRUPTCY—RECEIVERS—DELIVERY OF ASSETS TO TRUSTEE.

1. Whether a court of the United States having jurisdiction in bankruptcy has or has not authority, under the bankrupt law, to adjudge that a partnership which has been dissolved by the death of one of the partners, and whose assets are in the hands of a surviving partner, is a bankrupt, cannot be collaterally raised in a court of this state, when such adjudication has in fact been made, but that adjudication will be duly respected by the courts of this state.

2. In such a case it is not erroneous for a superior court, which had within four months prior to the adjudication in bankruptcy appointed a receiver to take charge of and administer the assets of such partnership, to grant an application that the receiver deliver those assets to the trustee in bankruptcy.

3. Such court, however, may, and should first, charge the assets so to be delivered with the payment of the costs and expenses incurred in bringing the same into the state court, before requiring the delivery to be made to the trustee.

(Syllabus by the Court.)

Error from superior court, Clarke county; R. B. Russell, Judge.

Proceedings between H. R. Wilson, administrator, and others and F. L. Parr and others. From the judgment rendered, Parr and others bring error. Affirmed.

Strickland & Green, for plaintiffs in error. S. C. Upson and Sol Flatan, for defendants in error.

LITTLE, J. By an order duly granted by Judge William T. Newman, presiding in the United States district court for the Northern district of Georgia, in the matter of Parr & Wilson, bankrupts, leave was granted to the Van Camp Packing Company, Gilpin, Langdon & Co., and the Empire Liquor Company, to proceed in the state court in the name and for the use of the trustee in bankruptcy, by a proper petition, to have the said state court grant an order directing its receiver, West, to turn over to the trustee in bankruptcy all the assets, property, money, and effects belonging to the estate of Parr & Wilson, bankrupts, in accordance with said leave given, the parties referred to filed a petition in the superior

court of Clarke county, setting out, in brief, the following as a statement of facts: Petitioners are creditors of Parr & Wilson, who have been legally and duly adjudicated bankrupts within the purview of the act of congress relating to bankruptcy; have properly proved their claims in the bankruptcy court, and their claims have been allowed by said court. At the first meeting of creditors, H. S. West was duly appointed trustee of the estate of Parr & Wilson, bankrupts, gave bond, and accepted said office of trustee. Since his appointment and qualification, West, trustee, has reported to the referee in bankruptcy that the funds belonging to the estate of Parr & Wilson are in the hands of West, receiver, and that the receiver refuses to turn over to him said funds. After West had so reported, petitioners filed in the district court of the United States a petition setting forth the facts reported. On a hearing of said petition the receiver and the moving creditors in the state court proceeding appeared and were made parties, and after argument his honor, Judge Newman, passed the order before recited. Thereupon the petitioners prayed that a rule nisi issue, requiring West, as receiver, and the plaintiffs in the state court to show cause why such receiver should not be directed to turn over to the trustee in bankruptcy the assets, property, money, and effects belonging to the estate of Parr & Wilson, bankrupts. When this petition was presented a rule nisi was issued, and for cause the respondents alleged that theretofore, in the state court, they had filed a bill against Parr as surviving partner, to force him to pay the debts and settle up the partnership, and West was appointed receiver under that petition, and took charge of the assets belonging to Parr & Wilson; that, after the death of Wilson, Parr continued business under the name of Parr & Wilson, and contracted a number of debts which were not paid. After West was appointed receiver, Parr, desiring to prefer certain of his creditors, had them file a proceeding against him and against the firm of Parr & Wilson, and have them declared bankrupts, without notice to the respondents, and the firm of Parr & Wilson was adjudicated bankrupt. This adjudication, while it was against the firm, was fraudulent, and, so far as concerns the plaintiffs, void for the reason that they were the only creditors of Parr & Wilson; all the others being creditors of Parr alone. Petitioners in the bankruptcy proceeding were small creditors of F. L. Parr, and their debts were contracted after the death of Wilson, and they were not interested in any way in the assets of Parr & Wilson. The state court, having seized the assets of that firm for the purpose of settling its debts, should retain the case until the real creditors of Parr & Wilson are paid and the partnership has settled with the administrator of Wilson, and the remaining sum should then be turned over to the trustee in bankruptcy. There was no question concerning bankruptcy in the original petition

filed by them in the state court, but it contained questions to be settled by the state court alone.

There appears in the record a copy of the original petition, under which the receiver was appointed, which contains more in detail a statement of the facts which were set out in the answer of the respondents. The case made by the petition and answers was heard by Judge Russell, of the state court, and an order was passed by him to the following effect: That there were questions involved in this case which must ultimately be determined by a court of bankruptcy, and it was therefore to the interests of all concerned that the entire case be tried in the same court; that all the papers in the case be transferred to the bankrupt court, and the judge of that court take jurisdiction of all the questions made; that West, receiver, pay all the costs of the case in the state court, and pay to himself \$250, commissions, services, and expenses as receiver to date, and pay to counsel for the receiver \$250 for their services in filing the petition and bringing the fund into court and for also representing the receiver; and that he pay over the remaining money in hand, and turn over any money carried by the receivership, to West, trustee. The respondents to the petition excepted to this ruling and order on the ground that the court erred in holding that, under the pleadings and record as made, there was any bankrupt question to settle; and that the court also erred in transferring the case from the state court to the bankrupt court, and in rendering the judgment recited. The petitioners who prayed for the order of transfer filed a cross bill of exceptions, complaining that the court erred in directing West as receiver to pay the costs and the expenses of the receivership proceedings in the state court, and that the trial judge also erred in directing the receiver West to pay himself commissions, etc., and counsel fees out of the fund in his hand; it being alleged that the state court was without jurisdiction to order such payment.

1. It is claimed, by the answer of some of the defendants to the petition filed by the creditors of the bankrupts, that the adjudication in bankruptcy was fraudulent and void in so far as those respondents were concerned, for reasons set forth by them. It is enough for us to say, in reply to this contention, that, when an adjudication in bankruptcy has in fact been had by the bankruptcy court, such an adjudication will be respected by the state court, and the latter court will not, after a regular adjudication has been had, enter into an inquiry as to whether such adjudication was fraudulent or void. Mr. Black, in the first volume of his work on Judgments (section 248), citing the case of *Chapman v. Brewer*, 114 U. S. 153, 5 Sup. Ct. 799, 29 L. Ed. 83, which upon examination seems to support his text, declares: "An adjudication in bankruptcy,

having been made by a court having jurisdiction of the subject-matter, upon the voluntary appearance of the bankrupt, and being correct in form, is conclusive of the fact decreed, and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in the property of the bankrupt," and Mr. Freeman, in his work on Judgments (volume 2, § 337), declares that discharges in bankruptcy and other orders and decrees of courts of bankruptcy cannot be collaterally impeached by proving them to be irregular, for which proposition he cites a number of cases found in note 1 on page 612. See, also, Brady v. Brady, 71 Ga. 71. Many other authorities could readily be cited to prove that, where an adjudication in bankruptcy has been made by a court of competent jurisdiction, such adjudication will be respected by the state court, and the question whether it was erroneously made or not, will not be entertained by such court, but the whole matter will be relegated to the proper bankruptcy court in which such adjudication was had, and there the parties complaining may and can have all objections to the regularity of the proceedings of such court considered and passed on.

2. It is further claimed that the court erred in directing its receiver to turn over to the trustee in bankruptcy the property and assets of Parr & Wilson. We cannot agree to this view. Assuming, as we must, under the pleadings in this case, that the firm of Parr & Wilson was regularly adjudicated bankrupt by a court of competent jurisdiction, it follows that the state court could not properly administer and divide the estate of the bankrupts among their creditors under the pleadings as they stand in the state court, and it must be apparent that only a court of bankruptcy can do so. Having all the proper parties before it, it has jurisdiction to settle priority and determine facts, and, in doing so, full protection can be given the rights of all creditors. It was ruled by Judge Adams, in the United States district court of the Southern district of New York, under the present bankruptcy act, that where the property of a corporation is levied on by execution, and thereafter a temporary receiver is appointed in a voluntary proceeding for the dissolution of the corporation on the ground of its insolvency, a receiver in bankruptcy subsequently appointed is entitled to the custody of the property, but that in view of the comity which exists between the federal and state courts, and the fact that the temporary receiver is an officer of the state court, and acting under its immediate direction, an application for an order specifically directing the sheriff and temporary receiver to turn over the property to the receiver in bankruptcy should be made to the state court. In *re Lengert Wagon Co.*, 6 Am. Bankr. R. 535, 110 Fed. 927. The supreme court of Rhode

Island, in the case of *Mauran v. Carpet Lining Co.*, 6 Am. Bankr. R. 734, 50 Atl. 331, 387, ruled that "the word 'judgment,' in section 67f of the bankrupt act, is sufficiently broad to apply to the judgment of a state court in appointing a receiver of an insolvent corporation, obtained within three months of an adjudication as an involuntary bankrupt," and that, "on application to the state court by the trustee in bankruptcy of an insolvent corporation which had been adjudged an involuntary bankrupt, the funds in the hands of the receiver of said corporation, appointed by the state court twelve days prior to the filing of the petition in bankruptcy, in what was practically an insolvency proceeding, must be turned over to him for administration in the bankruptcy proceedings." See, also, *Seligman v. Ferst*, 57 Ga. 561; *Same v. Saussy*, 60 Ga. 20. It is therefore ruled, both on principle and authority, that the judge committed no error, under the facts in the record in this case, in directing the receiver appointed by the state court to turn over the assets in his hands as receiver to the trustee in bankruptcy.

3. The defendants in error, by their cross bill of exceptions, complain that the judge erred in granting so much of the order as directed West, receiver, to pay the costs of the receivership proceedings in the state court, and in likewise ordering him to pay himself \$250 for commissions, services, and expenses as receiver, and the sum of \$250 to the attorneys as fees for bringing the fund into court and for representing the receiver, all of said sums having been ordered to be paid out of the fund held by the receiver of the state court, and which arose from the sale of the property of the defendants under orders taken in the original equitable proceeding in the state court, under which the receiver was appointed. It seems to us that it was eminently proper for the costs and enumerated expenses of the receivership in the state court to have been ordered paid from the fund before the same was turned over to the trustee in bankruptcy. The services of the receiver and his attorneys inured to the benefit of the creditors of the bankrupt. They were rendered under the order of the state court, and the fund in that court was the result of the services of the receiver and his attorneys acting under the orders of the court, and ought to be paid. As this fund in any court would be properly chargeable with such costs and expenses, and as the services of both the receiver and the attorneys in the original equitable petition were concluded by the order of transfer, there existed no reason why, before the transfer was made, the expenses of raising the fund transferred should not be paid. In the case of *Mauran v. Carpet Lining Co.*, supra, it was ruled that: "Under the general rule that a receiver holding property under the order of the court for the benefit of the party entitled to it should

be paid from the funds, as a part of the expense of the proceeding, the fund or estate in his hands, with reference to a party entitled to it, is the surplus over the charges allowed to the receiver, and the trustee in bankruptcy is vested only 'with the title of the bankrupt as of the date he was adjudicated a bankrupt.' The court, on further consideration, held that the receiver's fees and expenses incurred before the adjudication should be allowed to him, and the balance of the funds turned over to the trustee." In the case of *Seligman v. First*, supra, this court directed that "funds in the hands of the receiver appointed by the state court be surrendered to said trustees [in bankruptcy] except so much thereof as is legally necessary to defray the costs and expenses of collecting the fund and securing it until the order of surrender shall be granted." No point is made in the briefs of counsel that such costs and expenses could not properly be claimed after the date of the adjudication in bankruptcy, and there is nothing in the record before us which establishes the fact that any of the sums allowed to be paid out of the fund were for costs and expenses subsequent to the date of the adjudication, but the objection seems to be predicated on the allowance of any costs and expenses from the fund in the hands of the receiver. There is no reason why the state court should have sent its officers to the bankruptcy court to secure pay for their services to which they were justly entitled, and from which the fund to be distributed in the court of bankruptcy arose. It is our opinion that the court committed no error, under the evidence set out in the record, in directing these costs, fees, and expenses to be paid out of the fund before the same was turned over to the trustee in bankruptcy.

Judgment on the main and cross bill of exceptions affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 494)

ACME BREWING CO. v. CENTRAL R. & BANKING CO. OF GEORGIA.

(Supreme Court of Georgia. June 4, 1902.)

LOST DEED—ESTABLISHMENT—EVIDENCE—EXECUTION BY CITY—DOCUMENTARY EVIDENCE—EJECTMENT—ADVERSE POSSESSION—VALUE OF LAND—REMARKS OF COURT—COLOR OF TITLE—OPINION EVIDENCE—JUDGMENT—ENCROACHMENT ON STREET.

1. When it appears that one who held a deed to described land sold all the property embraced therein to another, and executed and delivered to the purchaser a conveyance of the same, it is not necessary for a party seeking to establish the loss of the deed first mentioned to show that it is not in the possession, custody, or control of the grantee in the same, in the absence of proof that he retained possession of the same after he had sold the land which it covered; the presumption in such a case being that this deed was delivered by him to the person to whom he conveyed the property.

2. Where, after proof of the loss of the original,

inal, a certified copy of the record of an instrument purporting to be the deed of a municipal corporation, and reciting that the grantor had caused the common seal of the corporation to be affixed thereto by the clerk of the city, was offered in evidence, and there appeared upon the same, after the signature of the person executing it as mayor, a scroll with the word "Seal" written in it, an objection to its introduction in evidence upon the ground that the seal of the municipal corporation was not attached to the deed was properly overruled.

3. A deed executed in 1854, purporting upon its face to be made by the mayor and council of the city of Macon, and to convey to the grantee therein named a described portion of the southwest commons of the city, reciting that the grantor "hath caused these presents to be subscribed to by the mayor of the city of Macon, and the common seal of said city to be hereunto affixed by the clerk of said city," attested by the clerk and sealed with the corporate seal, is the deed of the municipal corporation, although not signed in the corporate name of the municipality, but in the name of a particular person as mayor.

4. In view of other documentary evidence introduced by the plaintiff, there was no error in overruling the objection to the certified copy of the deed from the municipal corporation to the grantee named therein upon the ground that it did not sustain the allegation of the petition, in that it did not show that the deed conveyed lot 2 in block 12 "according to Schwabb's map."

5. The proof as to the identification and execution of the Schwabb map was sufficient to authorize its introduction in evidence.

6. In an action of ejectment, wherein the defendant relied upon adverse possession for seven years under color of title, it was not erroneous to refuse to permit a witness for the defendant to testify that its possession was notorious. The testimony would have been simply as to a conclusion of the witness.

7. Where in such a case, under the pleadings, testimony as to the value of the land in controversy, without the improvements placed thereon by the defendant and those under whom it claims, is relevant, the value of the land to be proved is its market value, and not what it may have been worth to the defendant for a particular purpose.

8. It is erroneous for the trial judge to express his opinion as to the effect of evidence in the case, and this is true though under the evidence there may not be room for doubt as to the correctness of the opinion expressed by the judge.

9. Where the question whether one entered into possession of land in good faith is involved in a case, it is competent for him to testify affirmatively that he paid for it in good faith.

10. It is not erroneous to refuse to allow the introduction of parol evidence as to the contents of a paper alleged to be lost, when the evidence as to its loss fails to show that it is not in the possession of a person who would be a natural and proper custodian of the same.

11. One who purchases land from another, and who, without written evidence of title, is placed by the seller in possession of the same, does not hold under color of title, although his vendor may have what would be color of title in him if he were in possession of the premises.

12. Even granting that the opinion of a witness for the plaintiff, testifying as an expert, as to the cost of the brickwork constituting the foundation upon which certain boilers were erected was inadmissible, because he admitted that he did not know how deep the foundation work extended into the earth, an assign-

¶ 11. See *Adverse Possession*, vol. 1, Cent. Dig. § 232.

ment of error upon the admission of such testimony over the objection of the defendant is without merit, when it appears that this same witness gave precisely the same opinion, based upon a description of the foundation, including the depth to which it extended, given in the testimony of a witness for the defendant.

13. Where, in an action for the recovery of land, the pleas of the defendant and the evidence make a case to which the act of December 21, 1897, is applicable, and it is admitted that the value of the improvements set up by the defendant exceeds the amount of the mesne profits, it is erroneous to allow the plaintiff to elect to take a money verdict for the value of the land and the mesne profits, and to thereupon charge the jury that, "under the election made by the plaintiff in the case, the jury would have the right, should the plaintiff be entitled to recover, to say what the value of the land was, and what the value of the mesne profits are, and to provide further that, upon defendant paying the amount of the land and the mesne profits, the title to the lot should vest in defendant, and, in the event defendant should not be willing to pay that amount, that it should be sold, and the amount devoted to the payment of the amount the plaintiff recovered for the value of the land and the mesne profits."

14. Where, in such a case as that just above stated, the defendant sets up improvements placed upon the land by another person, under whom the defendant holds, and the proof shows that the premises sued for, prior to the possession of the defendant, were placed in the hands of a receiver as the property of such third party, the fact that the property was in possession of the receiver will not prevent the plaintiff from recovering mesne profits for the time the receiver held it, if the plaintiffs, in the absence of the receivership, would have been entitled to recover mesne profits accruing during this period.

15. Where a city lot has, by lawful authority and grant of the municipal corporation, been permanently enlarged by the addition thereto and the incorporation therein of an encroachment upon a public street, by which the original lot has been so extended as to embrace territory which was formerly a part of such street, the land covered by the encroachment belongs to the person holding the legal title to the lot as it originally stood, although the encroachment may have been granted on the application of another person who claimed to be the owner of the lot. The true owner of the lot, in an action to recover the same and the encroachment, is, upon establishing his title to the former and the existence of the latter, entitled to recover all the land embraced within the lot as enlarged by the encroachment, and also mesne profits thereon, if sued for and proved.

16. There was no merit in the other questions made in the motion for a new trial.
(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Ejectment by the Central Railroad & Banking Company of Georgia against the Acme Brewing Company. From a judgment for plaintiff, defendant brings error. Reversed.

Estes & Jones and Hardeman, Davis, Turner & Jones, for plaintiff in error. Hall & Wimberly, for defendant in error.

FISH, J. The Central Railroad & Banking Company brought an action of ejectment against the Acme Brewing Company to recover "part of lot 2 in block 12 in the South-

western commons of the city of Macon, as fully described and laid out by Augustus Schwabb, city engineer, in the map and survey made by him of that portion of the city of Macon known as the 'Southwestern Commons' of said city; said map being made in October and November, 1851, and being the official map and survey of that portion of the city of Macon"; the tract sued for being also described by metes and bounds, and including an encroachment upon Hammond street, which was one of the boundaries of the same. There was also a count for mesne profits. In addition to the plea of not guilty, the defendant pleaded prescriptive title, based upon adverse possession, under a bona fide claim of right, by it and its predecessors in title, for more than seven years, under written evidence of title, and also that it and its predecessors in title went into possession of the premises sued for in good faith, and, while in the bona fide possession thereof, made permanent improvements thereon of the value of \$20,000, and that the land, independently of these improvements, did not exceed in value \$300, and had no rental value, except such as might be given it by reason of the improvements thus placed upon it. It prayed that, if its title was held not good, the value of the improvements should be set off against the value of the land, and that the plaintiff be required to pay it the value of these improvements. Upon the trial the jury returned the following verdict: "(1) We, the jury, find for the plaintiff. (2) We find four hundred dollars for land in dispute for plaintiff. (3) We find for the plaintiff fifty dollars per year from March 26, 1891, to date, for rent. (4) We further find the title to vest in defendant when the above has been complied with." The defendant made a motion for a new trial, which was overruled, and it excepted. In addition to the general grounds in the original motion for a new trial, there were numerous special grounds contained in an amendment thereto. The first of these special grounds alleged that the court erred in admitting in evidence "a certified copy from the record of deeds of Bibb superior court of a deed made by the mayor and council of the city of Macon, dated January 20, 1854, to Thomas P. Stubbs," to "lot of land No. 2 in block 12, as represented in the plan of survey of the Southwest commons of the city of Macon," etc., which deed closed with the following recital: "In witness whereof, the said party of the first part hath caused these presents to be subscribed by the mayor of the city of Macon, and the common seal of said city to be hereunto affixed by the clerk of said city, and these presents to be delivered, the day and year first above written. [Signed] Ed L. Strohecker, Mayor. [Seal] In presence of A. R. Freeman, C. O. W. S. Williford, Not. Pub." The motion for a new trial states that to this certified copy "no seal was at-

tached, other than the scroll after the name Strohecker," and that there were attached thereto "two affidavits not entitled in this cause or in any cause." One of these affidavits was made by H. M. Comer, dated May 20, 1897, and recited "that he is the president and one of the receivers of the Central Railroad & Banking Company of Georgia, and likewise president of the Central of Georgia Railway Company, and that the following described instrument [the original deed of this copy] is not in his possession, power, custody, or control, or in the possession, power, custody, or control of said Central Railroad & Banking Company of Georgia, or of the Central of Georgia Railway Company, and that he believes said original deed is lost or destroyed"; that he verily believes that said original deed was at one time in existence, and is now lost or destroyed, and he makes this affidavit in order that a certified copy of said deed from the record may be introduced in evidence." The other affidavit, which was dated the 19th of November, 1900, was similar to this, and was made by John M. Egan, who, in the affidavit, described himself as "the president of the Central of Georgia Railway Company, which has succeeded to the papers, offices, and property of the Central Railroad & Banking Company of Georgia." The defendant objected to the introduction of the certified copy of the deed upon the following grounds: "(1) That said affidavits that they believed said deed is lost is not sufficient proof, they not having shown that it is not still in the possession of Stubbs. (2) That said deed, whilst it purports to have been made by the mayor and council of the city of Macon, is not signed by the mayor and council, the corporate name of said municipal corporation, but is simply signed, 'Ed L. Strohecker, Mayor.' (3) That there is a recitation in said deed that it has caused the clerk of council to affix the common seal of said city to the deed, while no such seal being in fact attached negatives the idea that there had ever been a complete execution and delivery thereof. (4) That the presumption is that, if said deed was ever delivered, it is still in the possession of Stubbs, the grantee therein. (5) Because the allegation in said declaration is that they are suing for lot two (2) in block twelve (12), according to Schwabb's map, and said deed does not sustain said allegation; there being no reference whatever to Schwabb's map therein." After the admission of this certified copy from the record of deeds, the plaintiff put up a witness (Pritchard) who testified that he was "the custodian of the title deeds of the plaintiff," and had been for four years; "that he had made thorough search for said deed among the papers, and could not find it"; that it was "not in the possession, custody, or control of the plaintiff"; that he believed "it has been destroyed or lost"; that he was "unable to say that

[plaintiff] ever had possession of it"; that he "had not searched among Stubbs' papers for, nor called upon [his] executors for or children for, it."

1. As the plaintiff claimed under Stubbs, and introduced a deed from Stubbs to the Macon & Western Railroad Company conveying the same lot described in the deed from the city to him, we do not think there is any merit in the objection that the plaintiff did not show that any search had been made among Stubbs' papers for the original deed from the city to him. The presumption is that, when Stubbs sold and conveyed the lot to the Macon & Western Railroad Company, he turned over to his vendee the deed which he held from the city to the property; it not appearing that this deed embraced any other land than that in question. After he had parted with his title to the property, he was no longer the natural or proper custodian of the deed under which he had held that property alone.

2. The objection that the seal of the municipal corporation was not attached to the deed was not meritorious. It is true that the certified copy from the record did not show an attempt to reproduce the seal of the municipal corporation, probably for the reason that the clerk of the superior court, who recorded the original deed, could not copy the municipal seal upon the record of deeds. The certified copy did show a scroll after the name of Strohecker, the mayor, with the word "Seal" written in it. It did appear, therefore, that some sort of a seal was attached to the original deed. So the record showed that there was a seal attached to the deed, but failed to show its precise character or description. As the deed purported to be that of the municipal corporation, and recited that the grantor, the mayor and council of the city of Macon, had caused the common seal of the city of Macon to be affixed thereto by the clerk of the city, and as there was therefore no reason why Strohecker, the mayor who signed the deed, should attach his own seal to the instrument, we think that it may be fairly presumed that the seal which was attached to the deed was the seal of the municipal corporation which executed it.

3. The objection that the deed was signed, "Ed L. Strohecker, Mayor," instead of being signed with the corporate name of the municipality, was properly overruled. It was held in *Mayor, etc., v. Dasher*, 90 Ga. 195, 16 S. E. 75: "By the thirty-second section of the act of December 27, 1847 (Acts 1847, p. 42), the mayor and council of the city of Macon, as a municipal corporation, was invested with power to sell any portion of the town common not previously leased or sold, and appropriate the proceeds to the use of the city, and this power was conferred without any express restriction as to the mode of its exercise. As an incident to the power, the corporation could convey by deed to the purchaser any portion of the town common which

it contracted to sell; and a deed regular on its face, executed by the mayor, attested by the town clerk, and sealed with the corporate seal, would be the deed of the corporation itself, executed not by its agent or attorney in fact, but by its own corporate head and hand, the mayor; he for this purpose not being a distinct person, but a part of the corporate body."

4. In view of other documentary evidence introduced by the plaintiff, the objection to the certified copy of the deed from the city to Stubbs, upon the ground that it did not sustain the allegation of the petition, in that it did not show that the deed conveyed lot 2 in block 12 "according to Schwabb's map," as there was no reference therein to such map, was not meritorious. The plaintiff subsequently introduced a deed from Stubbs to the Macon & Western Railroad Company, wherein the description of the lot was the same, to which deed this same objection was made. The plaintiff introduced a certified copy, from the minutes of the mayor and city council, of an ordinance passed on December 9, 1851, entitled "An ordinance to establish certain surveys of the city lands made by Augustus Schwabb, civil engineer, and to name certain streets in the city of Macon," from which it appeared that on that date the city adopted "the plan of the survey made by Augustus Schwabb, civil engineer, of the Southwest commons." The deed was executed in 1854, and as there was no evidence whatever that the plan of the survey of the Southwest commons had been changed prior to its execution, it is to be presumed that when it described a lot in the Southwest commons, by its number and the number of the block in which it was located, it had reference to the map or plan of Schwabb which had been previously adopted by the city.

5. Another ground of the motion for a new trial was that the court erred in admitting a map upon which was inscribed the following: "Map of city lots of the Southwestern commons of the city of Macon, laid out at the request of his honor the mayor of the city of Macon in the months of October and November, 1851, by Augustus Schwabb, C. E." In connection with this map the plaintiff introduced the certified copy of the municipal ordinance above referred to. The objections urged to the admission of this map were: "(1) There is no proof of the identification or execution of the map; (2) that said ordinance does not adopt any map of Schwabb's, but simply indorses a plan." In a note to this ground of the motion the court says: "When the Schwabb map was first tendered in connection with the ordinance, the court stated that he would admit them for the present. Thereupon plaintiff, to prove the execution of the map, introduced the testimony of H. M. Steele, which is set forth in the brief of evidence. After this testimony was introduced, the defendant made no further motion to rule the map out on the ground that its execution

had not been proved, or on any ground." It appears from the brief of evidence that Steele testified that he knew Schwabb well, was acquainted with his handwriting and signature, and that he recognized his drafting, work, and handwriting on the map, and that the figures and printing thereon were in Schwabb's handwriting. We think this testimony effectually removed any objection to the map upon the ground that it had not been identified, or its execution proved. The second objection seems a mere play upon words, and is obviously without merit.

6. There was no error in excluding the testimony of a witness for the defendant that its possession of the land in dispute was notorious. Such a statement by the witness was a mere conclusion on his part, presumably from facts and circumstances within his knowledge. It would have been proper for the witness to testify to these facts and circumstances, but the conclusion to be drawn from them was for the jury.

7. It was error for the court to allow the plaintiff's counsel, over the objection of counsel for the defendant, to ask one of the defendant's witnesses what the land was worth to the defendant for the purpose of extending its building, as the value of the land, to be determined by the jury, was its market value, and not what it was worth to the defendant for a particular purpose. But as the motion for a new trial falls to give the answer of the witness to this question, we are unable to say whether or not any testimony by the witness upon this subject was illegally admitted.

8. In one of the grounds of the motion for a new trial a certain portion of the charge of the court upon the subject of adverse possession under color of title was alleged to be erroneous because it contained an expression of the opinion of the court on the evidence. In the charge excepted to, the court used the following language: " * * * Still the evidence of the defendant does show that Troy was in possession of that property for two years without written evidence of title, and therefore the defendant is not protected under this section of the Code, for the reason that his possession was not accompanied by written evidence of title during the entire seven years of the possession invoked in this case." It would be hard to find in a charge a more direct expression of opinion upon the effect of evidence. While, under the evidence introduced, the defendant signally failed to establish its plea of seven years' adverse possession under color of title, yet, under our stringent rule in reference to the expression of an opinion upon the evidence by the trial judge, this portion of the court's charge was clearly erroneous. Civ. Code, § 4334.

9. The court erred in refusing to permit a witness, under whose purchase and possession of the premises the defendant claimed, to testify whether he paid for the land in good faith or not. *Hale v. Robertson*, 100 Ga. 168, 27 S. E. 937, and authorities cited. In the

case cited, Chief Justice Simmons said: "Whether one has acted in good faith or not is better known to himself than to anybody else, and in many cases the statement of the person whose conduct is in question that he did so act is the only way in which good faith can be proved. The objection sometimes made to such testimony that it cannot be directly contradicted, and therefore must be of little value, is one which might properly be urged to the credibility of the testimony, but is not one which should render it incompetent. Of course, in cases where the law conclusively presumes bad faith from specific facts, such testimony would be inadmissible."

10. The defendant endeavored to show by the testimony of W. H. Whitehead and Thomas Troy that the former, as the agent of his wife, Mary E. Whitehead, and Thomas F. Thompson, had in 1887 sold the premises in dispute to Troy, but, not having the back deeds thereto at the time, had agreed with Troy that, if he (Whitehead) succeeded in finding these deeds, he would make to Troy a warranty deed to the lot, and, if these deeds were not found, he would make Troy a quitclaim thereto. Both Whitehead and Troy testified that at this time Whitehead gave to Troy some sort of a paper showing this agreement; Troy calling it a "receipt" and Whitehead speaking of it as a "bond for titles." The defendant sought to show by these witnesses that this paper had existed and been lost, and, claiming that it had successfully done so, sought to prove its contents; but the court, upon objection by the plaintiff, rejected the offered evidence as to its contents, and also refused to allow Whitehead to testify to its execution by Mrs. Whitehead and Thomas F. Thompson. Grounds 12 to 20, inclusive, and ground 23 deal with errors alleged to have been committed by the court in excluding this testimony. We are not prepared to say that the court erred in any of the rulings here complained of. The testimony of both Whitehead and Troy showed that, the back deeds referred to not having been found, a quitclaim was made to Troy. Therefore, if the so-called bond for titles was really, as the defendant claimed, executed by Mrs. Whitehead and Thomas F. Thompson, and delivered to Troy, it would seem that Troy, when he accepted the quitclaim from them, would naturally have returned this bond to them or to their agent, W. H. Whitehead. The evidence showed that it was not in the possession of either Troy, Mrs. Whitehead or her husband, W. H. Whitehead, but it failed to show whether it was or was not in the possession of Thomas F. Thompson, who would have been as proper and as natural a custodian of this paper, after it had become *functus officio*, as Mrs. Whitehead or W. H. Whitehead; and therefore we cannot say that the defendant had shown that this paper had been lost or destroyed. It is true that the witness W. H. Whitehead gave as a reason for his not having called upon Thompson for

it that he attended to all of Thompson's business, and could safely say that Thompson did not have the paper, because he knew that Thompson did not have anything to do with it. But it appears from the seventeenth ground of the amended motion that the defendant offered to prove by this same witness that the paper was executed by Thomas F. Thompson and Mrs. Whitehead, and that, if he had been permitted to do so, he would have so testified. If Thompson was one of the parties who executed this paper, we think that, without proof that it was not in his possession, the evidence as to its loss or destruction was not sufficient to show that the court erred in rejecting evidence as to its contents. While we think it would have been proper for the court to permit the witness to testify who signed the paper, without going into its contents or indicating its character, preparatory to proving its loss or destruction, still, for the reasons given above, we do not see how the defendant was hurt by the exclusion of this evidence.

11. In another ground of the motion for a new trial it was alleged that the court erred in refusing to permit the defendant's witness Whitehead to testify that he, claiming under a deed from Methven S. Thompson to Thomas F. Thompson and Mary E. Whitehead, executed in 1876, put Troy in possession of the land in dispute. There was no error in sustaining the objection to this testimony. The defendant claimed under Troy, and sought to show that Troy, from the time that he took possession of the premises, held under color of title. The deed from Methven S. Thompson to Thompson and Whitehead was, so far as the evidence shows, never in Troy's possession, and, as it covered numerous tracts of land besides the one involved in this case, it is entirely improbable that Troy ever had possession of it; and, even if he had had it, it could not have been color of title in him. This deed, not having been made to Troy, and never having been in his possession, could not have been color of title in him. Troy could not have been holding under color of title unless he had some writing which purported to connect him with the title, and which defined the limits of his claim. The mere fact that those from whom he purchased may have had what would have been color of title in them, if they had been in possession of the premises, would not show that when he went into possession he did so under color of title. When he went into possession he was not holding for those from whom he purchased, but for himself,—he was holding adversely to them; and, unless he had some writing purporting to connect him with the title, he was not holding under color of title, either for himself or for any one else. The testimony offered was utterly irrelevant, and hence properly excluded.

12. Complaint was made in the motion for a new trial because a witness for the plaintiff, who testified, as an expert, as to the

cost of the improvements placed upon the lot by the defendant and those under whom it held, after having testified that he did not know how deep they carried the brick work, was allowed to answer the following question in reference to the cost of the foundation: "Could you approximate it?" To which he answered: "Yes, sir; foundations for boilers of that character could be built for about \$800." The objection made to the question was that the witness, having testified that the foundation was hidden, could not be called upon to fix its value. Even granting that the opinion of the witness as here given was inadmissible, because he admitted that he did not know how deep the foundation work extended into the earth, the assignment of error upon its admission over the objection of the defendant is without merit, as it appears that this same witness gave precisely the same opinion, based upon a description of the foundation, including the depth to which it extended, given in the testimony of a witness for the defendant.

18. At the close of the evidence, plaintiff's counsel elected to take a money verdict for the value of the premises and the mesne profits, to which election defendant's counsel objected on the ground that they were entitled to have a verdict returned in accordance with the act of 1897. The defendant insisted then and throughout the whole of the trial that the plaintiff had no right to elect; that the act of 1897 applied to the case, and the jury should be instructed that, if they found for the plaintiff, they should find the value of the land itself, the amount of the mesne profits, and the value of the improvements placed upon the premises by the defendant and those under whom it claimed, so as to give the parties the alternate rights provided for in that act; and that, in default of either of the parties paying the other as provided for in the act, the property should be sold, and the proceeds divided pro rata between the parties as the act provides. "Though the defendant so insisted, the court failed and refused to give the jury instructions to find the value of the improvements, or to find that the plaintiff should have the right to take said property on paying said value, or, in default of its so doing, that the defendant should have the right to take said property, and pay the plaintiff the value of the land and the mesne profits, and, on failure of both to avail themselves of said privilege, that said property should be sold, and the proceeds divided between the parties." "Instead of which, the court charged the jury, under the election made by the plaintiff in the case, the jury would have the right, should the plaintiff be entitled to recover, to say what the value of the land was, and what the value of the mesne profits are, and provide further that, upon defendant paying the amount of the land and mesne profits, that the title to the lot should vest in defendant, and, in the event the defendant should not be willing to pay that amount,

that it should be sold, and the amount devoted to the payment of the amount which the plaintiff recovered for the value of the land and the mesne profits." This ruling of the court was alleged in the motion for a new trial to be erroneous. We think the point meritorious. Under the act of December 21, 1897 (Acts 1897, p. 79), the defendant, as a bona fide purchaser of the premises in dispute, had the right to have the jury, in the event that they found for the plaintiff, to find the present value of the land, without the improvements placed thereon by the defendant and those under whom it held, the amount of the mesne profits, and the value of these improvements, so that the parties could be placed in a position where they could exercise the alternate rights provided for by the act. In this case, it being admitted that the value of the improvements made by the defendant and those under whom it claimed exceeded the value of the mesne profits, the court should have instructed the jury that, if they found the plaintiff was entitled to recover, they should find the present value of the land without the improvements, the value of the mesne profits, if any, and the present value of the improvements placed upon the premises by the defendant and those under whom it held. Upon such a verdict being rendered, the alternate rights provided for by the act would be as follows: First, the plaintiff would have the right to recover the land itself, upon payment to the defendant of the excess in value of the improvements over the mesne profits; second, upon the plaintiff's failure to make this election within the time fixed by the decree of the court, the defendant would have the right, by paying to the plaintiff the value of the land and the mesne profits, to acquire all the plaintiff's right and title to the premises; third, upon failure of the defendant to avail itself of this option within the time fixed for this purpose by the decree of the court, the land should be sold by a commissioner appointed by the court, and the net proceeds of such sale divided between the parties, plaintiff and defendant, in the ratio of proportion that the value of the land bore to the amount by which the value of the improvements exceeded the value of the mesne profits. The plaintiff had no right to elect to take a verdict for the value of the premises in dispute and the mesne profits. No such election is provided for by the act in question. The time for making an election does not arrive until after the verdict is rendered and the decree of the court has been entered. Still, if the plaintiff had simply announced that, in the event the jury should find in its favor, it would decline to take the property upon the conditions prescribed by the act, there would have been no impropriety in its doing so. This would simply have amounted to a refusal in advance to exercise the option to which it would be entitled under the provisions of the act. But it could not deprive

the defendant of the choice which would then have been left to it,—to either take the property upon paying to the plaintiff the value of the land and the mesne profits, or to have the premises sold by a commissioner appointed by the court, and the net proceeds of such sale distributed between itself and the plaintiff in the proportions prescribed by the act. The error committed by the court was in assuming that the plaintiff, if entitled to recover, had the right, in any event, to recover in money the full value of the land, without the improvements, and the full value of the mesne profits. It had no right to such a recovery, because, by waiving its own option to take the land upon the conditions prescribed by the statute, it could not deprive the defendant of its right to also decline to take the premises upon the terms provided by the law, and to stand upon its right, under such circumstances, to have the land sold by a commissioner, and the net proceeds apportioned between the plaintiff and itself as the statute prescribes.

14. It was alleged in the motion that the court erred in charging the jury that, if the plaintiff was entitled to recover, it was entitled to recover mesne profits for four years prior to the bringing of the suit. The error assigned is that this charge authorized the jury to find mesne profits during the period of time while a receiver of the court held possession of the premises, and before the defendant went into possession. It appears from the evidence that one of the defendant's predecessors in title was the Macon Brewing Company; that it became insolvent, and its property was placed in the hands of a receiver, who took possession of and held the land in controversy as the property of that company. As the defendant claimed under the Macon Brewing Company, and relied upon its possession under color of title, and also claimed that, in the event the plaintiff recovered, it was entitled to credit for all the improvements placed upon the land by itself and those under whom it held, including improvements erected thereon by this brewing company, it was properly chargeable with mesne profits which accrued during the time this company held possession. *Mills v. Geer*, 111 Ga. 276, 36 S. E. 673, 52 L. R. A. 934. The receiver took possession of and held the premises as the property of the Macon Brewing Company, and, relatively to the plaintiff, his possession was but a continuance of the possession of that company. It is true that, in one sense, his possession was the possession of the court; but the court, through him as its officer, held the property as the property of the Macon Brewing Company, and administered it as such, applying the proceeds realized from its sale to the debts of that corporation. When the defendant, by its pleas, went beyond the possession of the receiver, and claimed credit for the improvements placed upon the land by the Macon Brewing Company, it became liable for mesne profits

which accrued during the time that this brewing company and the receiver, whose possession was acquired under the title claimed by that company, held the property. The Macon Brewing Company was responsible to the plaintiff for the possession of the property by the receiver. If it had kept its hands off the property, the receiver would never have been placed in possession of the same, and it would be unjust to the owner of the land to allow the defendant to set up and obtain credit for the improvements made by the Macon Brewing Company, without being chargeable with the mesne profits during the time that the receiver of such company held possession of the premises.

15. The plaintiff sued for the recovery of the lot in dispute, as described in its deed, and an encroachment extending therefrom into Hammond street. One question made by the motion for a new trial, which appears in several grounds thereof, was whether or not the plaintiff was entitled, if it recovered at all, to recover this encroachment, and mesne profits upon the same. We have not been able to ascertain from the testimony in the record how, by whom, or to whom this encroachment was granted. The evidence shows that the original lot had been enlarged by the addition thereto of this encroachment upon the original street. Presumably, it was granted by the municipal corporation, and it may perhaps be inferred from the testimony that it was granted upon the application of one of the defendant's predecessors in title. The plaintiff in error contends that the plaintiff below showed neither title to nor possession of, this encroachment, and therefore was not entitled to recover the strip of land embraced in it, nor mesne profits upon the same. We apprehend that the encroachment was granted, not to a particular individual or corporation, but to the owner of a particular lot. If, as a matter of fact, it was granted upon the application of a person or corporation not the owner of the lot, the municipal authorities, in making the grant, must have acted upon the representation and under the belief that the applicant was the owner; for it is inconceivable that they would grant to one person the right to have, possess, and occupy, as an encroachment upon a public street, a strip of land extending from the street boundary of the lot of another person into the street immediately in front of such lot. We can safely assume that the encroachment was granted as appurtenant to the lot. It was added to the same, and became a part thereof, and necessarily followed the ownership and title of the lot. It would be very strange, indeed, and as unjust as strange, if one person could, without the consent of the owner, take possession of a city lot belonging to another, and, after doing so, obtain from the municipality an encroachment from such lot into the street upon which it fronted, erect a building partly upon the original lot and partly upon such encroachment, as appears

to have been done in this case, and then, when the true owner sought to recover his land, could hold the strip of land embraced in the encroachment, together with the portion of the structure which had been erected thereon; thus completely cutting the lot off from the street, and greatly reducing its value. If the plaintiff was entitled to recover the original lot, it had the right to recover the encroachment which had been added thereto and become a part thereof, and to recover mesne profits on the lot as it stood after being so enlarged.

16. We find none of the other rulings or instructions complained of erroneous, and the questions raised by the grounds of the motion dealing with the same are not of sufficient importance to require any discussion.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 635)

SOUTHERN RY. CO. v. ALLISON.

(Supreme Court of Georgia. June 7, 1902.)
CARRIERS—FAILURE TO DELIVER FREIGHT—
EVIDENCE—INSTRUCTIONS.

1. In an action against a railway company for damages for its failure to transport and deliver goods turned over to it for that purpose, it was not erroneous to allow plaintiff to testify that he had never been paid for such goods.

2. The declarations of the agent as to the business transacted by him are not admissible against his principal unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead.

3. Waybills made out by a railway company, being declarations in its own favor, are not admissible in its behalf.

4. There was no error in refusing to give the last clause of the request to charge, referred to in the eleventh ground of the motion for a new trial.

5. The evidence failed to show that the cotton, for the loss of which the action was brought, was delivered to the defendant company, and for this reason a new trial should have been granted.

(Syllabus by the Court.)

Error from superior court, Franklin county; A. B. Russell, Judge.

Action by T. F. Allison against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. G. & J. B. McCurry, for plaintiff in error. J. H. Skelton, for defendant in error.

FISH, J. T. F. Allison sued the Southern Railway Company for damages alleged to have been sustained by him on account of the failure of the defendant to transport and deliver two bales of cotton delivered to it for that purpose by the plaintiff. Defendant denied receiving the cotton sued for. Upon the trial there was a verdict for the plaintiff. Defendant made a motion for a new trial, which was overruled, and it excepted.

1. One of the grounds of the motion was that the court erred in permitting the plaintiff, over the defendant's objection, to testi-

fy: "I have never been paid for the cotton." The objection made was that the testimony was irrelevant. This ground is without merit. It was relevant for plaintiff, if he delivered the cotton to defendant for shipment, and it had failed to transport and deliver the same to the consignee, to show that plaintiff had not been paid for it, either by defendant or the consignee.

2. Another ground of the motion was that the court erred in permitting the plaintiff, over the objection of the defendant, to testify as follows: "Some two or three weeks after the shipment, I had a conversation with O. L. Moore, the defendant's agent, and he told me he did not ship the two bales I was claiming to have delivered, numbers 490 and 492. Said that he shipped and delivered 43 bales, all the cotton the bill of lading covered." The objection made to the admissibility of this testimony was "that the declarations were not made *dum fervit opus*, but after the transaction to which they related was over." It is difficult to see how the defendant was hurt by the admission of this testimony. If the agent meant by his statement that he had never received the two bales of cotton, then this testimony was in favor of the defendant. If, however, by stressing the word "ship," it was sought to show that the agent had received the cotton but had not shipped it, then the objection made to the declarations of the agent should have been sustained, under the rule that "the declarations of the agent as to the business transacted by him are not admissible against his principal unless they were a part of the negotiation, and constituting the *res gestæ* or else the agent be dead." Civ. Code, § 3034; *Hematite Min. Co. v. East Tennessee, V. & G. Ry. Co.*, 92 Ga. 268, 18 S. E. 24.

3. Another ruling of the court complained of in the motion was the refusal to permit defendant to put in evidence copies of certain waybills, which were admitted by the plaintiff to be true copies of the originals. These waybills related to the lot of cotton in controversy, and in which plaintiff claimed there were two bales short. There was no error in excluding them, as they simply amounted to declarations of the defendant in its own favor.

4. The defendant requested the court, in writing, to charge the jury as follows: "If you believe that the agent, Moore, under instructions from plaintiff or his agent, S. C. Knox, issued the bill of lading to J. H. Sloan, as consignee, order notify G. H. McFadden & Co., for 43 bales of cotton, and said 43 bales of cotton were delivered to the consignee, and there was no other notification to defendant, or request of the agent to ship any other cotton of the S. O. P. mark, then the plaintiff cannot recover, even though you believe that said Knox, at the time the bill of lading was issued, asked for, or put on a paper handed to the agent, Moore, a memorandum for a bill of lading

for 45 bales of said S. O. P. cotton." The court charged all of this request except this part of it, viz: "Even though you believe that said Knox, at the time the bill of lading was issued, asked for, or put on a paper handed to the agent, Moore, a memorandum for a bill of lading for 45 bales of said S. O. P. cotton." Defendant complained that the court erred in not giving in charge the entire request. We do not think so. The plaintiff's contention was that he had delivered 45 bales of cotton, marked "S. O. P.," to the defendant at Lavonia, to be shipped to McFadden & Co. at West Point, Va., while the defendant contended that only 43 bales had been delivered to it. The question at issue was how many bales had been delivered by plaintiff to the defendant, and not how many plaintiff had requested defendant's agent to put in the bill of lading, and such a request, if made, was only relevant in so far as it might shed light upon the question as to the number of bales delivered. If 45 bales were delivered, and defendant gave a bill of lading for only 43, it would nevertheless be liable for 45. Or if it gave a bill of lading for 45, and only received 43, it would be liable for only the number received. The request to charge as a whole was not appropriate, and was too favorable to the defendant, in that it was susceptible of the construction that if defendant, under plaintiff's instructions, issued a bill of lading for 43 bales of cotton, and these were delivered to the consignee, the defendant would not be liable although it had received for shipment 45 bales of cotton, all of which plaintiff intended should be included in the bill of lading and shipped.

5. After a careful study of the evidence, we conclude that it was not sufficient to authorize a verdict for the plaintiff, and that the court, for this reason, should have granted a new trial. The defendant admitted that 43 bales of the lot of cotton in question were delivered to it. There was no dispute as to them. The evidence failed to show the delivery to the defendant of more than 43 bales. The agent of the plaintiff testified that he weighed and marked 45 bales of this lot in the cotton yard of the plaintiff, about 100 yards from the defendant's depot in Lavonia, and had it carried on a dray to defendant's depot platform; that he did not accompany the dray to the depot, but ordered the cotton placed on the dray, and saw the dray go and return each time; that he did not know how many loads were carried, nor how many bales at each load, nor did he examine the cotton after it was placed on the depot platform. The drayman was not sworn as a witness, and there was no other evidence introduced tending to show that more than 43 bales had been delivered to the defendant.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 511)

CREW et al. v. HUTCHESON.

(Supreme Court of Georgia. June 7, 1902.)

DIVORCE—ALIMONY—ACTION ON BOND—LIABILITY OF PARTIES.

1. A money judgment for permanent alimony in favor of a wife against her husband, payable in monthly installments, beginning after the expiration of five years from the date of their marriage, does not bar an action by her, against him and a surety, upon a bond given under section 388 of the Penal Code.

2. The liability of the principal obligor and his surety on such a bond is not affected by wrongful conduct on the part of the wife after the marriage; the husband being bound to maintain and support her and her offspring, during the period fixed by the bond, without reference to her behavior. It was in the present case proper for the trial judge, ex mero motu, to decline to allow the defendants to sustain by proof a defense based upon alleged misconduct on the part of the wife. Per Little, Fish, and Cobb, JJ.

3. The plaintiff in an action upon such a bond is not entitled to recover an amount greater than that which would have been sufficient to adequately support the wife and her offspring, if any, for the period or periods elapsing, before the bringing of the suit, during which support was withheld. Per Simmons, O. J., Lumpkin, P. J., and Little, J.

(Syllabus by the Court.)

Error from superior court, Haralson county; O. G. Janes, Judge.

Action by T. A. Hutcheson, ordinary, against S. F. Crew and others. Judgment for plaintiff. Defendants bring error. Reversed.

W. R. Hutcheson and E. S. & G. D. Griffith, for plaintiffs in error. Edwards & Ault, for defendant in error.

LITTLE, J. Thomas A. Hutcheson as ordinary of Haralson county, brought an action for the use of Cora Della Crew, "formerly Della Shelnutt," against S. F. Crew as principal, and M. J. Crew as surety, upon a bond in the sum of \$750, which they, in pursuance of a requirement made under section 388 of the Penal Code, had executed on the 17th day of August, 1895. This bond was made payable to J. W. Kelley, ordinary of said county, and his successors in office, and its condition was that "the said S. F. Crew shall maintain and support the said female, the said Della, and her child or children, if any, for the period of five years."

The petition alleges that she and S. F. Crew were married on the day last mentioned, and the fourth paragraph thereof reads as follows:

"Your petitioner further shows that the said S. F. and Della lived together as man and wife from the time of their marriage, as aforesaid, until the first of August, 1897, when the said Della was compelled to flee from the home of the mother of the said S. F. by reason [of] the inhuman and cruel treatment of the said Della by the said S. F. Crew. The said S. F. Crew refused to

support and maintain the said Della as his wife, and compelled her to work and support herself at the home of his mother, the said M. J. Crew. He cursed and abused her, and procured his mother, the said M. J., to do the same, and, as above stated, she was compelled to flee to the home of relatives for protection and support."

The fifth paragraph of the petition contains an averment that the defendants are indebted to the plaintiff, "for the use of the said Cora Della Crew, * * * the sum of six hundred dollars for her said support and maintenance for the period of five years from the date of said marriage to the present date," and prays for a judgment in that sum. There is in the petition no allegation of the existence of a child at the time of the bringing of the action. The petition was filed about four years after the marriage, and apparently it was the idea of the pleader that the defendants were, under the bond for \$750 covering a period of five years, chargeable at the rate of \$150 per annum, thus making \$600 for the four years indicated.

The fourth and fifth paragraphs of the defendants' answer are as follows:

"Par. 4. Plaintiff C. D. Crew and the deft. S. F. Crew lived together as man and wife until the time alleged in this paragraph; all of the balance of the 4th paragraph is every word untrue.

"Par. 5. The fifth paragraph is untrue. Defts. are not indebted to said usee one cent whatever for support. She was well supported and cared for while she remained at the home of said deft. M. J. Crew, and she left said home of her own accord, without any wrong treatment from these defendants whatever. Defts. believe, and charge from what they have since learned, that said usee was persuaded by her mother and others to leave deft. S. F. Crew and sue him on the bond now sued on. Defendant further says that he at all times treated her as well as he was able, and at no time did he give her any cause to leave him, and stay as she has, and at one time after she left he went to Yorkville, in Paulding county, to get her to return home, and she refused to see him at all, her sister stating to deft. that she would not return. Deft. also wrote two letters to said usee to return, and she refused to return. Defts. therefore ask to be discharged, with their reasonable costs."

The case was called for trial on the 20th day of July, 1901. After the parties had announced "Ready," and a jury had been stricken, the defendants filed an amendment to their answer, in which they set up, in substance, the following facts: On the 19th day of July, 1901, the plaintiff's usee upon a suit for divorce and permanent alimony, which she had previously instituted against S. F. Crew, obtained a second verdict granting her a total divorce. This verdict also embraced a finding in favor of the plaintiff in that suit for "the sum of \$6.00 per month

as permanent alimony, to be paid as follows: \$6.00 on the 1st of each month during her single life, beginning 1st day of August, 1901." A judgment in accord with this verdict was duly entered July 20, 1901. After setting forth these facts, it was in the amendment alleged that inasmuch as the suit for permanent alimony and the action on the bond in this case were "for one and the same thing, both being for support and maintenance of the said usee Cora D.," and she had "elected to proceed with said application for permanent alimony, instead of insisting on her rights, if any she had, under the bond sued on in this case," the right of the plaintiff to recover therein had become barred, and accordingly the present action should abate, for otherwise there would be two judgments in favor of the plaintiff's usee upon one and the same cause of action. It appears that this amendment was not only offered, but actually filed, in the office of the clerk; and the court, on motion of plaintiff's counsel, passed an order striking the same. The case then proceeded to trial. The plaintiff put in evidence the bond sued on, but offered no testimony. There was an admission by the defendants that, after the separation, the husband contributed nothing to the wife's support. The court, of its own motion, refused to allow the defendants to introduce any evidence to sustain their original answer, and directed a verdict for the plaintiff for \$600. To all of the rulings indicated above, the defendants excepted.

1. As will have been observed, the marriage took place on the 17th day of August, 1895. The period of five years covered by the bond therefore expired on the 17th day of August, 1900. The judgment requiring S. F. Crew to pay permanent alimony to Mrs. Cora D. Crew at the rate of \$6 per month expressly postponed the beginning of the monthly payments until the 1st day of August, 1901. Accordingly, it is obvious that the period during which it was contemplated that the wife should be supported by these payments embraced no part of the period as to which the bond was operative. While it is true that the suit for permanent alimony was begun before the five years expired, it is to be noted that the defendants to the action on the bond did not set up as a defense thereto the pendency of the proceeding for permanent alimony. Had they done this, an altogether different question would have been presented. As the present case stood when the amendment to the defendants' answer was actually filed, not only had a judgment already been rendered for permanent alimony, but the same, on its face, showed that it gave to Mrs. Cora D. Crew no recovery whatever for that period of time during which the bond entitled her to demand a support from S. F. Crew. It is therefore clear, we all think, that the amendment set up no good defense, and that

the court did right in striking it on motion of the plaintiff's counsel.

2. In the case of *Duke v. Brown*, 113 Ga. 310, 38 S. E. 764, this court held: "The undertaking of the principal obligor and the securities in such a bond is not at all dependent upon the conduct of the female after the marriage. He must maintain and support her and her offspring, for the period fixed in the bond, without reference to her conduct." Three of us still adhere to the view then entertained as to this point. It appears from the record now before us that the defendants in their answer set up, as a defense, alleged misconduct on the part of the wife. This defense was not challenged either by demurrer or by a motion to strike the same, but at the trial the court, of its own motion, declined to allow the defendants to introduce any evidence in support thereof. In pursuing this course his honor below was evidently endeavoring to follow the ruling made by this court in the case just cited, and a majority of us think that this was eminently proper. In support of this view, it is only necessary to refer to what is said with respect to this question of practice in the opinion filed in the present case by Mr. Justice COBB.

3. It only remains for the writer to briefly discuss the question dealt with in the third headnote. Did the facts appearing warrant the direction of a verdict for \$600, the full amount for which the plaintiff sued? This action of the court was doubtless predicated upon the ruling in *Duke v. Brown* that: "In such a suit, if it be shown that there has been a breach of the bond, the recovery shall be for the full amount stated in the bond, and the judgment shall remain open and be subject to be appropriated by the ordinary 'from time to time as the situation and exigencies' of the wife and her offspring may require." Of course, if the court could properly direct a verdict for \$750, the amount named in a bond of this character, when the petition prayed for a recovery of that amount, it was not, as to the defendants in the present case, harmful error to direct a verdict for the smaller amount of \$600, which was all the plaintiff claimed. A majority of us are, however, now satisfied that the ruling last above quoted was not well considered, and should not be followed. The conclusion that, in an action of the present nature, any breach of the bond would authorize a recovery of the full amount therein named, was reached by analogizing the provisions of sections 388 and 389 of the Penal Code with those embraced in section 1254 of that Code, which deals with a bond given in a bastardy case, and in terms authorizes the rendition of a judgment for "the full amount of the bond, which judgment shall remain open, and be subject to be appropriated by the courts, from time to time, as the situation and exigencies of the bastard child may require." After again carefully and

anxiously going over the whole matter, three of us are now convinced that we erred in taking the view above pointed out. The difficulty is that section 389 of the Penal Code does not in terms authorize a recovery of the full amount named in the bond upon a mere breach of the same. This section simply declares that "upon the failure of the defendant to comply with its terms, suit may be brought thereon." The almost universal rule is that, in actions upon penal bonds, the recovery can in no case exceed the actual amount of the damages proved. An exception is made, as has been seen, in the case of a bastardy bond; but there is no such exception in the law providing for the giving of the bond required by section 388 of the Penal Code. To be perfectly frank and candid, therefore, it now seems to us that the ruling on this point in the case of *Duke v. Brown* was more in the nature of legislation than of judicial construction. We therefore feel that it would not be proper to adhere to the same. The truth is, we undertook by construction to cure an omission in legislation. It would, we think, have been entirely proper for the general assembly to declare that, in an action upon a bond of the sort now before us, there might, under conditions so authorizing, be a recovery of the whole amount named in the bond, even for a slight breach thereof, with a provision, as in the case of a bastardy bond, that the courts might, by appropriate orders passed from time to time, administer the fund raised by the judgment for the benefit of the beneficiary or beneficiaries of the bond. Such legislation should, however, be so framed as not to permit a full recovery when there was palpably no necessity for it. For instance, if a husband had fully and adequately supported his wife for four years and eleven months, it would hardly do to allow the ordinary to recover \$750 for the support due, but not furnished, for the remaining month of the five years. Perhaps the best legislation which could be had on this line would be to allow several distinct recoveries on the bond, from time to time, as the exigencies of the case might require. Impressed by the idea that the legislation should have gone further than it did, the court was led into the error which we are now undertaking to correct. Another reason which influenced us was that, in the absence of any such provision as that last suggested, the wife, in a case like the one before us, would, by bringing her suit when the first breach of the bond occurred, be compelled to accept as final a recovery equal only to the amount required for her support during the period or periods when the same had not been furnished, up to the time of the bringing of the action, which would, of course, in many cases, be less than the full amount named in the bond; or else wait until the expiration of the five years, and then in a single action recover the full amount of the bond,

or so much thereof as it then appeared she was entitled to receive. Neither of these alternatives seemed just or adequate to the situation, and, this being apparent, we were, under the influence of a strong and proper desire to afford adequate protection to all women who had thus been mistreated, misled into an attempt to accomplish that for which the law-making power should have provided. We still adhere to the spirit of the decision made, and are firmly convinced that the law on this subject should be amended; but for the reasons given above we are now constrained to hold that the ruling announced was not authorized by the law as written. There being in the present case no evidence warranting a finding for the plaintiff in any particular sum, the trial judge was not, in the opinion of a majority of us, authorized to fix the amount of the recovery. Judgment reversed.

LEWIS, J., absent.

LUMPKIN, P. J., speaking for himself and the Chief Justice, concurring specially: While we concur in the judgment of reversal, we are unable to agree to the conclusion reached by our Brethren, that the court below was right in refusing to allow the defendants to prove the allegations of their original answer to the effect that Mrs. Cora D. Crew voluntarily and without sufficient excuse abandoned her husband's home, and that while she remained there he had provided her with an adequate support. The only reason which can be suggested for holding that this answer did not set up a good defense, and one which it was proper to allow the defendants to sustain by competent testimony, arises from the ruling made by this court in the case of *Duke v. Brown*, 113 Ga. 310, 38 S. E. 764, that: "The undertaking of the principal obligor and the securities in such a bond is not at all dependent upon the conduct of the female after the marriage." We are, after mature deliberation, convinced that the language just quoted does not set forth a correct rule of law; and the same is not binding as authority because the case just referred to was not decided by a full bench of six justices.

It is not only the policy of the law that a woman who has been betrayed and seduced shall, when the author of her ruin evades the punishment of his crime by taking her in marriage, be supported by him for the five years ensuing next after the date of the marriage, but it is also no less its policy to discourage separations between husband and wife, and to encourage their living together in peace and harmony. It is the duty of the courts to effectuate, as far as they can possibly do so, both of the legal objects outlined above. The seducer, if he escapes the penitentiary by marrying his victim, should, it is true, be compelled to take care of her, and he should bear the punish-

ment of being compelled to do so, if punishment it be, without being heard to complain. This salutary principle should, however, be qualified by requiring, as a condition of her support and maintenance, that the wife shall with reasonable good faith and fidelity conform to the duties resting upon her in the conjugal state. As the law stood for a long time, a prosecution for seduction could "be stopped at any time by the marriage of the parties, or a bona fide and continuing offer to marry on the part of the seducer." See Code 1882, § 4371. That the law-making power did not, in employing the language just quoted, contemplate the mere empty form of a marriage, or intend to allow the seducer to escape punishment by tendering to the woman a fraudulent offer to marry with the sole design of escaping conviction, is evidenced by two considerations: (1) It cannot be supposed that there would be such trifling with so serious a matter; and (2), for the manifest purpose of preventing just such an improper use of the above-quoted provision as we have just indicated, the general assembly in 1893 passed an act amending the law. The design of this act was to no longer permit the abatement of prosecutions for seduction by marriages which were such in form only. All of this was very plainly pointed out by Mr. Justice Cobb on pages 313 and 314 of 113 Ga., 38 S. E. 764. It being clear, then, that the legislative intent was that a marriage between the seducer and his victim should be entered into in good faith, there is every reason for holding that the parties thereto should be mutually bound to perform the obligations and duties usually incident to the contract of marriage. The great object which the legislature had in view was, not to afford the seducer a pretext for evading punishment, but to bring about a marriage which would tend as far as possible to enable him to atone for a great wrong, and relieve society of the evils which must necessarily flow from the crime of seduction, whenever perpetrated. If, therefore, a woman entering into matrimony under such conditions is to be permitted to violate ad libitum her marriage obligations, disregard her duties as a wife, and conduct herself in such a manner that even a truly repentant seducer could no longer cherish for her those sentiments which ought to animate the bosom of every good husband, and at the same time compel him to support her, it is plain that the sound public policy referred to above, which seeks to preserve domestic happiness and prevent unseemly separations between husbands and wives, would be destroyed. It was certainly not in legislative contemplation that a marriage brought about by a prosecution for seduction should, when entered into, be a marriage of a different kind, or one having different incidents, from marriages contracted under usual and ordinary circumstances. On the contrary, it was designed that the marriage

between the seducer and the woman he had led astray should be bona fide, and that it should, as nearly as possible, place these two in the same position they would have occupied after an honorable courtship ending in matrimony. It is to be noted, that the seducer is not required to support his victim as such, but as his wife. The law does not undertake to provide for an injured and disgraced woman, but for one who has forgiven and become a wife. She ought, then, in order to be entitled to support, to be a wife in fact, at least to the extent of observing those duties and obligations which are to be justly expected from every woman who takes the vows of marriage. As has been seen, the statute is designed to encourage marriages between seducers and their victims, to the end that past wrongs may be atoned for and society benefited. To construe the statute to mean that a woman who marries her seducer owes him no marital duties whatever would certainly tend to deter a wrongdoer who is really repentant, and ready to repair his wrong, from offering the protection of marriage to the woman he had betrayed, and thus the object of the statute would be in a large measure defeated. A man with knowledge that such was the law might well prefer the penitentiary to a married state of such an anomalous character that, while it imposed upon him all the burdens of matrimony, his wife (who was so in name only) would be free to abandon him at pleasure, and even live a life of open shame. In passing upon the case of *Duke v. Brown*, we overlooked these considerations, being led to do so by the righteous indignation with which all right-thinking men are inclined to regard the conduct of one who deceives a trusting woman and leads her to her ruin. We are prompted to take the view we now announce, not because of sympathy for seducers, but because, after further reflection, we cannot escape the conclusion that, in laying down the rule announced in that case, this court took a step too far in the direction of destroying the sanctity of marriage contracts, and in establishing a precedent the following of which would tend to defeat the principal object which the legislature had in contemplation when passing the above-mentioned act of 1893.

As we think the defendants' answer set up a perfectly good defense, and that they ought to have been allowed to support it by competent evidence, it is unnecessary for us to express our views upon the question of practice dealt with in the opinions filed by Mr. Justice LITTLE and Mr. Justice COBB.

COBB, J. (dissenting), speaking for himself and Mr. Justice FISH. We concur in the conclusions stated in the first and second headnotes, but we cannot agree to the proposition laid down in the third headnote, and we therefore are constrained to dissent

from the judgment rendered in the case. We do not desire to add anything to what has been said by Mr. Justice LITTLE in support of the propositions laid down in the first headnote, but will state the reasons why we concur in the ruling made in the second headnote, and dissent from that contained in the third headnote.

The case of *Duke v. Brown*, 113 Ga. 310, 38 S. E. 764, was in all its aspects very carefully considered, at least by the writer, and the conclusions reached therein in reference to the questions which were directly raised in the record, as well as those which were discussed in the course of the opinion, were not by any means the result of a hasty examination of the case nor a cursory review of the law supposed to be applicable to those questions. That the case presented questions difficult of solution was thoroughly and fully appreciated, and there was no desire or inclination to deal with the case in any other way than by the exercise of a patient and conscientious effort to arrive at a correct solution of the questions involved, although the writer was painfully conscious of the fact that, in determining the questions involved, no precedents were in sight to be pointed to as in any way upholding or sustaining the conclusions there reached. Any one reading what is there said cannot but be aware that there was at the time a keen appreciation, on the part of the writer, of the difficulties then encountered, and an earnest effort to construe the act then under consideration so as to carry out the intention of the general assembly, and make the act effective for the beneficent purposes for which it was passed. It is now said that, at least so far as one of the points involved in that case is concerned, the ruling there made partakes more of the nature of judicial legislation than of judicial construction. It did not so appear to us then, or the judgment would never have been rendered. It does not so appear to some of us now, even after the lapse of time and additional reflection and examination into the question. To some of us it appears now that what was there said on the point in question was subject to the criticism above referred to. To those who take this view of the question, of course, no other course is open to them than to refuse to follow the ruling there made. When a court becomes satisfied that it has in the past usurped functions which properly belong to another department of government, it should not continue in the path of usurpation, and if any member of the court becomes conscientiously satisfied that, in the past, usurpation has taken place, it is the duty of that member, notwithstanding his Brethren and associates may disagree with him, not only to refuse to further engage in the usurpation, but to put upon record his reasons for not further concurring with his Brethren in what appears to him to be a palpable usurpation of

authority. What is said in the opinion in *Duke v. Brown*, it still seems, ought to be sufficient to support the conclusions therein reached, but in addition to what is therein said other views tending to support the conclusions therein reached will be now stated.

When the general assembly passed the act now contained in Pen. Code, § 388, which provided that a prosecution for seduction could be stopped by the marriage of the parties and the giving by the defendant of a bond to the ordinary conditioned to support the female and her offspring for a period of five years, the purpose of the legislature, as was pointed out in *Duke v. Brown*, was to protect the female who was the victim of the seduction. The act was not passed for the purpose of showing any mercy or consideration to the seducer, but the conspicuous figures in the legislative mind were the wronged female and her offspring. The past had demonstrated that seducers had availed themselves of the privilege afforded by the law of marrying their victims, not from any conscientious regard of duty or desire to make reparation, but solely to evade a sentence imposing a term of penal servitude; and while the law contemplated that the parties should become bound in the bonds of matrimony, it also contemplated that, in addition to the usual remedies which were given to require a performance on the part of a husband of the obligations he had assumed to support and maintain his wife and children, the husband who married the woman whom he had betrayed, under circumstances where it was apparent that the marriage was contracted simply to avoid the punishment prescribed by law for the crime of seduction, should be bound with stronger bands than the ordinary husband to support his wife and children. It is true that the relation of husband and wife exists between these parties, but this relation is not brought about by the voluntary act of the husband, or as the result of a virtuous courtship. The wife that the seducer thus takes in order to avoid the penalty of the law is not to be held to the high standard of the virtuous woman who marries an honorable man. The woman is not a virtuous woman, and the man is not an honorable man, and this fact was in the legislative mind when the act was passed, and must be kept in the judicial mind in arriving at what was the intention and what was the scope of the act passed by the law-making power. The husband at the date of the marriage is not only not a man who can be described by the term honorable, but he is a confessed felon, and enters into the bonds of matrimony, not with a pure and holy purpose, but with the same motives which would prompt a savage to surrender to authority when no other course was open to him. Such a man, marrying the victim of his crime, has not the right to expect of her the same conduct that an honorable man would expect of a virtuous wife. She was a

virtuous woman once. He has deprived her of the right to stand before the world and demand the rights that a virtuous woman would be entitled to. He has not only betrayed her and destroyed her, but has compelled her to resort to the publicity of a public trial in order to make him repair, as best he can, the wrong which he has committed. She would be more than human if such an experience had any other effect than to blunt altogether her sensibilities. When he takes her to wife, he knows that he takes to wife a woman whose sensibilities are presumptively all gone, and that he is responsible for her being in this condition. Even in any marriage, the husband takes the wife for better or for worse, but in a marriage of the character now under consideration the husband can be presumed to know that he takes the wife for worse under all circumstances, because the conditions are not favorable for the other alternative of married life. With a full knowledge of the fact as to what he has done, and what effect he has wrought upon the life and character of the woman, he takes her to wife, and becomes bound to maintain and support her. If she is willful, he must remember that he is responsible, probably, for the development of this trait of character; if she is wayward, he must not forget that it was through him that she was led into the paths of the wayward; if she is vicious, this should be only a reminder to him that her first lesson in vice was learned under his instruction; if she is lawless, he must not lose sight of the fact that it was from him she received the first suggestion that caused her to disregard law both human and divine. His obligation is to support and maintain the wife he has married, not the ideal wife that the honorable man would expect to find in a pure woman whom he had led to the altar after a virtuous courtship. After the maturest reflection and the most earnest consideration, no other conclusion can be now reached than that it was not the intention of the general assembly, in the passage of the act requiring a bond to be given for the support and maintenance of the wife before a prosecution for seduction could be stopped by a marriage, that it should ever become a question for a jury to determine whether the wife had behaved in such a way as to forfeit her right to a support from her husband. This question is concluded by the bond, and, no matter how the wife conducts herself after marriage, the obligation of the bond is to support and maintain her, and this obligation must be complied with. Hard as this may seem, as was said in *Duke v. Brown*, it is not nearly so hard as being required to serve a term of involuntary servitude in the penitentiary of the state. This construction of the law imposes upon the husband, under certain circumstances, a term of servitude, it is true, but a servitude with far less disadvantages and far less severity than a servitude imposed as

the result of a conviction for the crime of which it must never be forgotten the husband has in open court confessed that he is guilty. Of course, the woman may conduct herself in such a manner as to make it impossible for the husband to live with her and comply with all the obligations which the law imposes upon the ordinary husband. This fact was recognized by the general assembly, and it was not contemplated that it would be possible that parties who had before marriage sustained such relations to each other could after marriage found a home based on mutual esteem and affection, where the chief aim of each of the parties would be the happiness and welfare of the other. It can be confidently asserted, and it must have been known to the members of the general assembly, that the foundation of such a home by such parties was a practical impossibility; and this is the reply to the suggestion that the law had in mind the protection of society. It was undoubtedly contemplated that society should be incidentally protected by the legitimization of the offspring, but the main and controlling purpose of the law was to impose upon the husband the obligation of supplying the wife with the necessities of life. All confessed criminals must be punished; and the punishment inflicted upon a confessed seducer by simply requiring him to support the wayward and willful victim of his crime is a light penalty, compared to what might be imposed upon such a criminal except for the leniency of the law in allowing him to marry his victim.

It is contended that, as the plea which set up that the failure of the defendant to support his wife was due to her conduct was not demurred to, the defendant had a right to introduce evidence in support of the same, and, if the allegations of the plea were proved, was entitled to a judgment in his favor. The defendants offered evidence to establish the truth of the allegations of the plea. This evidence was rejected by the court, and error is assigned in the bill of exceptions under this ruling. Under the ruling in *Duke v. Brown*, the facts stated in the plea constituted no sufficient defense to the action on the bond. The question, therefore, arises, what is to be done by a court when it appears during the progress of the trial that the plea relied upon as a ground of defense constitutes no reason for refusing to permit a recovery by the plaintiff? In reference to the plea in the present case, if the rule laid down in *Duke v. Brown* is to be followed there can be no two opinions on the question as to whether the plea constituted a ground of defense. In such a case, is the court required to go through the farce of hearing evidence to establish a state of facts which, if true, should not in any view of the law be permitted to defeat the plaintiff's right to recover? Does the mere fact that the plaintiff has passed over, without demurring, the patent defect in the plea, deprive the court of the right at a

subsequent stage of the case to call in question the sufficiency of the plea? Are the hands of the court so tied that it must permit not only evidence to be introduced to establish the truth of a plea which has no foundation in law, but must charge the jury that if they believe these facts to be true they must return a verdict in favor of the defendant, and then, when such a verdict is returned, enter up a judgment thereon? Can it be said that in this enlightened day such a proceeding is required to be carried on in a place where it is supposed that justice is judicially administered, and which is presided over by an intelligent judge, aided in his investigations, so far as the facts are concerned, by an upright and intelligent jury? No such result as this was permitted under the rules of the common law, nor is it required by the laws of this state. It is proposed now to establish the proposition just laid down. A demurrer admits the truth of all the matters of fact sufficiently pleaded on the other side, but it does not follow from this that the effect of pleading without demurring is to admit the sufficiency in law of the facts adversely alleged. If a party pleaded without demurring, he was held at common law to have waived all defects in the pleading of his adversary which he could not take advantage of by a general demurrer, and all defects in the pleading which were amendable before verdict were cured by the verdict. *Perry, Com. Law Pl.* pp. 236, 237; *Shipman, Com. Law Pl.* §§ 152, 153; *Steph. Pl. (Andrews' 2d Ed.)* §§ 141, 142; *Steph. Pl. (Heard's Ed.)* 146, 149; *Martin, Civ. Proc. Com. Law, § 240; 4 Minor, Inst.* pt. 2, marg. p. 895 et seq. If, at common law, a case proceeded to trial upon an issue formed upon a plea, and it appeared after verdict that the plea set forth no ground of defense and for this reason was fatally defective, the court upon motion would enter a judgment in favor of the plaintiff notwithstanding the verdict that was rendered against him, provided there appeared, either in the plea upon which the verdict was rendered or in any other plea filed by the defendant, what amounted to either an express or implied confession, on the part of the defendant, of the plaintiff's right to recover, in the absence of the matter of avoidance which was set up in the plea upon which the verdict was rendered. The judgment non obstante verdicto was allowable upon the theory that, the plea itself being substantially bad in law, of course the verdict, which merely showed it to be true in point of fact, would not entitle the defendant to a judgment; and, when the plea upon which the verdict was founded was a plea in confession and avoidance, the judgment was entered in favor of the plaintiff upon the confession of the plaintiff's right to recover, and the matter of avoidance was disregarded because not sufficient in law to do away with the effect of this confession. Originally, at common law, the judgment non obstante verdicto could not be entered except in cases

where the plea upon which the verdict was rendered was one in confession and avoidance, but subsequently to the statute of Anne which allowed the filing of several pleas it was held that although the plea did not confess the cause of action, yet if it was confessed in other pleas there should be a judgment for the plaintiff. If issue was joined upon a point which was immaterial, and upon which it was not proper to decide the action, the effect of a verdict finding against either party on such an issue was relieved against by a motion for a repleader filed by the unsuccessful party. The issue under the common-law system of pleading was always upon some question raised between the parties, and which, by the course of the pleading, was mutually agreed upon as one proper to decide the controversy. After the issue of fact thus made was decided, it might appear that the issue thus raised and agreed upon by the parties was one upon which the controversy should not or ought not to have been determined; this state of affairs having been brought about by one of the parties having, from misapprehension of the law or oversight, passed over without demurring a statement of the other side insufficient and immaterial in law. Under the common-law system of pleading, with all of its strictness, a case would not be allowed to be determined upon an irrelevant or immaterial issue, although for the time being the parties had agreed by their course of pleading that such an issue would properly determine the case. Notwithstanding the fact that the case was made to turn upon an immaterial issue was the fault of the parties, the law allowed a remedy when this fact was ascertained, and permitted the court to remedy the absurdity of making the case turn on an insignificant and immaterial point by awarding a repleader in the case. It was said that a repleader should never be granted to the party who made the first fault in pleading, but to that suggestion Tindall, C. J., once answered: "A repleader is rather the act of the court, where it sees that justice cannot be done without adopting that course." See *Gordon v. Ellis*, 7 Man. & G. 607. If a plea was so defective that it ought to have been stricken on general demurrer, and the defendant succeeded at the trial, and the plea confessed the action, the plaintiff was entitled to a judgment notwithstanding the verdict. If the plea was fatally defective, and should have been stricken, on general demurrer, because the matter alleged was so foreign or immaterial to the controversy and the plea did not contain a confession of the plaintiff's cause of action, and the verdict was for the defendant, the issue raised on the plea was not allowed to decide the controversy between the parties, but a repleader was awarded in order that the parties might, by readjusting the pleadings, arrive at a material issue upon the determination of which the court would be justified in giving judgment for the one or the other. See, in this connec-

tion, *Shipman*, Com. Law Pl. §§ 161, 162; *Steph. Pl.* (Heard's Ed.) *97 et seq.; *Gould*, Pl. pp. 494-498; *Steph. Pl.* (Andrews' 2d Ed.) § 127 (3, 4); 1 Chit. Pl. *p. 686 et seq.; *Perry*, Com. Law Pl. p. 212 et seq.; *Martin's Civ. Proc. Com. Law*, §§ 371, 372; 4 Minor, Inst. pt. 1, pp. 771-775; 2 Tidd, Pr. *pp. 921, 922; *Harris v. Goodwyn*, 2 Man. & G. 405; *Goodburne v. Bowman*, 9 Bing. 532; *Id.*, 23 E. C. L. 692; 11 Enc. Pl. & Prac. 912 et seq.; 18 Enc. Pl. & Prac. 490 et seq.; *Bouv. Law Dict.* (Rawles' Rev.) tit. Judgment, subtit. Classification; *Id.*, tit. Non Obstante Veredicto, Repleader.

An examination of the authorities just cited will show what course was pursued, under the common-law system of pleading, where, on account of the fault of one or the other of the parties to the case, a piece of bad pleading was passed over without objection being taken thereto by demurrer, and after issue joined, and verdict rendered, the court was confronted with a condition of affairs where, if judgment was entered in accordance with the verdict, the party in whose favor the verdict was entered would be allowed a judgment which would either be unfounded in law or which would be founded upon an issue which did not and ought not to have really determined the controversy between the parties. Under such a state of facts, what was to be done? If the verdict rendered was against the party who had committed the first fault in pleading, or against the party who had negligently or ignorantly overlooked the defect in his adversary's pleading, it might be said that he should lose the case as a penalty for his ignorance or negligence, as the case might be. Dr. Minor, in his *Institutes* (volume 4, pt. 1, marg. p. 774), in discussing the question as to whether a repleader ought to be granted in favor of the party who committed the first fault in pleading, uses this language: "Doubtless, if the pleaders only were to be considered, it might be proper to punish their remissness in this way. But, whilst the court is visiting upon the parties the laches of their counsel, what is it to do in respect to its own judgment? Is the judge to stultify himself by pronouncing a judgment upon grounds irrelevant and immaterial?" Chief Justice Tindall seemed to have entertained the opinion, also, that on this question the court owed something to itself and the integrity of its proceedings and judgments, as well as the rights of the parties to the controversy. This is manifest from the language quoted above from him in the case of *Gordon v. Ellis*. In *Ex parte Pearce*, 80 Ala. 195, where it appeared that a verdict in favor of the defendant could not be supported except upon pleas which were insufficient, an award of a repleader was affirmed, notwithstanding it was held that this remedy was not technically the correct one to be employed in that case. The court in the opinion (page 199) say: "The result

of the trial and verdict in this case was a manifest injustice to plaintiffs. The defenses set up were without merit, and the court would have been justified in setting the verdict aside *ex mero motu* and allowing the pleadings to be amended. We will not say it was not the duty of the court to do so. One of the chief purposes for which courts are organized is that, while observing the dividing line which separates the duties of the judge from those of the jury, the presiding judge should exert his powers in favor of legal justice." In *Gerrish v. Train*, 3 Pick. 124, the supreme court of Massachusetts lay down the rule to be that if, after issue found, the court is at a loss how to give judgment, a repleader will be awarded on the motion of either party. Decisions can be found in those states where the system of the common-law pleading once prevailed, as well as in those states where that system now prevails, which show that the principles of common-law pleading are still recognized, and that it is a general rule that a judgment which is manifestly improper, if not illegal, will not be entered simply for the reason that one or the other of the parties to the case has ignorantly or negligently omitted to take advantage of the defect in the pleading of his adversary. The distinction between the motion for a judgment non obstante veredicto and the motion for a repleader is that the first is always founded upon something involving the merits of the controversy, and the latter is generally founded upon something affecting the form or manner of the pleading, though there are some rulings which indicate that a motion for a repleader might be made in any case where it would have been manifestly wrong for a judgment to be entered upon the verdict rendered, for the reason that it did not decide the real issue between the parties. If the defendant pleaded in confession and avoidance and sustained his plea by proof, and it appeared upon a retrospection of the pleadings that the matter pleaded in avoidance constituted no defense to the action, the finding in the defendant's favor, of course, amounted to nothing, and, if objection was made to the judgment in his favor, the court would not stultify itself by entering a judgment in favor of the defendant simply because a matter alleged which was not sufficient to defeat the action was found by the jury to be true in fact. It would be useless in such a case to make a motion for a new trial, for the reason that the purpose of this motion is to set aside a verdict which is in the way of the movant, and a verdict of the character above indicated, when construed in the light of the pleadings, ought not to be in the way of anybody. The court, therefore, upon motion, would disregard such a verdict, and as the pleading of the defendant amounted to a confession of the plaintiff's cause of action, in the absence of the matter of avoidance set forth in the

plea, judgment would be entered in favor of the plaintiff as upon this confession. If the defendant's plea was a traverse of the allegations of the plaintiff's petition, and issue was joined on this plea, and the plea found in favor of the defendant, of course a judgment for the defendant could be entered if such a verdict was consistent with the law and the pleadings; and, if the evidence at the trial did not support the denial contained in the defendant's plea, the plaintiff had a remedy by motion for a new trial to set aside the verdict on the ground that the evidence did not sustain the plea, it being good in substance. If the parties joined issue upon a matter which was immaterial to the real merits of the controversy, and therefore a matter which should not be allowed to determine the question as to who should prevail in the case, the effect of finding upon this immaterial issue was avoided by a motion for a repleader, which, if granted, would require the parties to start the pleading anew at the point where the first fault in pleading was made, in order that an issue might be raised which would decide the real merits of the controversy. It seems, from what has been above stated, that when a motion of this character was filed it called into exercise the powers of the court, not only to do substantial justice between the parties, but also to give such distinction to the case as would prevent a judgment from being entered which would be a reflection upon the integrity of the court and the administration of justice.

In those states which have adopted a code of practice, while the motion for a judgment non obstante veredicto and the motion for repleader are not preserved by name, there is in the codes of such states a recognition of the fact that the same condition of affairs which brought into existence at common law the two remedies is likely to arise, and, when this condition of affairs arises in the code states, there is a remedy provided to accomplish the same purpose which was accomplished by the common-law motions above referred to; that is, to prevent the court from rendering judgment which would be manifestly wrong and improper and one which would be calculated to bring into discredit the courts as the organs of the administration of the law. If the complaint be sufficient, the plaintiff may apply for a judgment on the pleadings if the defendant has filed an answer which expressly admits the material facts stated in the complaint, or where the answer merely sets up new matter and is found substantially insufficient. 3 *Estee*, Code Pl. § 4604; 11 *Enc. Pl. & Prac.* p. 1030 et seq.; 2 *Bates*, Code Pl. p. 968. A frivolous answer will, in all of the Code states, be stricken on motion, although it seems that the Missouri Code only expressly provides for so doing. *Bliss*, Code Pl. (3d Ed.) § 421; *Estee*, Code Pl. § 4610. In *Hemme v. Hays*, 55 Cal. 337, it was held that a

frivolous answer is one which denies no material averment in the complaint and sets up no defense, and when such an answer is filed the plaintiff may apply for a judgment on the pleadings. In the opinion, Sharpstein, J., said: "Where an answer presents nothing, either by way of denial or new matter, to bar or defeat an action," the plaintiff may apply for judgment upon the pleadings." See, also, *Montgomery v. Merrill*, 62 Cal. 385; *Felch v. Beaudry*, 40 Cal. 439. In *Strong v. Sproul*, 58 N. Y. 498, Allen, J., says: "A frivolous answer is one so clearly and palpably bad as to require no argument or illustration to show its character, and which would be pronounced frivolous and indicative of bad faith in the pleader upon a bare inspection; and when such an answer is interposed, and alone delays the plaintiff in obtaining the judgment to which he is clearly entitled, judgment is authorized to be given upon a summary application on a notice of five days." In the case of *Lough v. Bragg*, 18 Minn. 121 (Gil. 106), the supreme court of Minnesota recognizes that a motion for a judgment upon the pleadings under the Code system is equivalent to the motion for a judgment non obstante veredicto at common law. In that case, the defendant having obtained a verdict upon a plea in confession and avoidance, the plaintiff moved for a judgment notwithstanding such verdict, and it was held that as the answer contained no valid defense to the action, and confessed the execution of the note sued on, the motion should have been granted; it appearing that the judgment moved for would be a judgment upon the merits, and not upon the form of the pleading. Mr. Black, in his work on Judgments (volume 1, § 16), recognizes that while in many of the states the motion for a judgment non obstante veredicto, and the motion for a repleader, are not retained in form as specific remedies, there is, under the practice of nearly all the states, a remedy of some name which accomplishes the same purpose which was accomplished by these motions at common law. See, also, in this connection, 1 *Freem. Judgm.* (4th Ed.) § 7. There is no reference in our Code, by name, either to the motion for a judgment non obstante veredicto or the motion for a repleader. As the motion for a repleader was generally applicable at common law in cases where there had been an immaterial issue made up and joined at some stage of the case subsequent to the plea, that motion in form would have very little application to our system, where there is, except in special cases, no pleadings after the answer of the defendant. There seems to be no ruling by this court which expressly recognizes the motion for a judgment non obstante veredicto as a remedy eo nomine in this state. Such a motion was made in the case of *Grant v. Insurance Co.*, 76 Ga. 575. While it was held in that case that the motion was not

well taken, there is nothing in what is said by the court, either in the headnote or the opinion, to indicate that that motion or one which would be the same in substance would not be an appropriate remedy in Georgia, if the facts of the case were such as to call for its exercise.

In Georgia the forms of the common-law pleading have been abolished, but the substance has been retained. While in other states where codes have been adopted there are prescribed forms of procedure, there is in our code nothing requiring adherence to any particular form in judicial proceedings. An examination of the laws of procedure in this state, from the judiciary act of 1799 down to and including the uniform procedure act of 1887 and its various amendments, will demonstrate that the efforts of the legislatures which have from time to time dealt with the subject of procedure in this state have been to bring about a system where the litigant would not be hampered by prescribed forms, but where the controversies between the parties at issue would be determined by the court, and justice administered, according to the facts of the cases as they appeared in the pleadings of the parties, and the parties be given a decision upon the merits of the controversy. Wherever this result could be accomplished by an adherence in substance to the remedies of the common law, these remedies are still applicable in this state. They need not be designated by any name, but, if there was a remedy at common law which would bring about the desired result when applied in this state, the courts can still administer such remedies, no matter whether they call them by any particular names or not. If, in a particular case, the law and the facts demand that a judgment should be entered on the merits of the case in a particular way, and there is no precedent either at common law or in the past in this state for such a case, under our system the court may frame a remedy, and give the case such direction as justice demands and the law and the facts of the case authorize. If at common law, where the court was hampered by a system of procedure which was replete with strict rules and technical niceties, the court was authorized to protect itself from rendering a judgment which was palpably erroneous and manifestly wrong, and would be in violation of the principles of law, and do great injustice in the particular case, notwithstanding the condition of affairs that thus confronted the court was brought about by the negligence or ignorance of the litigants or their counsel, much more, under our loose system of procedure, which looks alone at substance, and ignores form, would the court be authorized, if not required, to take such steps as might be necessary in order to demonstrate that courts are places where justice is judicially administered and controversies are decided upon their merits.

If the plaintiff files a petition which sets forth a cause of action, and the defendant files an answer thereto which would be equivalent to a plea in confession and avoidance at common law, and instead of demurring to the answer the plaintiff goes to trial, and the issue made by the answer is found in favor of the defendant, we know of no good reason why this verdict should not be set aside upon motion made during the term at which the verdict was rendered, upon the ground that the plea was bad in substance, or why a new trial should not be granted in order that the pleadings might be amended and the bad plea stricken from the record, even if it would not be proper in such a case for the judge to ignore the matter of avoidance in the plea which was bad in substance, and enter a judgment in favor of the plaintiff upon the petition as confessed. Certainly, when the attention of the court is called to the fact that a judgment is about to be entered, in favor of the defendant, simply because a plea which was bad in substance, and which would be held to be frivolous and unfounded in the code states, had been found to be true by the jury, the court would have a right to disregard the plea, upon a motion to set aside the verdict, or, it may be, upon a motion for a new trial, or, if either of these remedies was not appropriate under our system, then to frame such a remedy as would prevent the court from entering a judgment which could have no other effect than to bring the court into discredit and the administration of the law into contempt. Such a judgment was never permitted at common law when a timely motion was made to disregard the finding upon the insufficient plea. Such a judgment cannot now be entered, in any of the code states in this Union, when a timely motion for a judgment on the pleadings is made. Certainly, in a state where the claim is made that substance only is looked to in judicial proceedings, such a judgment cannot be entered when timely objection is made to its rendition. If the court could at common law protect itself from entering such a judgment after verdict, then it would necessarily follow that, under our system, the court would have a right to stop the trial at any time before verdict, when its attention is called to the fact that the plea is bad in substance, and that, even if found true, it would not legally authorize a judgment in favor of the defendant, and would take some steps, either by striking the plea or directing a verdict, which would have the effect, not only of preventing the necessity of entering a judgment upon a bad plea, but also the necessity of proceeding with a trial which would result in no other way than in a finding which would have to be subsequently disregarded by the court. If the court can disregard the plea after verdict because the same is bad in substance, either by setting aside the verdict which is based

thereon, or by granting a new trial, or by taking such other steps as would have the effect of preventing a judgment from being entered on the finding in favor of the plea, then the court, during the progress of the trial, can take any proper and necessary steps required to prevent a finding upon the plea which is bad in substance. This may be accomplished either by striking the plea, if a motion is made to this effect, by ruling out evidence which is offered in support of the plea, or, if evidence has been admitted, by directing a verdict for the plaintiff notwithstanding the plea and the evidence offered in support thereof. A plea which does not set forth anything which is, in law, a sufficient reason for defeating the right of the plaintiff to recover upon a petition which sets forth a cause of action, should not, even if proved to be true, be allowed to have the effect to defeat the plaintiff in his right to recover, provided the plaintiff calls attention to the fact that the plea is bad in substance, either during the progress of the trial before verdict, or makes a timely motion after verdict to disregard the verdict finding in favor of the plea; and this is true notwithstanding the plaintiff has passed over the plea which was bad in substance without demurring to the same prior to the trial. It is well settled in this state that, if a petition does not set forth a cause of action, the court can relieve itself of the necessity of rendering a judgment in favor of the plaintiff on such a petition by dismissing the same at any time, during the progress of the trial, when its attention is called to the fact that the petition is bad in substance. This can be done either upon motion of the defendant or by the court upon its own motion. If the petition sets forth a cause of action, and the plea and answer thereto set up no ground of defense whatever, we see no good reason why, under our system, the court at any time before verdict should not give the case such direction as would disregard the plea, and do this either upon motion of the plaintiff or upon its own motion. This practice is entirely in accord with the theory of our system, which is that a verdict and judgment in a case should, so far as possible, decide the actual merits of the controversy between the parties, and do substantial justice between them. Of course, if the answer was good in substance, and was simply defective in form, the court would have no authority to disregard the same either on the motion of the plaintiff or otherwise, for the reason that, by failing to demur, the plaintiff has waived all defects of form in the answer.

Keeping this in mind, none of the rulings of this court are in conflict with the position above taken. In *Bryan v. Gurr*, 27 Ga. 378, it was held that where a plea of justification had not been demurred to for insufficiency, and evidence had been admitted under it without objection, it was error for the

court to charge the jury that the plea was defective, and the defendant could take nothing under it. An examination of this case will show that the plea, though informal and defective, was good in substance, and of course in such a case the plaintiff, by failing to demur, waived the formal defects in the plea, and the court should have treated the plea as good for the purposes of the case. In *Slesel v. Harris*, 48 Ga. 652, it was held that when the defendant filed a plea of usury which was good in substance, but otherwise defective, and there was no demurrer to the plea, it was error for the court to charge that the jury could disregard the plea for the reason that it did not contain all of the essentials necessary to make a perfect plea of usury. There was nothing said in either of these two cases as to the right of the court to instruct the jury to disregard the plea if it had been altogether bad. In *Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839 (3), it was held that a plea of justification, although loose and informal, which was not demurred to, would not be very closely scrutinized after verdict. Neither in England after the statute allowing pleadings to be amended, nor in the code states, was the court authorized to disregard, either before or after verdict, a plea which was good in substance but defective in form; and that is the extent only of the rulings just referred to. There is no ruling, so far as we have been able to ascertain, which in terms denies to the court the right to disregard a plea bad in substance before verdict, or after verdict if a timely motion is made to that effect, notwithstanding the failure of the opposite party to raise the question of the sufficiency of the plea by a general demurrer to the same. There is nothing in the position above taken which conflicts with the rulings of this court that the legal sufficiency of a petition cannot be called in question by a motion for a nonsuit, or by objection to evidence, or by a motion for a new trial. In the case of *Fleming v. Roberts*, 114 Ga. 634, 40 S. E. 792, which followed the previous rulings of this court, it was held that the legal sufficiency of a petition cannot be brought in question by an objection to evidence introduced in support of the same. It was there said: "If a petition is good in substance, but defective in form, objection to it must be made by an appropriate special demurrer at the first term; if a petition is not good in substance,—that is, taking every allegation to be true, it fails to set forth a cause of action,—objection must be made to it either by a general demurrer, or a motion to dismiss the case before verdict, or by motion in arrest of judgment or motion to set aside the judgment after verdict. We know of no other way in which the legal sufficiency of a petition can be properly brought before the court."

It will thus be seen that, where the defendant passes over a petition bad in sub-

stance without demurring, he is given three remedies by which he may call in question the sufficiency of the petition,—one before verdict, and two after verdict,—one of these latter being recognized by the common law; that is, a motion in arrest of judgment; the other two, the motion to dismiss before verdict and the motion to set aside after verdict, being peculiar to our system. The legal sufficiency of a declaration could not be called in question at common law on a motion for a new trial, and it cannot be called in question by such a motion in this state. The legal sufficiency of a plea in confession and avoidance which was bad in substance, but which had not been demurred to, could be called in question at common law by a motion after verdict to enter a judgment notwithstanding the verdict, or, in certain cases, by a motion for a repleader. There being very few, if any, cases where the motion for a repleader would be applicable under our system of pleading, it follows that, if the motion for a judgment notwithstanding the verdict is not in substance still of force in this state, we have abolished the only remedy known to the common law which would be applicable under our system, and substituted no remedy in the place of this salutary common-law remedy which was abolished. The negligent or ignorant defendant who fails to demur to the petition is given, under our system, the motion to dismiss, available to him at any time before verdict, and there is retained for his benefit the common-law motion in arrest of judgment. Is the ignorant or negligent plaintiff to be punished more severely than the ignorant or negligent defendant? If we have retained the motion in arrest of judgment as a remedy for the defendant, why not retain also the motion for judgment notwithstanding the verdict for the benefit of the plaintiff? If we have created a new remedy for the defendant by motion to dismiss pending the trial, why not recognize the necessity for a similar remedy for the plaintiff, and give him a right to move to strike the plea or disregard the plea, or any other motion which would have the effect, during the progress of the trial, of disposing of a plea which was altogether bad in substance? A motion to exclude the evidence, or a motion to direct a verdict, would have the same effect, and in justice it seems that the plaintiff should be entitled to remedies of this character, where similar remedies are given to his adversary under circumstances where he would be as much at fault as the plaintiff would be.

In the present case, the plea confessed the truth of the allegations in the petition. It in effect admitted the execution of the bond and the failure to support the wife. It set up, as a reason why the defendant was not liable on the bond notwithstanding the facts charged in the petition were true, that the wife had voluntarily abandoned the husband, and the failure to support her was due enth—

ly to her conduct. Under the ruling in *Duke v. Brown*, this constituted no reason for the failure to support the wife, and therefore was no defense to the action on the bond. If this plea had been proved, and the jury had returned a verdict finding in favor of the defendant on this plea, this finding would have been upon an issue which could not have legally decided the controversy between the parties. The finding should either have been disregarded or set aside. Such being the case, when it appeared to the court, during the progress of the trial, that the plea was bad in substance, and if found in favor of the defendant the court should have refused to enter a judgment thereon, it was not only the right, but it was the duty, of the court to give the case such direction as that the plea would be disregarded. This was done in the present case by refusing to allow evidence to sustain the plea. The same result could have been accomplished by allowing the evidence and directing a verdict against the defendant. In any event the right result was reached, and the judgment, so far as this question is concerned, should be affirmed.

In all that has been said, Mr. Justice LITTLE agrees with us. In what follows we speak only for ourselves.

In this case, the bond was for \$750, but for some reason the suit was brought only for \$800. The court directed a verdict in favor of the plaintiff for the full amount sued for. It having appeared that the husband failed to support the wife, under the ruling in *Duke v. Brown* the plaintiff was entitled to recover the full amount of the bond, if this amount had been sued for, and under that ruling he was entitled in the present case to recover the full amount for which the suit was brought. It is insisted that the ruling in *Duke v. Brown* was erroneous, for the reason that there is nothing in the statute authorizing a judgment for the full amount stipulated in the bond, and that, therefore, suits upon bonds of this character should be governed by the ordinary rules of the common law, and the plaintiff should be permitted to recover only such damages as the proof showed she had sustained prior to the filing of the petition. The general rule is that in a suit upon a penal bond, whether the amount recovered is the full penalty or not, all remedies on the bond are merged in the judgment, and no further suit can be brought on the bond. The act in reference to the bond given for the purpose of stopping a prosecution for seduction provides that the bond shall be filed in the office of the ordinary and recorded, and, upon the failure of the principal obligor to comply with the bond, suit may be brought thereon. Pen. Code, § 389. The statute does not in terms say what should be the amount of recovery on the bond. The question thus arises whether it was within the contemplation of the general assembly that one recovery, say for a failure to support the wife for one day, of an infinitesimal amount, would

have the effect to prevent another recovery on the bond for a failure to support during a period of two, three, or five years. As the statute does not in terms provide that successive recoveries may be had upon the bond for continued default on the part of the husband to support the wife, the better view seems to be that the general assembly intended that one suit only should be brought upon the bond. Such being the case, could this suit be brought the moment there was a failure to comply with the terms of the obligation, and the full amount of the bond be recovered as a penalty, the fund thus going into the hands of the ordinary to be disbursed by him for the benefit of the wife and her offspring, having a due regard for what had been done by the husband in the way of supporting his wife before the suit, or what might be done thereafter during the continuance of the five years; or was the wife compelled to wait until the expiration of the five years, and live as best she might during that term, and then bring a suit which would reimburse her for the cost of her living during the period that her husband had failed to support her? It must be kept in mind that the legislative purpose and intent was to provide for the maintenance and support of the wife, and the act must not be construed in such a way as to defeat this end. If it is held that no suit can be brought until after the expiration of five years, except for such an amount as may be necessary to pay for the support during the time that the husband may have failed to support the wife prior to the suit, or that a suit brought within five years must be limited so as to authorize a recovery only for an amount necessary to support the wife during that part of the period of five years which had expired before the bringing of the suit, then the legislative purpose, to provide for the support of the wife for the full period of five years, although not entirely defeated, is, to a large extent, disregarded. To hold that a suit brought during the five years was limited to the actual damages sustained up to the time the suit was brought would not carry out to its full extent the legislative purpose. To hold that the wife must wait until after the expiration of the five years, if she expected to demand of her husband and the security on his bond the full amount necessary to support her for the entire period, would not be at all in furtherance of the legislative scheme. The purpose, as has been stated more than once, of the general assembly, was to provide for the maintenance and support of the wife for the period of five years; and the amount necessary for this purpose was to be fixed by the ordinary when the bond was given; and the wife was entitled to look to the bond for such a part of this sum as was necessary to support her during that portion of the period of five years that the husband failed to support her. No other course was open to the court, in passing upon the act and determining what was intended to be accomplished by

the general assembly, keeping in view the purpose and intent for which the legislation was passed, than to hold that the failure, for any period of time, to support and maintain the wife, constituted a breach of the bond, and that, when such breach took place, it was the duty of the public officer who was the custodian of the bond to bring a suit thereon, and recover the full amount of the bond. Any other view than this is not only inconsistent with the purpose and intent of the legislation under consideration, but tends to defeat the wise and beneficent ends intended to be accomplished by that legislation. But it is said, as it was said in *Duke v. Brown*, that the act does not in terms authorize this. This must be conceded. While we cannot look to other legislation for the purpose of carrying into effect a piece of defective legislation, we can look to other legislation indicating the purpose and policy of the state in order to determine what was the legislative intent in dealing with a matter similar to that already dealt with by previous legislation, and construe the terms of the act in the light of prior legislation on a subject of a somewhat similar nature, and in this way give to the act a construction which is clearly in line with the legislative intent indicated therein, and which will further the wise purposes which are manifested by the terms of the act, when taken in the light of past history which had its effect in bringing about the legislation in question. The legislation on the subject of the remedies to be given on bastardy bonds was, therefore, in *Duke v. Brown*, resorted to in order to throw some light upon the question as to what was to be the character of the remedy upon the bond given in cases of the character now under consideration. It was not contended in *Duke v. Brown*,—neither is it contended now,—that there is any express legislation authorizing a recovery of the full amount of the bond in a suit of the character before us; but it was contended then, and it is contended now, that in no other way can the legislation contained in the sections of the Penal Code above cited be carried into full effect unless so construed as to allow in a given case a recovery for the full amount stated in the bond. Any other construction would not only be not consistent with the scheme as dealt with in the act, but would seriously tend to defeat the entire purpose for which the legislation was passed. The bond given by the seducer to stop the prosecution for seduction was treated as a bond given to the public, conditioned for the support of his wife, and, if he failed to support her, the public, through the public officer who was the payee of the bond, was to recover the amount, and see that the same was appropriated for the purpose for which the bond was given. While the question was not directly involved in *Duke v. Brown*, nor is it involved here, it was then said, and no reason appears for a modification of what was laid down there, although it may be subject

to the criticism that it was obiter, that the ordinary should use the fund from time to time for the support and maintenance of the wife and her offspring, and that if, at the end of the period of five years from the date of the marriage, any amount remained uncollected on the judgment, or, if collected, remained unexpended in the hands of the ordinary, such amount should be returned to the person who paid the same to the ordinary. The court is now, and was in *Duke v. Brown*, confronted with a condition of affairs where, under one construction, the act providing for the bond to be given by the seducer to support his wife and children could be rendered effective, and under another construction the act would be practically nullified. One construction would make the act a benefit to the victim of the crime; the other construction would simply afford to a confessed felon an opportunity to escape from the obligation to support a once virtuous female whose happiness and character he had destroyed. Between these two constructions it seemed, when *Duke v. Brown* was before the court, that that which carried into effect the manifest legislative intent, and inured to the benefit of the unhappy victim of the crime, was to be preferred to a construction which inured to the benefit of the felon himself, who was out of the penitentiary simply by the mercy of the law, the enforcement of which he was further attempting to defeat by the refusal to comply with the obligation entered into when this mercy was extended to him.

After due reflection, there appears no good reason why the rule laid down in *Duke v. Brown* should not be adhered to. Every conclusion reached in *Duke v. Brown*, after patient re-examination of that case, is still satisfactory to the writer, and nothing has occurred to his mind, or been presented by any one else, in reference to the conclusions there reached, which would require that the same should not be followed in other cases where the questions there discussed are involved. The writer stated in *Duke v. Brown* that a great deal of what was there said was obiter, but such portions of the opinion were then deemed to be necessary to a well-rounded discussion of the questions actually involved. The right was expressly reserved to depart from these dicta in the future, if upon further reflection they were not thought to be well founded. The writer now sees no reason to withdraw, restrict, modify, or depart from anything said in the opinion in *Duke v. Brown*.

(115 Ga. 796)

WYNN v. RICHARD ALLEN LODGE,
NO. 14, K. P.

(Supreme Court of Georgia. June 12, 1902.)
JUSTICE OF THE PEACE—SUMMONS—VALIDITY.

1. It is essential to the validity of a summons issuing from a justice's court for the purpose of instituting an action therein that some person should be named as defendant. *Ac-*

cordingly, a summons which names as a defendant "Richard Allen Lodge, No. 14, Knights of Pythias," is fatally defective, in that it does not disclose that such lodge is either a corporation or a partnership, and therefore subject to suit. *Barbour v. Albany Lodge*, 73 Ga. 474, followed in *Thurmond v. Baptist Church*, 36 S. E. 221, 110 Ga. 816.

2. The ruling above announced disposes of the only question made and argued in the present case, and it follows that there was no error in refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by D. D. Wynn against the Richard Allen Lodge, No. 14, Knights of Pythias. Judgment for defendant in an action before a justice, and from the refusal of a petition for certiorari, plaintiff brings error. Affirmed.

O. E. & M. C. Horton, for plaintiff in error. Rucker & Rucker, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 670)

BAKER v. BRANAN et al.

(Supreme Court of Georgia. June 7, 1902.)

APPEAL—REVIEW—NEW TRIAL.

The evidence did not, under the law applicable thereto, demand the verdict rendered. Therefore this court will not reverse the judgment of the trial court granting a first new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; C. G. Jones, Judge.

Action by C. N. Baker against Branam Bros. & Co. From an order granting a new trial, C. N. Baker brings error. Affirmed.

S. Holderness, for plaintiff in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 671)

McLAUGHLIN v. TAYLOR.

(Supreme Court of Georgia. June 7, 1902.)

MORTGAGE LIEN—SALE BY RECEIVER—PARTNERSHIP.

The lien of a mortgage held by a stranger to a suit in which a receiver is appointed to wind up the affairs of a partnership, against the individual interest in real estate of one member of the partnership, remains upon the property, notwithstanding it has been sold by the receiver.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Action by L. C. McLaughlin against L. F. McLaughlin. Judgment for plaintiff. On levy of execution, J. M. Taylor filed a claim.

Judgment for claimant, and plaintiff in execution brings error. Reversed.

J. J. Dunham and Simeon Blue, for plaintiff in error. Geo. P. Munro, for defendant in error.

COBB, J. This was a claim case, in which L. C. McLaughlin was plaintiff in execution, L. F. McLaughlin defendant in execution, and J. M. Taylor claimant. At the trial it appeared that on September 24, 1886, the defendant in execution executed a mortgage to the plaintiff in execution upon a one-fourth interest in certain described lots of land, and that this mortgage was duly recorded. At the time this mortgage was executed the defendant in execution was a member of the firm of Fort & Co., and this firm was in possession of the land described in the mortgage. On July 15, 1890, an order was passed by the judge of the superior court in a proceeding which had been instituted by L. F. McLaughlin against Wiley Fort for the purpose of dissolving the partnership above referred to, and having an accounting and settlement of the affairs of the same, authorizing the receiver which had been appointed to sell the assets of the firm, part of which was the land in controversy in the present case. Under the authority of this order the receiver sold the land in controversy, and on December 21, 1890, made a deed to the same to one Jenkins, and the claimant in the present case derived title from the purchaser at the receiver's sale. The mortgage of the plaintiff in execution was not foreclosed at the date of the receiver's sale, a judgment of foreclosure not having been obtained until the 27th day of April, 1892. The mortgagee was not a party to the proceeding in which the receiver was appointed and the order of sale granted. The court directed the jury to return a verdict finding the property not subject to the execution, and to this judgment the plaintiff in execution excepted.

The controlling question in this case is whether the sale by the receiver under the order in the proceeding instituted by the defendant in execution against his copartner for the purpose of winding up the affairs of the partnership of which they were members divested the lien of the mortgage held by the plaintiff in execution. The plaintiff in execution was not a party to this proceeding. The receiver was appointed for the purpose of bringing before the court and disposing of the property of the parties to the litigation, and no other interest was before the court than such interest as either of the partners had in the property sold by the receiver, and the only interest in the property in controversy which was before the court was the equity of redemption. *Tarver v. Ellison*, 57 Ga. 54; *Roberts v. Hinson*, 77 Ga. 589, 2 S. E. 752 (2); *De Vaughn v. Byrom*, 110 Ga. 907, 36 S. E. 267 (2). An

interest in the property vested in one who had a claim adverse to either of the parties to the case was not before the court; and the court had no jurisdiction to pass any order which would prejudice such adverse claim in any way in reference to the property held by the partnership or either of the partners, and apparently owned by them. The court could authorize the sale of, and the receiver could sell, only the interest of the parties to the proceeding in the property which was in the custody of the court. It was held by the supreme court of Indiana in *Lorch v. Aultman*, 75 Ind. 162, that a sale of mortgaged property by a receiver appointed in a suit between partners for the settlement of the partnership business invests the purchaser with only so much interest in the property as the firm had, and does not devalue or affect the paramount mortgage lien of a stranger to the record. See, also, *Manufacturing Co. v. Parkhurst*, 125 Ind. 317, 25 N. E. 347; *Foster v. Barnes*, 81 Pa. 377; *Beach, Rec. (Alderson's Ed.)* § 735; *High, Rec. (3d Ed.)* § 191. The plaintiff in execution in the present case—the mortgagee—could not have claimed the proceeds arising at the receiver's sale, for the simple reason that the mortgage was not foreclosed at that time. The statute which authorizes a mortgagee holding an unexpired mortgage to consent to the sale of the entire interest when the property is levied upon by other process, and claim the proceeds of the sale in the same manner as if the mortgage had been foreclosed, does not apply to sales by receivers; the statute being restricted in its operations to sales where the equity of redemption is levied on under an execution. See *Civ. Code*, § 2759. While the effect of the judgment rendered in the case between the two partners was that the property in controversy was partnership property, this judgment did not bind the plaintiff in execution in the present case, for the simple reason that she was not a party to the proceeding, and could not be heard on this question. The plaintiff in execution having shown that at the date of the mortgage the defendant in execution was in possession of the property described in the mortgage, the presumption was that he was the owner of the interest described in the mortgage (see *Morris v. Winkles*, 88 Ga. 717, 15 S. E. 747, and cases cited); and this presumption is not overcome by proof showing title in the claimant, derived through a judgment to which the defendant in execution was a party, but to which the plaintiff in execution was a stranger. If the land in controversy was really a part of the assets of the firm of which the defendant in execution was a member at the time the mortgage was executed, and the plaintiff in execution had knowledge of this fact at the time the mortgage was taken, it may be that in a proper proceeding, with proper parties, a court of equity would protect the rights of the other

partner, or those claiming under him. But upon the facts as they appear in the present case, the property levied on was, as against the claimant, subject to the execution, and the court erred in directing the jury to find to the contrary.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 764)

STEELE v. WARD et al.

(Supreme Court of Georgia. June 11, 1902.)

APPEAL—REVIEW—NONSUIT.

There was no error in the rulings on evidence of which complaint is made, and under the facts appearing in the testimony offered in behalf of the plaintiff the granting of a nonsuit was proper.

(Syllabus by the Court.)

Error from superior court, Henry county; Z. A. Littlejohn, Judge.

Action by W. S. Steele against W. W. Ward and others. From a judgment of nonsuit, plaintiff brings error. Affirmed.

Vasser Woolley, E. F. Weems, and John S. Gleaton, for plaintiff in error. J. F. Wall, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 753)

TRION MFG. CO. v. ROME BRICK CO.

(Supreme Court of Georgia. June 11, 1902.)

APPEAL—REVIEW.

There was no error in rejecting evidence. The evidence admitted demanded a finding in favor of the plaintiff for the amount sued for, and the court did not err in directing the jury so to find.

(Syllabus by the Court.)

Error from superior court, Chattooga county; E. L. Brinson, Judge.

Action between the Trion Manufacturing Company and the Rome Brick Company. From a judgment the Trion Manufacturing Company brings error. Affirmed.

Wesley Shropshire and Harper Hamilton, for plaintiff in error. Jno. D. Taylor and J. Branham, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 723)

COX v. ATKINSON et al.

(Supreme Court of Georgia. June 10, 1902.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This being the first grant of a new trial, and it not appearing that the verdict returned was under the law and the evidence absolutely required, the judgment of the trial court will not be disturbed. *Civ. Code*, § 5585.

(Syllabus by the Court.)

Error from city court of La Grange; **F. M. Longley, Judge.**

Action by **J. E. Cox** against **Atkinson & Turner**. From an order granting a new trial, Cox brings error. Affirmed.

G. D. Dominick and **H. T. Moon**, for plaintiff in error. **R. A. S. Freeman**, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 741)

HODGES v. MOSELY.

(Supreme Court of Georgia. June 10, 1902.)

APPEAL—REVIEW.

No error of law is complained of, and the evidence was sufficient to authorize the verdict. (Syllabus by the Court.)

Error from superior court, Early county; **H. C. Sheffield, Judge.**

Action between **W. R. Hodges** and **M. E. Mosely**. From the judgment, Hodges brings error. Affirmed.

A. G. Powell, for plaintiff in error. **W. O. Worrill** and **R. H. Sheffield**, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 722)

SOUTHERN RY. CO. v. JOHNSON.

(Supreme Court of Georgia. June 10, 1902.)

APPEAL FROM JUSTICE—DENIAL OF CERTIORARI.

There was no error of law complained of. The evidence warranted the verdict rendered in the magistrate's court, and the judge of the superior court committed no error in overruling the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Gordon county; **A. W. Fite, Judge.**

Action by **Laura Johnson** against the **Southern Railway Company**. Judgment for plaintiff. From an order overruling a petition for certiorari, defendant brings error. Affirmed.

Shumate & Maddox and **Watkins & Dodd**, for plaintiff in error. **Starr & Erwin**, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 737)

ANTHONY v. BOLAND et al.

(Supreme Court of Georgia. June 10, 1902.)

APPEAL—REVIEW.

The evidence warranted the verdict, and there is no merit in any of the special assignments of error.

(Syllabus by the Court.)

Error from superior court, Muscogee county; **W. B. Butt, Judge.**

Action between **S. W. Anthony** and **J. W. Boland** and others. From the judgment, Anthony brings error. Affirmed.

A. A. Dozler, for plaintiff in error. **J. H. Martin**, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 729)

BALL, Treasurer, v. WRIGHT.

(Supreme Court of Georgia. June 10, 1902.)

WRIT OF ERROR—DISMISSAL—CONTEMPT.

1. There is no merit in the motion made to dismiss the writ of error.

2. The plaintiff in error was properly attached as for contempt by the judgment of the superior court, as the questions made by the bill of exceptions in this case were conclusively settled against him in a former ruling making the mandamus absolute.

(Syllabus by the Court.)

Error from superior court, Butts county; **E. J. Reagan, Judge.**

Application of **Y. A. Wright** for rule nisi against **L. J. Ball**, treasurer, to show why he should not be arrested for contempt. Rule granted, and defendant brings error. Affirmed.

J. F. Carmichael and **Marcus W. Beck**, for plaintiff in error. **Jno. R. L. Smith** and **B. P. Bailey**, for defendant in error.

LITTLE, J. It appears that in June, 1901, **Young A. Wright** presented a petition to the judge of the superior court of Butts county in which he alleged that **L. J. Ball** was treasurer of Butts county; that in 1893, and prior thereto, the petitioner was the duly commissioned solicitor of the county court of that county, and on the 12th day of December of that year there was due him from fines and forfeitures, as insolvent costs on orders duly approved, the sum of \$519.08, which orders were liens upon the funds arising from fines and forfeitures that might thereafter come into the hands of the county treasurer from such source in said court; that the county court referred to was abolished on the 15th day of December, 1893, by an act of the general assembly, at which time there were no funds in the hands of the county treasurer subject to the payment of his said orders; that on the 4th day of December, 1900, by an act of the general assembly, this court was re-established, and since its re-establishment, to wit, on the 27th day of May, 1901, there were in the hands of the treasurer funds subject to the payment of his said orders, and these orders were a lien thereon; that on said last-named date he presented his said orders to the treasurer for payment,

¶ 2. See Mandamus, vol. 22, Cent. Dig. § 425.

which was refused, whereupon petitioner prayed for a writ of mandamus, directed to Ball as county treasurer, to compel him to pay said orders. On this petition a rule nisi was issued and served. The treasurer answered, admitting in his hands certain funds arising from fines and forfeitures in the re-established court, but denying that the funds so arising were subject to the payment of the orders of petitioner. Other parts of the answer are not material here. The rule nisi was made returnable June 25, 1901, and on that date, after due inquiry into the case, the judge of the superior court passed an order that: "Upon the proofs and evidence submitted, and after considering said cause, it is ordered that said mandamus be, and the same is hereby, made absolute; and, in obedience to this order, L. J. Ball, the treasurer of Butts county, is hereby directed to pay over immediately, from the fines and forfeitures in his hands arising from the county court of Butts county, to Y. A. Wright, the sum of two hundred and thirty-one and $\frac{80}{100}$ dollars,—the same being the amount admitted by said L. J. Ball to be in his hands at the time of making his answer,—and that from any other fines and forfeitures which may come into his hands from said source he will pay the same on said order of Y. A. Wright until same is fully paid off." Subsequently, in December, 1901, Wright presented to the same judge another petition, the answer of the defendant, and the order of the judge. He then recited that the treasurer, in obedience to the mandamus absolute, paid him \$231.80, leaving a balance of \$262.28 due him on his orders; that, since the date of the judgment rendering the mandamus absolute, the treasurer had received from fines and forfeitures from the county court a sum largely in excess of the balance due to petitioner, but said treasurer had failed and refused to obey the mandamus absolute and pay over to him on said orders the funds in his hands so arising; and he prayed a rule nisi calling on the treasurer to show cause why he should not be punished for contempt in so refusing. The rule nisi was duly issued on this petition, and the county treasurer made answer that he had received as treasurer the amount of \$1,337.35 from the judge and solicitor of said court. He denied, however, that such money came into his hands as fines and forfeitures, but asserted that, while the money had been paid as fines and forfeitures into the hands of the proper officers of the court, it had been distributed among the officers of that court as costs, "and the part going as costs to the judge of said court, * * * to wit, \$475, as well as the part ordered paid to the solicitor of said court, to wit, the sum of \$913.35, was then paid over to respondent upon his giving the following receipts therefor to said judge and solicitor, respectively: 'Received of Frank Z. Curry, judge of Co. court of Butts county, three hundred and fifty dollars, being a portion of the foregoing

bill and funds coming into said Curry's hands as his costs in said cases, and now received by me as Co. treas'r, to be covered into the treasury of said county, in accordance with the tenor and effect and for the purpose as set forth in and intended by section five of the act of 1900, creating said county court. This Aug. 20, 1901.' " A second receipt from the judge for \$74, and two receipts from the solicitor, aggregating \$913.35, in the same terms, were set out. Certain exhibits were attached to his answer, not material to the question now under consideration. On the hearing of the motion for attachment, and the evidence submitted therewith, the court ruled and adjudged that the sheriff of the county should seize the body of the defendant, Ball, and safely confine him in the common jail until he should have purged himself of the contempt adjudged against him, by paying to the plaintiff the sum of \$287 in satisfaction and discharge of the mandamus absolute. To this judgment and order, respondent, Ball, excepted, and assigned this ruling as error, as being contrary to law, and without evidence to support it, and alleging that the court erred in holding that the money shown to have gone into respondent's hands was subject to the plaintiff's demands.

1. A motion to dismiss the writ of error in this case was made upon its call in this court upon the ground that the parties to the case in the court below had agreed that the trial judge should hear and determine all issues of law and fact without a jury, and no right of exception was reserved by either party, and that no writ of error would lie from the action of the trial judge. There is no merit in this motion, as it has been distinctly ruled that a writ of error will lie under such circumstances. *Morrison v. Ponder*, 45 Ga. 167; *Gleason v. Traynham*, 111 Ga. 887, 36 S. E. 969.

2. We think no error was committed by the trial judge in attaching the plaintiff in error for contempt. Section 5 of the act to establish the county court, etc., approved December 4, 1900, provides that all moneys coming into said court from costs in criminal cases and proceedings, arising from fines and forfeitures, except fees of the sheriff and bailiffs of said court, shall be immediately paid over to the county treasurer, and covered into the county treasury. In passing on the application for mandamus, the judge necessarily had under consideration a construction of this act, for the reason that the answer of the treasurer set out the facts of the abolition of the court, and its re-establishment by this act of 1900. This section does not change the character of the funds thus to be paid to the treasurer. On the contrary, it designates the fund to be thus paid over as that arising from fines and forfeitures, and, with this act before him, the trial judge, by mandamus, directed the treasurer to pay to the petitioner not only the fund in his hands at that time, but also such as might thereafter come into

his hands from this fine and forfeiture fund, to the petitioner, in sufficient amount to extinguish the orders held by him, which fund, after the judgment in mandamus, could only have arisen in the county court as established by the act of 1900. That judgment of the court was unexcepted to, and was in full force and effect when the petition to attach the treasurer for contempt was filed. Hence it was his duty to pay that balance from the fines and forfeitures in his hands. None of the evidence, nor the receipts given to the county treasurer by the officers of the court, can have the effect of changing the character of the money paid to the treasurer. That money arose from fines and forfeitures in the county court, and the money in his hands from that source he had been expressly directed to pay over to Wright. He was therefore in open contempt of the order, and should have been, as he was, attached. There is nothing in section 5 of the act of 1900 which relieves the fund arising from the fines and forfeitures in that court from the payment of insolvent costs. The covering of it into the treasury would not defeat the provision of the law which made it so subject. In any event, there was a subsisting judgment of the court that when this money was received by the county treasurer he should pay the balance due petitioner on his order, and for a disobedience of that mandate the treasurer was properly attached.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 740)

BRYAN v. TEAL et al.

(Supreme Court of Georgia. June 10, 1902.)

DISTRESS WARRANT—AFFIDAVIT—SUFFICIENCY.

A distress warrant in favor of G. W. & H. T. Teal, issued upon an affidavit which alleged that there appeared before the undersigned a named person as "attorney at law for H. T. Teal, who, upon oath, says that J. F. Bryan, the tenant of H. T. Teal, of said county, is justly indebted to G. W. & H. T. Teal" a named sum, should have been quashed upon a demurrer to the affidavit on the ground that there was nothing in the affidavit to show that the affiant had been employed as attorney by G. W. Teal, or that H. T. Teal was authorized to employ an attorney in behalf of G. W. Teal.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Distress proceedings by G. W. & H. T. Teal against J. F. Bryan. Judgment for plaintiffs. From an order overruling a certiorari, defendant brings error. Reversed.

J. J. Bull, for plaintiff in error. Persons & McGehee and A. J. Perryman, for defendants in error.

COBB, J. A distress warrant, reciting that the attorney at law of H. T. Teal had made oath that J. F. Bryan was indebted

to G. W. & H. T. Teal a named sum for rent, was issued against J. F. Bryan. In the affidavit upon which this warrant issued, it was alleged that there appeared before the officer administering the oath a named person as "attorney at law for H. T. Teal, who, upon oath, says that J. F. Bryan, the tenant of H. T. Teal, of said county, is justly indebted to G. W. & H. T. Teal" a stated number of pounds of cotton, of a given value, for rent of a described tract of land. When the case came on to be heard in the justice's court, the defendant demurred to the affidavit upon which the distress warrant was issued, and moved to quash the warrant and dismiss the levy upon the ground that the affidavit did not show upon its face that the affiant was the attorney of G. W. Teal. The justice overruled the demurrer, and the case was carried to the superior court by certiorari, where the judgment of the justice was sustained. The defendant then sued out a bill of exceptions and brought the case to this court.

It appears from the answer of the justice of the peace that he admitted evidence on the motion to quash the warrant, from which it appeared that Bryan was the tenant of G. W. & H. T. Teal, who were tenants in common of the premises described in the affidavit, and that G. W. Teal died before the distress warrant was issued. On the motion to quash the warrant, of course, the justice should not have admitted evidence. The affidavit was fatally defective for the reasons above referred to. It did not appear from the face of the affidavit whether the Teals were partners or tenants in common, and there was nothing in any of the allegations of the affidavit which showed any authority on the part of the affiant to appear as attorney for G. W. Teal, or authority on the part of H. T. Teal to employ an attorney in behalf of G. W. Teal. If the affidavit had set forth that G. W. Teal was dead, and that the premises described in the affidavit had been held by G. W. & H. T. Teal during the lifetime of the former as tenants in common, and that Bryan had entered as the tenant of the Teals during the lifetime of G. W. Teal, and that there was no administration upon his estate, or if there had been a motion to amend the affidavit by setting forth these facts, an entirely different question from that presented by the record would have been made for decision. As the affidavit did not show upon its face any authority for the affiant to appear as attorney for one of the parties who was apparently interested in the claim for rent, and who was, so far as appears from the affidavit, then in life, it was fatally defective, and the motion to quash the warrant should have been sustained. The court erred in overruling the certiorari.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 705)

SOUTHERN RY. CO. v. ADAMS et al.
Supreme Court of Georgia. June 10, 1902.)
CARRIERS—LIVE STOCK SHIPMENT—NOTICE
OF INJURY.

1. When, in a written contract between a consignor and a transportation company, it was stipulated that, as a condition precedent to the right of the owner and shipper to recover damages for loss or injury to live stock shipped under such contract, "he will give notice in writing of his claim therefor to the agent of the railroad companies actually delivering said stock to him * * * before said stock is removed from the place of destination, * * * and before said stock is intermingled with other stock," the owner or consignor is not entitled to recover unless it be shown that such notice was given according to the terms of the contract. (a) Such an agreement is a reasonable one.

(Syllabus by the Court.)

Error from superior court, Franklin county;
R. B. Russell, Judge.

Action by William A. Adams and others against the Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

A. G. & J. B. McCurry, for plaintiff in error. W. R. Little, for defendants in error.

LITTLE, J. Adams instituted an action against the Southern Railway Company to recover damages in the sum of \$80, which he alleged he had sustained in the shipment of a car load of cattle from Lavonia, Ga., to Norfolk, Va. He claims that he was injured by the negligence of the company in causing unreasonable delay in the transportation of said cattle, on account of which they had deteriorated in value. Attached to his petition was a written contract, into which the parties entered at the time the shipment was made. This contract is in the usual form of contracts for the transportation of live stock by railroad companies. It was signed both by the company and by Adams, the plaintiff, and recited that the cattle which were received at Lavonia were to be shipped to the freight station at Norfolk, Va., ready to be delivered to the consignee or his order. It also contained a stipulation hereafter set out and discussed. The defendant denied liability, and at the trial the plaintiff testified in part to the following effect: He went on the train with the cattle. They were watered and fed at Spencer, N. C. At Greensboro they were side-tracked, and remained five hours. They were further delayed an hour or more at Pinner's Point, opposite Norfolk. They were in bad condition when they arrived at Norfolk. They were off in flesh, and the witness considered that they were damaged \$3 per head. They were not weighed on delivery, but were put in the lot of the consignee with other cattle and sold. He thought they brought less per pound on account of their bad condition, and in this way they were damaged \$3 per head. No exceptions to the

cattle were made by the witness or consignee when they were delivered and sold. No notice was given of any claim or damage at the point of destination or elsewhere, or before they were intermingled with other cattle. The damage was occasioned by reason of side-tracking the cattle at Greensboro and Pinner's Point and at Norfolk by reason of the fact that the cattle had had no food or water, and, being empty, looked bad, which caused a loss in sales. Other evidence, to which reference need not be made, was introduced. The jury returned a verdict for the plaintiff for \$50. The defendant made a motion for a new trial on the grounds that the verdict was contrary to the evidence, and without evidence to support it, against the weight of the evidence, and contrary to law. By an amendment other grounds assigning error on the failure of the judge to instruct the jury in certain particulars were added. In certifying to the amended grounds, the trial judge in a note states that no special reference was made to any particular piece of the testimony of either the plaintiff or defendant in his charge, nor was any request for the same made, but the general contentions of both parties were fully submitted to the jury with instructions as to the law applicable thereto. He overruled the motion for a new trial, and in his order so doing he states that the jury were instructed generally that the question of negligence was for them to determine, both as to its existence or non-existence, and were fully charged upon that subject; and it was not the duty of the judge, in the absence of a request to elaborate or magnify any particular feature of the testimony, more especially as in this case, where the sections of the contract referred to in the fourth and fifth grounds of the amended motion, in the opinion of the judge, were unreasonable, and contrary to sound public policy; that the evidence in the case was conflicting, and it was the right of the jury to say whom they would prefer to believe. The contract of shipment contained this stipulation: "It is further agreed that, as a condition precedent to the right of the owner to recover any damages for any loss or injury to said live stock, he will give notice in writing of his claim therefor to the agent of the railroad companies actually delivering said stock to him * * * before said stock is removed from the place of destination * * * and before said stock is intermingled with other stock." By the terms of this contract no recovery can be had in the absence of the notice contracted for, and yet, confessedly, the cattle were received at the place of destination by the consignee or the owner, who accompanied them, and no notice of a claim for damages was given to the agent of the company at the place of destination; and, more than that, having been received, they were at once, according to the testimony of the owner, intermingled with other stock, and sold. It is suggested by the trial judge in

¶ 1. See Carriers, vol. 9, Cent. Dig. § 933.

His order overruling the motion for a new trial that these stipulations were, in his opinion, unreasonable, and contrary to sound public policy. Mr. Hutchinson, in his work on Carriers, states as the law this rule: "As the carrier may limit the amount beyond which he is not to be held liable unless a greater value be declared at the time of the delivery for carriage, so it has been held that he may limit the time within which claim shall be made upon him by the owner of the goods in case of their loss, provided the limitation is reasonable,"—for which he cites *Express Co. v. Glenn*, 16 Lea, 472, 1 S. W. 102; *Glenn v. Express Co.*, 86 Tenn. 594, 8 S. W. 152; *Sprague v. Railway Co.*, 34 Kan. 347, 8 Pac. 465; *Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385. In the case of *Sprague v. Railway Co.*, so cited, it was expressly ruled that: "In an agreement between a railway company and a shipper for the transportation of horses over the railway, there was a stipulation which provided that, as a condition precedent to his right to recover damages for any loss or injury to the horses while in transit, the shipper would give notice of his claim therefor to some officer of the said railway company, or its nearest station agent, before the horses were removed from the place of destination, or from the place of delivery to the shipper, and before such horses were mingled with other stock. Held, that the agreement was reasonable, and, when fairly made, is binding upon the parties thereto." In the case of *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, Mr. Justice Strong, in discussing this subject, in his opinion delivered in that case, said: "The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit. It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law, and inoperative. . . . A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity which the strictest rules of the common law ever required." In the case of *Banking Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 938, 44 Am. St. Rep. 37, it was further

ruled that a stipulation in a bill of lading, which exempts the carrier from liability unless notice is given within a specified time, is one of the matters forbidden by section 2276 of the Code, and is not effectual without proof of assent thereto by the shipper. In the present case the stipulations referred to were not only assented to by the shipper, but were contained in an express written contract, and we know of no legal reason why the shipper is not bound thereby. It can, we think, readily be seen that a stipulation making it a condition precedent in a case where live stock is shipped that the owner or consignee shall, when such live stock reaches the place of its destination, give notice to the agent of the company of a claim for damages before the stock is carried from such a place, and before the animals are intermingled with others, is reasonable; for, if such stock has become depreciated by delay in transportation, or want of proper attention on the part of the transportation company, such fact can be more readily ascertained at that time than afterwards, and it affords to the carrier an opportunity of protecting itself from an unauthorized claim. So, likewise, the stipulation that this notice shall be given before the stock is intermingled with others serves the purpose of identifying the stock which were actually shipped. It would seem, then, that such a stipulation prejudices no right of the owner or consignor, and at the same time protects the transportation company; and, following the authorities above cited, we must rule that not only could the carrier lawfully make a contract containing a stipulation of this character, but that the stipulation is a reasonable one. We therefore rule that the court erred in overruling the motion for a new trial on the ground that the verdict was not supported by the evidence.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 698)

DYKES v. TWIGGS COUNTY.

(Supreme Court of Georgia. June 9, 1902.)
CERTIORARI—NECESSITY OF BOND—APPROVAL

1. A clerk of a superior court has no authority of law to issue a writ of certiorari, not applied for in forma pauperis, unless the plaintiff files with his petition for certiorari such a bond as that required by section 4639 of the Civil Code, which must, either on its face or by other written evidence bearing the official signature of the judicial officer before whom the case was tried in the first instance, show that it had been duly approved by him.

2. When a writ of certiorari was issued upon a bond upon which there was no entry evincing the fact of such approval, the writ should have been dismissed; and it was too late at the trial in the superior court to allow the justice of the peace who tried the case to testify that the bond "was, in point of fact, accepted by the witness in terms of the statute, and he simply neglected to put his approval

on the bond, but had mentally approved the same," and to thereupon allow this officer to make an entry of approval *nunc pro tunc*.

(Syllabus by the Court.)

Error from superior court, Twiggs county; D. M. Roberts, Judge.

Action between J. I. Dykes and Twiggs county. From a judgment granting a writ of certiorari, Dykes brings error. Reversed.

Henry Bunn Wimberly, for plaintiff in error. L. D. Shannon, for defendant in error.

FISH, J. Upon the trial of a certiorari the defendant therein moved to dismiss the proceeding upon the ground that the plaintiff had not given bond as required by section 4639 of the Civil Code. A paper purporting to be a bond, and signed by the plaintiff in certiorari and a surety, but neither attested nor approved, appears in the record. There was no affidavit in forma pauperis. The court, over defendant's objection, permitted the magistrate before whom the case was originally tried to testify: "The bond herein referred to was, in point of fact, accepted by the witness in terms of the statute; and he simply neglected to put his approval on the bond, but had mentally approved the same." The court then passed an order reciting that as it appeared from the testimony of the magistrate that at the time the petition for certiorari, with the sanction of the judge thereon, was filed, "a good and solvent bond, in terms of the law, was filed in said case, and that said justice of the peace duly accepted and approved said bond, but failed to mark or indorse his approval thereon, it is ordered that the said justice be allowed, *nunc pro tunc*, to make said entry of approval." The defendant objected to the granting of this order and the making of the entry upon the ground that the bond should have been approved before the writ of certiorari was issued. The hearing then proceeded, and the court sustained the certiorari, and remanded the case for another trial. The defendant, in his bill of exceptions, assigned error upon all of the rulings of the court referred to above.

This court has frequently decided that a writ of certiorari in a civil case, unless sued out in forma pauperis, is void if the same be issued before the applicant has given the bond required by section 4639 of the Civil Code, and that the bond, to render it effectual, must be approved by the judge or justice of the court in which the case was originally tried. *Stover v. Doyle*, 114 Ga. 85, 39 S. E. 939, and cases cited. In *Hamilton v. Insurance Co.*, 107 Ga. 728, 33 S. E. 705, the plaintiff in certiorari filed with the clerk of the superior court a paper purporting to be a bond, without having made any attempt prior to the issuance of the writ to have such instrument approved by the trial judge. When the defendant in certiorari, upon the hearing, moved to dismiss the proceeding because the plaintiff had not given the bond required by law, the presiding judge overrul-

ed the motion, heard evidence as to the solvency of the sureties, and then himself undertook to approve the bond. This ruling, upon a review thereof, was held to be erroneous; this court deciding that, as the writ of certiorari had been issued upon the filing of a bond which had never been approved, the writ was void, and the bond was not amendable in the superior court. The decision was not put on the ground that the judge of the superior court was not the proper official to approve the bond, but upon the ground that the writ was void, and could not be cured by amendment. Presiding Justice Lumpkin, in the opinion, said: "As there was no legal writ of certiorari, there was really no case at all lawfully before the superior court. The sections of our Code and the decisions of this court cited by counsel for defendant in error, and relating to the amendment of appeal bonds and other like bonds taken in the course of judicial proceedings, are not applicable to a case such as that now before us; for here there was really nothing to amend by, the process upon which the proceeding rested being a mere nullity. That is to say, the issuing of the writ of certiorari by the clerk being, under the circumstances stated, totally unwarranted, it was the same thing, in contemplation of law, as if the writ had never been issued; and, as an absolutely void and unauthorized process cannot be cured by amendment, it follows, of course, that there was no case before the superior court of which it could entertain jurisdiction for any purpose, except to dismiss it." The principle here ruled is conclusive upon the questions presented by the record in the present case. As we have seen, the writ of certiorari was not applied for in forma pauperis, and there was no bond given by the applicant, and approved as the statute requires, before the writ was issued. As the clerk has no authority of law, in the absence of a pauper affidavit, to issue the writ unless a bond has been approved by the judicial officer who tried the case, the clerk should be furnished with evidence of such approval, of the best and most permanent nature, and the fact of approval should not be left simply in the mind of the officer who tried the case. Therefore the bond should, either on its face, or by other written evidence bearing the official signature of such judicial officer, show that it has been duly approved by him.

In view of this ruling, it may be advisable to refer to language used in several of the former decisions of this court which may seemingly be somewhat in conflict with what we now hold. In *Hester v. Keller*, 74 Ga. 369, it was said: " * * * The record must show somewhere that such justice did accept and approve the bond; otherwise the certiorari will be dismissed." In the *Hamilton Case*, supra, it was said: "The fact of approval may be evidenced not only by a formal entry, but also by any conduct on the part of the trial judge showing his ac-

ceptance of the bond as a sufficient one under the law." So, in *Wingard v. Railway Co.*, 109 Ga. 177, 34 S. E. 275, it was said: "While the law does not require any formal certificate of such approval, or any special method of showing an acceptance by the magistrate of the bond, yet it must appear from the record that such acceptance and approval were had." Again, in *Stover v. Doyle*, supra, it was said that the "bond, to render it effectual, must in some manner be approved by the judge or justice of the court in which the case was originally tried." In each of these cases, however, it appeared that the bond in question had never been approved at all, and in none of them was there any evidence of any character offered to show an approval, and therefore no question as to how an approval must be shown was involved. So the expressions quoted, even if in conflict with our present ruling, were purely obiter. In *Watson v. State*, 85 Ga. 237, 11 S. E. 610, it was held that where, "in response to the writ of certiorari, after a conviction in the county court, the judge of that court sends up, as a part of the proceedings in the case, a bond with security given by the defendant, this is equivalent to an approval of the bond by him." No notice was taken in this case of the former ruling in *Memmier v. State*, 75 Ga. 576, where it was held that under the provisions of section 302 of the Code of 1882, relating to writs of certiorari in criminal cases from the county court, the approval of the bond prior to the issuance of the writ was not necessary. As the presiding justice said in the *Hamilton Case*, supra, in discussing this question, "These cases are not applicable to the point now before us." *Watson's Case* has never been followed, and in *Wingard v. Railway Co.*, supra, it was held that a certificate of the magistrate who originally tried the case that all the costs had been paid, entered on the bond, was not of itself sufficient evidence of his approval of the bond to warrant the issuance of the writ of certiorari. It follows that the court below erred in not dismissing the certiorari proceeding.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 702)

WIMBERLY v. MACON, D. & S. R. CO.

(Supreme Court of Georgia. June 9, 1902.)

CERTIORARI—BOND.

This case is controlled by the decision this day rendered in *Dykes v. Twiggs Co.*, 42 S. E. 36.

(Syllabus by the Court.)

Error from superior court, Twiggs county; D. M. Roberts, Judge.

Action between J. R. Wimberly and the Macon, Dublin & Savannah Railroad Company. From an order granting a writ of

certiorari to a justice court Wimberly brings error. Reversed.

Henry Bunn Wimberly, for plaintiff in error. L. D. Shannon, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 702)

SEABOARD AIR LINE RY. v. LEADER et al.

(Supreme Court of Georgia. June 9, 1902.)
RAILROADS—CONTRACTS OR TORTS OF PREDECESSOR—LIABILITIES—PURCHASER OF RAILWAY.

1. The mere fact that a railroad company is in possession of and operating a line of railway which formerly belonged to another company does not render the company so in possession liable for damages growing out of the breach of a contract which had been entered into by the other company, or for a tort committed by it, before the change of possession took place. In order to render a railroad company liable upon the contracts of, or for torts committed by, its predecessor in title, it must appear either that it has assumed the liability of its predecessor sought to be imposed upon it, or that the law charges it with such liability.

2. There is nothing in Civ. Code, § 1863, construed in the light of the decision of this court from which it was codified, which renders a corporation purchasing the line of railway of another corporation liable either upon the contracts or for the torts of its predecessor in title, in the absence of an agreement to be so liable.

(Syllabus by the Court.)

Error from superior court, Montgomery county; D. M. Roberts, Judge.

Action by Leader & Rosansky against the Seaboard Air Line Railway. Judgment for plaintiffs, and defendant brings error. Reversed.

J. B. Geiger, for plaintiff in error. W. M. Lewis, for defendants in error.

COBB, J. The plaintiffs sued the Seaboard Air Line Railway, as successor to the Georgia & Alabama Railway Company, in a justice's court, for damages claimed to have resulted from the loss of the defendant of two dozen pairs of pants of the value of \$29.50. The trial resulted in a verdict in favor of the plaintiffs, and the case was carried by certiorari to the superior court, where the judgment of the justice's court was affirmed, and the certiorari dismissed. To this ruling the defendant excepted. It appears from the answer of the magistrate that the evidence at the trial showed that L. Goldman delivered to the Baltimore & Ohio Railroad Company, in New York, a case of clothing, which, according to the bill of lading issued, was to be transported by the railroad company just named and its connecting carriers to the plaintiffs at Vidalia, Ga. The box referred to in the bill of lading was delivered to the Georgia & Alabama Railway Company, and by it transported to

Vidalia. When delivered by that company to the plaintiffs, the box was in a damaged condition, and two dozen pairs of pants were gone. There was evidence that the missing pants were worth the amount sued for. It appears from the testimony of one of the plaintiffs that after they received the box from the Georgia & Alabama Railway Company that line of railway went into the possession of the Seaboard Air Line Railway. The goods were received by the plaintiffs in 1899. The plaintiff further testified as follows: "This change took place, I think, about July 1, 1900. I do not know how the Seaboard Air Line Railway Co. got possession of the G. & A. Ry. property. I do not know what contract, if any, was entered into between the G. & A. Ry. Co. and the S. A. L. Ry. Co. when the change took place. Don't know whether the S. A. L. Ry. Co. assumed the liabilities of G. & A. or not. I simply sued the S. A. L. Ry. Co. because they appeared to be operating the railroad as successors of the G. & A. Ry. Co., and I didn't know how else to get pay for my pants. I do not know whether the missing pants was ever delivered to the G. & A. Ry. or not." There was evidence showing that the case of goods referred to in the bill of lading issued by the Baltimore & Ohio Railroad Company was received by the Georgia & Alabama Railway Company in bad order, and that exceptions to the condition of the box were taken at the time it was received. We do not think, under the evidence, the verdict against the defendant was authorized. Even if the evidence was sufficient to authorize a finding against the Georgia & Alabama Railway Company, there is nothing in the record to show that the Seaboard Air Line Railway is liable upon the contracts of, or for the torts committed by, the Georgia & Alabama Railway Company, entered into or committed by it before the Seaboard Air Line Railway came into possession of the line of railway of the Georgia & Alabama Railway Company. While the Seaboard Air Line Railway is sued as successor to the Georgia & Alabama Railway Company, there is nothing in the record to indicate how it succeeded the former company,—whether by purchase, by lease, by merger, or otherwise. It was possible for the Seaboard Air Line Railway to become the owner of the line of the Georgia & Alabama Railway Company without at the same time becoming responsible for its then existing liabilities, and one who claims that it did assume the liabilities of that company must establish this fact by competent evidence. The mere fact that the Seaboard Air Line Railway is operating a line formerly owned by the Georgia & Alabama Railway Company would not render the former company liable upon a contract entered into by the latter, or for a tort committed by it, or subject the former to damages growing out of a breach by the latter of a contract made

by it, or the commission of a tort by it before the change of possession took place. It is contended, however, by counsel that the defendant is liable under the provisions of Civ. Code, § 863. That section is as follows: "All corporations, foreign or domestic, operating the franchise of a corporation chartered by this state, are subject to its burdens, and can be sued when and where and for like causes for [of] action for which suits could have been maintained against such other corporation, were it in possession of the franchise so acquired or usurped." It will be noticed that this section was codified from the decision of this court in *Railroad Co. v. Fulghum*, 87 Ga. 263, 13 S. E. 649, and the section must be construed in the light of that decision. *Calhoun v. Little*, 100 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254 (3). In the *Fulghum* Case it was simply held that when one railroad company is in possession of and exercising the franchises of another railroad company it is liable to one who sustained a personal injury growing out of the running of a train to the same extent that the railroad company which owned the line would be liable. Nothing in that decision, or in the section of the Code construed in the light of that decision, would render a railroad company which purchased the line of another company liable for the breach of a contract of its predecessor in title, or for damages growing out of a tort committed by it, in the absence of an agreement on its part to pay such claims against its predecessor in title.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 577)

WELLS v. STATE.

(Supreme Court of Georgia. June 3, 1902.)

MURDER—EVIDENCE.

1. In the trial of a murder case, when the only question to be determined is whether the accused is guilty of murder or voluntary manslaughter, evidence that the deceased was "a small, delicate man," is not irrelevant. Such evidence would elucidate the question as to whether the killing was done with malice.

2. There was ample evidence to support the verdict finding the accused guilty of murder, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

W. R. Wells was convicted of murder, and brings error. Affirmed.

W. W. Haden and R. O. Lovett, for plaintiff in error. C. D. Hill, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

¶ 1. See *Homicide*, vol. 24, Cent. Dig. § 412.

(115 Ga. 696)

GLOVER v. BLAKESLEE.

(Supreme Court of Georgia. June 9, 1902.)

**APPEAL—HARMLESS ERROR—NEW TRIAL—
ERRONEOUS INSTRUCTIONS.**

1. Excluding evidence which is either immaterial, or of no probative value to the party offering it, affords him no just cause of complaint.

2. A new trial should not be granted because of erroneous instructions to the jury, when it appears that their verdict was demanded by the evidence.

3. In the present case the verdict rendered was, under the law and the facts, required. (Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by D. A. Blakeslee against Charles McBryde. Judgment for plaintiff. On levy of execution A. D. Glover filed a claim. Judgment for plaintiff in execution, and defendant brings error. Reversed.

Goetchins & Chappell and Persons & McGhee, for plaintiff in error. J. J. Bull and Clyde Brooks, for defendant in error.

LUMPKIN, P. J. On April 7, 1883, John T. McBryde borrowed a sum of money from Francis L. Archy, giving therefor a promissory note, and securing the payment of the same by a deed to certain land. Attached to this deed was an instrument signed by the wife of McBryde. It read as follows: "I, Gracie Elizabeth McBryde, wife of John T. McBryde, having had the above and foregoing deed to Francis L. Archy read over to me, and being fully informed of its contents, I hereby fully and voluntarily consent to the same, and approve of the conveyance made." When the debt thus created matured, McBryde, being unable to pay it, applied to Nelson & Barker, a firm of brokers, "to get the money for him from some other party, and on the same security." They submitted his application for a loan to Marshall W. White, who accepted it, and the loan was closed, and "new papers taken"; that is to say, McBryde executed a new note, payable to White, dated March 20, 1883, and due March 20, 1893, and gave to him a security deed covering the same land as that described in the conveyance he had previously made to Archy. The deed from McBryde to White was dated March 20, 1883. On June 3, 1893, White made and delivered to Blakeslee a deed to the land above mentioned, and also indorsed to him the note of McBryde. Subsequently, McBryde having died, Blakeslee obtained a judgment against his executor, Charles McBryde, and thereafter filed and had recorded a deed to him, as such executor, the same being made for the purpose of levy and sale under an execution issued upon that judgment. In resistance to a levy of this execution upon the land in question, Mrs. Glover, who was the sole heir at law of Mrs. John T. McBryde, whose death occurred shortly after that of her husband, inter-

posed a claim. On the trial of the claim case the facts above recited appeared, and it was also affirmatively shown that at the time John T. McBryde executed his deed to Archy, and up to the time of Mrs. McBryde's death, she held the legal title to this land, her ownership thereof being evidenced by several deeds, all of which had been duly recorded prior to April 7, 1883. The jury found the property not subject, whereupon Blakeslee made a motion for a new trial, which was granted, and Mrs. Glover excepted. The grounds of the motion were: (1) That the court erred in ruling out the testimony of one Hollerman that his employers, Nelson & Barker, negotiated for John T. McBryde the loan which he obtained from Archy in 1883, and that "the loan is one and the same from the beginning to the present, each transaction being for the purpose of enabling McBryde to meet his maturing obligations, and to save himself from being sued"; (2) that the court erred in giving certain instructions to the jury; and (3) that the verdict was contrary to the evidence.

1. There was no error in excluding the testimony just mentioned. It was entirely immaterial through what agents the loan from Archy to McBryde was made; and the statement of the witness that "the loan" was one and the same from beginning to end was not only a mere conclusion, but an erroneous conclusion at that, for the documentary evidence conclusively showed that the loan made to McBryde by White was an entirely new and distinct transaction.

2. It is unnecessary to deal with the question whether the charges excepted to were or were not erroneous, for the verdict returned by the jury was, as we shall undertake to show, demanded by the evidence, and ought to have been allowed to stand.

3. It does not affirmatively appear whether or not Archy ever made a reconveyance to McBryde. If not, then the latter certainly had no title when the levy was made. But giving to the plaintiff in execution the benefit of the assumption that such a reconveyance was in fact made, we are still of the opinion that at the time of the levy the title to the property was in the claimant as the sole heir at law of the deceased, Mrs. McBryde. Even if the instrument quoted above, whereby she consented to and approved of the deed made by her husband to Archy, would, relatively to the latter, estop her from setting up title in herself (a proposition as to which we express no opinion), it is quite clear that this instrument adds no strength to the position of Blakeslee, who, of course, stands in the shoes of White. Had he taken a deed from Archy, his situation would have been as good as that occupied by Archy; but White did nothing of the kind. On the contrary, he accepted a new and independent deed from McBryde, to which Mrs. McBryde was not a party, and with the making of which she, so far

as appears, had no connection whatsoever. It certainly was not shown that she ever said or did anything to mislead White into the belief that she recognized the land in dispute as the property of her husband, or was willing for him to deal with it as such. White was bound to take notice of the records evidencing the fact that the legal paper title was in her, and he had no right to assume that, because on a previous occasion she consented to her husband's securing his debt by a deed to her land, she was willing for him to engage in a similar transaction with another. White not only had constructive notice that the legal title was in Mrs. McBryde, but there was at the trial below no attempt to show that he did not actually know such to be the fact. There is not a line of testimony to support the theory that any fraud or deceit was practiced upon him, or even that he acted upon the circumstance that she had consented to the making of the deed to Archy. Of course, Mrs. Glover, as the sole heir of Mrs. McBryde, stands in precisely the same position as the latter would have occupied had she lived and were now claiming the property levied on. We are, for the reasons just stated, of the opinion that the trial judge erred in setting the verdict aside, it being the only outcome of the pleadings and evidence which was legally possible.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 653)

STONER v. PICKETT.

(Supreme Court of Georgia. June 7, 1902.)

NOTE—ATTORNEY'S FEE.

A promise to pay attorney's fees, embraced in a promissory note executed on September 19, 1896, is not enforceable unless an action be brought on such note, and "a plea or pleas be filed by the defendant, and not sustained."

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by M. Stoner against T. Pickett. Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. Neel, for plaintiff in error. Milner & Anderson, for defendant in error.

LUMPKIN, P. J. The only question which this case presents for our consideration is whether or not a stipulation for the payment of attorney's fees, embodied in a promissory note dated September 19, 1896, is, under the act of December 12, 1900, amending section 3867 of the Civil Code (Acts 1900, p. 53; Van Epps' Code Supp. § 6185), enforceable when an action is brought on the note, and no defense thereto is filed. The trial judge decided this question in the negative, and, in our judgment, reached the

right conclusion. The section of the Code just cited, the provisions of which were of force at the time the above-mentioned note was given, reads as follows: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless a plea or pleas be filed by the defendant and not sustained." This section was under construction in the case of Hall v. Pratt, 103 Ga. 255, 29 S. E. 764, and in discussing its effect the writer said (pages 258, 259, 103 Ga., and pages 765, 766, 29 S. E.): "All contracts to pay attorney's fees incorporated in promissory notes or other evidences of indebtedness must be construed in the light of section 3867 of the Civil Code, which, by operation of law, constituted a part of all such contracts, and renders them void 'unless a plea or pleas be filed by the defendant and not sustained.' A promissory note, therefore, which stipulates for the payment of attorney's fees in the event of its collection by law, must be construed as if it embraced a condition to the effect that such promise is not to be binding unless the maker of it files a plea or pleas and fails to sustain the same. Therefore, in the present case, the contract made by Kirby was to pay to the order of Hall a stated number of dollars, and, in addition thereto, a certain amount of attorney's fees in case of suit, provided Kirby made an unsuccessful defense. As he made no defense at all, he was clearly not liable for attorney's fees." The act of 1900 amends section 3867 of the Civil Code by providing that an obligation to pay attorney's fees shall be enforceable where "the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same, provided the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing ten days before suit is brought of his intention to bring suit, and also the term of the court to which suit will be brought." It is obvious that this act can have no effect upon a promissory note given before its passage. To hold otherwise would be to give the act a meaning which would render it unconstitutional, as impairing the obligation of contracts.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 689)

SOUTHERN RY. CO. v. LASSETER.

(Supreme Court of Georgia. June 9, 1902.)

RAILROADS—INJURY TO BAGGAGE—APPEAL—DAMAGES.

As the verdict in the magistrate's court was limited in amount to the proved value of the plaintiff's trunk which was destroyed, and the evidence was amply sufficient to establish the liability of the defendant, its petition for

certiorari, alleging to the contrary, was wholly without merit. The judgment of the superior court was, therefore, so palpably correct, it must be held that the bill of exceptions was sued out for delay only, and accordingly the judgment is affirmed, with damages.

(Syllabus by the Court.)

Error from superior court, Butts county; E. J. Reagan, Judge.

Action by R. L. Lasseter against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dessan, Harris & Harris, for plaintiff in error. O. M. Duke, for defendant in error.

PER CURIAM. Judgment affirmed, with damages.

LEWIS, J., absent on account of sickness.

(115 Ga. 659)

SOUTHERN RY. CO. v. O'BRYAN.

(Supreme Court of Georgia. June 7, 1902.)
INSTRUCTIONS—WEIGHT OF EVIDENCE—RAILROADS—DUTIES OF CONDUCTORS.

1. A charge to the effect that the testimony of a witness testifying positively is entitled to more weight than that of one who testifies negatively is open to serious criticism unless it embraces an instruction that the jury, in weighing the testimony of such witnesses, should consider and pass upon the question of their credibility.

2. Instructions presenting issues not made by the pleadings or evidence should not be given.

3. A railway conductor is not bound to personally enter a car upon its arrival at a station to inform passengers for that station that they have reached their destination. It is sufficient if the name of the station is duly announced by any employé of the railway company whom it may select to perform this duty.

4. All material questions now presented for decision here are covered by the rulings above announced.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by S. M. O'Bryan against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox and Harris, Chamlee & Harris, for plaintiff in error. McHenry & Maddox and Fouché & Fouché, for defendant in error.

LUMPKIN, P. J. This case was here at the October term, 1900, when a new trial was ordered because of errors committed by the presiding judge. See 112 Ga. 127, 37 S. E. 161. Subsequently the case was again tried, and resulted in a verdict against the railway company, which is again before this court complaining of a judgment denying it a second new trial. We are constrained to reverse this judgment, and order yet another hearing of the case.

1. Exception is taken to the following charge: "I charge you that the existence of

a fact testified to by one positive witness is to be believed, rather than such fact did not exist, because many witnesses, who had the same opportunity of observation, swore they did not see or know of its having transpired." This charge was clearly erroneous. In *Humphries v. State*, 100 Ga. 263, 28 S. E. 25, Mr. Justice Cobb took occasion to remark that a charge with respect to the relative weight of positive and negative testimony was open to criticism if it failed to instruct the jury that in passing upon such testimony they "should consider the question as to whether the witnesses were of equal credibility." And in *Railway Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934, it was distinctly ruled by this court that: "The general rule as to the probative value of positive and negative testimony is subject to the qualification that other things are equal, and the witnesses are of equal credibility." The error just pointed out requires a new trial, for the record discloses that the plaintiff depended almost, if not entirely, upon her own testimony, as showing a right to recover, and that there was testimony in behalf of the railway company which tended very strongly to establish non-liability on its part.

2, 3. There was no evidence, nor any contention on the part of the plaintiff, that the train upon which she was a passenger failed to stop at Rome, the station at which she wished to alight. Nevertheless, the court charged the jury that: "If the plaintiff purchased a ticket at Lindale, or paid her fare to go to Rome, and got aboard the train, if they failed to stop the train,—if the conductor failed to come into the car or stop the car according to contract at Rome,—she would be entitled to nominal damages, if that was brought about by no fault on her part." This charge was erroneous for two reasons: (1) It left to the determination of the jury as an open question whether or not the train stopped at Rome, when no such issue was involved in the case; and (2) it imposed upon the conductor the duty of entering the car at Rome, when no such duty rested upon him, either as matter of law or of fact. The plaintiff certainly knew that her destination was Rome, and all the duty the company owed to her as a passenger was to have the station called out so that she might be put on notice to alight; and the company was at liberty to select any of its employes it saw fit to perform for it this duty.

4. While complaint is made in the motion for a new trial of other charges, we do not deem it necessary to specifically deal with them. Suffice it to say that such of them as are not covered by the rulings above announced are not, when taken in connection with the entire charge, open to the objections made to them, and therefore did not operate to the prejudice of the company.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 573)

MOON et al. v. POTTER.

(Supreme Court, of Georgia. June 7, 1902.)

MAIL CONTRACT—ASSIGNMENT—BOND.

1. A contractor with the government of the United States to transport the mail within the same may contract with or hire another to transport the mail according to the terms of his contract, and such an agreement is not in contravention of Rev. St. U. S. § 3963, which prohibits the assignment or transfer of mail contracts.

2. It follows from the foregoing that where one who had undertaken to transport the mail for a mail contractor, and had given a bond, with security, for the faithful performance of the service to be rendered, failed to render the service in accordance with his contract, he and his securities were liable to the contractor upon the bond.

(Syllabus by the Court.)

Error from city court of Americus; C. R. Crisp, Judge.

Action by C. A. Potter against George Moon and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. R. Williams and Shipp & Sheppard, for plaintiffs in error. J. H. Lumpkin, for defendant in error.

COBB, J. Potter brought suit upon a bond against Moon as principal and three others as sureties. At the trial it appeared that Potter had made a contract with the United States government to transport the mails between the post office and the railroad depots in the city of Americus, and that he had entered into a contract with Moon by which he was to perform the service required under the contract with the United States government. For this service Moon was to be paid a specified amount. In order to secure the faithful performance of the contract on the part of Moon, the bond sued on was executed. In this bond Moon and the other defendants bind themselves jointly and severally to pay a specified sum of money as liquidated damages in the event Moon fails to carry out his contract with Potter. The defendant Moon is designated in the bond as a subcontractor under Potter as contractor with the United States. The bond binds Moon to transport the mail in accordance with the laws and regulations of the post-office department and the requirements of Potter's contract with the government. It is provided that all fines and deductions imposed upon Potter by the postmaster general for failures and delinquencies shall be borne by Moon, and that in case of a total discontinuance of the service a pro rata of one month's extra pay allowed by the United States to Potter shall be allowed to Moon. The contract contains other stipulations not necessary to be set out. There was evidence at the trial that Moon had, from time to time, failed to comply with the terms of the contract between himself and Potter, and finally had abandoned the contract altogether. The court directed a verdict for the

plaintiff for the amount stipulated in the bond. The defendants made a motion for a new trial, as well as a motion in arrest of judgment, both of which being overruled they excepted.

Counsel insist that the verdict in the present case was unauthorized, for the reason that there was no allegation in the petition that the postmaster general had consented to the contract entered into between Potter and Moon, and that there was no sufficient evidence at the trial of such consent, and, this being so, the contract was, under the laws of the United States, illegal and void. The case of *Nix v. Bell*, 66 Ga. 664, is relied on. It is there held that a contract for transporting the mail cannot be transferred or assigned, in whole or in part, without the consent of the postmaster general, and that such a transfer or assignment, being illegal, would not constitute a valid consideration for a promise to pay for a one-half interest in such a contract. The Revised Statutes of the United States provide that "no contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void." Section 3963. In *Nix v. Bell* this court held the contract then under consideration to be either an assignment or a transfer of a mail contract, and, of course, when this conclusion was reached, it inevitably followed that the contract was void under the laws of the United States. The question in the present case is whether the contract between Potter and Moon was an assignment or transfer of Potter's contract with the government to transport the mail. It is true that the bond characterizes Moon as a subcontractor; but when all the recitals of the bond, as well as the nature and condition of the stipulations therein, are considered, there is nothing in the bond to indicate that there was an intention on the part of either of the parties to provide for a transfer or assignment to Moon of the contract which Potter had with the United States. There is nothing in the evidence to show such an intention. The bond and all of the evidence taken together show that what was intended was that Moon should undertake to perform in behalf of Potter, the contractor, those services which Potter had contracted to perform for the government. There is nothing in the record to indicate that the contract between the government and Potter required that these services should be personally performed by the contractor, and there is nothing in the statutes of the United States which requires personal service. Potter remained bound on his contract with the government, and there was no attempt to create any contractual relation between the government and Moon, or to transfer to him Potter's liability on his contract with the government. Moon was simply Potter's agent to perform a service which he had contracted should properly and faithfully performed. Pot

had a right to make a contract of this character with Moon, and he had a right to undertake to perform the service in question. In *Frye v. Burdick*, 67 Me. 408, it was held that a contractor with the United States to transport the mail within the same may contract with or hire another to transport the mail according to the terms of his contract, and that such an agreement is not in contravention with Rev. St. U. S. § 3963, which prohibits the assignment of mail contracts. See, also, *Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221. The contract between Potter and Moon being lawful, if Moon failed to perform his contract he was liable in damages to Potter, and, having entered into a bond with security for the faithful performance of the services required by his contract, and the evidence showing that he failed to perform the services, he and his sureties became liable on the bond. This being true, the plaintiff was entitled to recover in the present case. While the record raises some question as to the proper measure of damages, no such question was argued in the brief of counsel for the plaintiff in error. It will therefore be treated as having been abandoned. The case is really controlled upon its merits by the point above decided, and, under the view we have taken of the matter, there was no error in rejecting the evidence tending to show that the postmaster general had consented to the assignment of the contract by Potter to Moon upon conditions which had not been performed. While there were other questions made in the record, no others were insisted on in this court except those above referred to.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 735)

HUGHEY v. PEACOCK.

(Supreme Court of Georgia. June 10, 1902.)
HOMESTEAD—EXEMPTIONS—WAIVER—RENEWAL OF NOTE—SALE ON SETTLEMENT.

1. A judgment founded upon a promissory note given for a valid debt, and with a general waiver of homestead and exemption, may be enforced against a homestead subsequently set apart to the maker of the note as head of a family.

2. A renewal of the note between the same parties and for the same consideration, with no new security, and containing the same waiver, relates back to the original note, and continues the waiver in force, although the renewal may have been made after the homestead had been set apart.

3. Where judgment is obtained on these notes, and the execution thereon is levied upon some of the homestead property, the head of the family may settle the claim without an order of court, by selling the property levied upon to the plaintiff in *fi. fa.*, at a fair valuation, in payment of the debt.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butts, Judge.

Action by Edgar Hughey against B. T. Peacock. Verdict for defendant. From an

order denying a new trial, plaintiff brings error. Affirmed.

J. J. Dunham and J. H. Lumpkin, for plaintiff in error. T. B. Rainey and Simeon Blue, for defendant in error.

SIMMONS, C. J. It appears that Hughey owed Peacock. For this debt he in 1892 gave his promissory note, containing a waiver of homestead and exemption. In 1894 Hughey had set apart to him, as head of a family, a homestead and exemption, without notice to Peacock. In 1897 he renewed his note by giving three promissory notes to the same party for the same aggregate amount, and upon the same consideration, with no additional security, and containing the same waiver. These renewal notes were sued to judgment, and the execution levied upon the property now in controversy; the same being part of that set apart to Hughey as a homestead and exemption. Before the day of sale the parties entered into a settlement whereby Hughey sold and delivered to Peacock the property in dispute, and made a bill of sale to the same; the value of the property being not more than the amount of the notes. This was done in extinguishment of the judgment and execution. By some mistake of the constable who had made the levy, Hughey obtained possession of some of the property. Peacock subsequently retook possession, and Hughey brought an action of trover to recover it. The jury found for the defendant. The plaintiff moved for a new trial. The motion was overruled and he excepted.

1, 2. The court did not err in refusing a new trial for any of the reasons assigned in the motion therefor. When one owes a valid and binding debt, and gives therefor a promissory note containing a waiver of homestead and exemption, a homestead subsequently set apart to him and his family is, so far as this note is concerned, a nullity. The constitution of this state allows such a waiver, except as to wearing apparel and a few other articles, and a note containing a waiver may be enforced against property subsequently set apart. If the homestead is set apart after the execution of the waiver notes, and then, after the homestead has been set apart, the head of the family renews the note by giving several renewal notes to the same payee, aggregating the same amount, with no additional security, and containing the same waiver, this does not amount to a novation of the contract, and the waivers in the renewal notes relate back to the time of the execution of the original note. The renewal notes may therefore be enforced against the homestead property, just as the original note could have been. It is the same debt, and in law the same waiver. If the renewal notes are sued to judgment, an execution thereon may be levied upon any property belonging to the

maker and enforced against such property, even though it be part of the homestead which he has obtained.

3. After the levy has been made, the parties may enter into a settlement whereby the maker (the head of the family), without an order of court, sells and delivers to the creditor a part of the homestead property at a fair valuation to extinguish the execution. As against this execution, there is no homestead. The property is subject to it. The law will authorize the head of the family to do an act voluntarily, when, if he refuses, it would compel him to do the same act. In other words, the law will permit him to sell the property in payment of the execution, when, in the absence of such settlement, the law would itself sell the property to pay off the execution. Hughey had therefore no right to recover from Peacock the property sued for.

There were other questions made in the motion for new trial, relative to charges of the court and the admission of evidence; but it is unnecessary to discuss them, as the principles above announced control the case, and the questions referred to, except in so far as they are decided by what has been said above, could not affect the result.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 655)

CITY ELECTRIC RY. CO. v. FLOYD COUNTY.

(Supreme Court of Georgia. June 7, 1902.)

CONTRACT—CONSIDERATION—COMPROMISE.

1. Where a disputed claim, depending upon a legal question, is settled and adjusted by the parties, and a contract between them is accordingly made, whereby one promises to pay to the other a sum of money, the promisor is bound thereby, though such question be really free from doubt, and, properly resolved, would have absolved him from all liability.

2. There was no error in admitting evidence. (Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the City Electric Railway Company against Floyd county. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Branham, for plaintiff in error. Nat Harris and W. J. Neel, for defendant in error.

FISH, J. In our opinion, the decision of this case turns upon the proper determination of the question whether or not the contract entered into on February 25, 1892, between the Rome Street Railroad Company and Floyd county was valid. By the terms of that contract the railroad company agreed to pay to the county a stipulated compensa-

tion annually for the right to construct and operate its electric railway line across the three bridges in the city of Rome belonging to the county. If, as contended by the plaintiff in error, this contract was a nudum pactum, then the judgment of the court below was wrong. On the other hand, if this contract was based upon a sufficient consideration, then that judgment was right. Before this contract was entered into the county claimed that the company could not thus use these bridges without paying to it a reasonable compensation therefor, while the railroad company claimed that it had the right to so use them without the consent of the county, and without paying any compensation whatever. Each party to the controversy appears to have been acting in perfectly good faith. Pending these conflicting contentions, negotiations were entered into by the parties which resulted in a settlement of the matter, under which the railroad company agreed to pay to the county the sum of \$100 per annum for the use of each of the three bridges, and the county, for this consideration, granted to the company "the right to lay and maintain a single track on one side of" each bridge, "with the right to place electric wires and appliances and to run electric cars across said bridges." We think that, under the evidence submitted, the presiding judge, who, by agreement of the parties, tried the case without the intervention of a jury, was authorized to find that this contract was the result of a compromise of the conflicting claims of the parties. The county in the beginning of the controversy demanded a reasonable compensation for the use by the railroad company of the bridges, but ultimately agreed to accept an annual sum, which, according to the testimony of one of the witnesses, "was believed to be barely sufficient to cover the actual added expense and damage to said bridges by reason of such unusual and extra burdens." After the previously existing controversy between these parties had been compromised and settled, it mattered not which side thereof was right in its contentions, for the compromise and settlement of the dispute was a sufficient consideration for the agreement of the railroad company to pay the stipulated annual sum for its use of the bridges. The controversy arose over a question of law. If the railroad company originally had the right, under the power granted to it by the legislature,—as we are inclined to think it did,—to construct and operate its electric lines over the bridges in question without the consent of the county, and without paying anything whatever therefor, it lost this right when the dispute between it and the county was compromised and settled by the execution of this contract. If there had been no controversy between the parties as to their respective rights in the matter, and the county had simply charged the railroad company

¶ 1. See *Compromise and Settlement*, vol. 14, Cent. Dig. § 21.

\$100 per annum for the use of each of the bridges, and the company had simply agreed to pay this sum annually, the contract entered into might have been, as contended by the plaintiff in error, a nudum pactum, and therefore not binding upon the company. But this was not the case. The parties asserted conflicting claims, depending upon a question of law, and these claims were compromised and settled by the contract now under consideration. "Where parties have conflicting claims, depending upon a law point, and they compromise them, each is bound by the settlement, whether the law point turns out to have been for him or against him." *Morris v. Munroe*, 30 Ga. 630. See, also, *Spriggs v. Bromblett*, 54 Ga. 348; *Bass v. Bass*, 73 Ga. 135; *Tyson v. Woodruff*, 108 Ga. 368, 33 S. E. 981; *Thornton v. Lemon, McMillan & Co.*, 114 Ga. 155, 39 S. E. 943. "Moreover, in order to render valid the compromise of a claim, it is not essential that the matter should be really in doubt. It is sufficient if the parties consider it so far doubtful as to make it the subject of a compromise." 6 Am. & Eng. Enc. Law (2d Ed.) 713, and cases cited. This contract settled the disputed question as to the right of the Rome Street Railroad Company to construct and operate electric railway lines across the three bridges without paying to the county compensation therefor, and established the right of the county to charge the amount agreed upon for such use of the bridges. Under this contract the electric railway lines were constructed and operated upon these bridges. When the City Electric Railway Company, the plaintiff in error, by purchase from previous purchasers of the same, acquired the property, rights, powers, and franchises of the Rome Street Railroad Company, it acquired no greater right in reference to the use of the bridges than that which was possessed by its predecessor, the last-mentioned company. After its purchase it recognized the validity of the contract made with the county by the Rome Street Railroad Company, by paying the county for the use of the bridges, applying to the county authorities for a reduction in the amount of the annual charge, and entering into a new contract with the county, by which the original contract was so modified as to reduce the annual sum to be paid for the use of the three bridges from \$300 to \$200. The claim of the county which resulted in the judgment under consideration was based upon this new contract, which was but a modification of the old one, and which, for the reasons given above, was founded upon a valid consideration, and therefore enforceable against the City Electric Railway Company.

Certain affidavits were admitted in evidence over the objection of the railway company that they were "irrelevant and immaterial, and upon the further ground that it was sought by said testimony to set up oral

statements and negotiations that occurred prior to the execution of said alleged written contracts." These affidavits set forth the above-stated facts and circumstances leading up to the contract between the Rome Street Railroad Company and Floyd county, and also the circumstances under which this contract was modified by the one between the county and the City Electric Railway Company. In view of the ground upon which we have placed our decision in this case, and the reasons which we have given therefor, it seems hardly necessary to say that, for the purposes indicated in the above discussion of the consideration for these contracts, this testimony was clearly admissible.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 676)

CARTER et al. v. JACKSON.

(Supreme Court of Georgia. June 7, 1902.)
REPORT OF AUDITOR — CONCLUSIVENESS — FINDINGS—CONSIDERATION OF DEED.

1. Where a case is submitted to an auditor with instructions to report his findings of fact on the questions raised by the pleadings, and he makes a report, to which no exception is taken by either party, the conclusions of fact set forth in the report are binding upon all the parties to the litigation.

2. A finding by the auditor that conveyances which apparently pass into one of the parties to the litigation title to the property in controversy were not based on any "valuable" consideration would not authorize a conclusion that such conveyances were void, as being without any consideration which the law recognizes.

3. Where a person executed a mortgage upon certain property, his administrator is estopped, in a suit brought to foreclose the mortgage, to plead want of title in his intestate at the time the mortgage was executed.

4. When the bill of exceptions is considered in the light of the record, the assignments of error are sufficiently specific for this court to deal with the same.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Action by Carter & Woolfolk against A. R. Jackson. Judgment for defendant, and plaintiffs bring error. Reversed.

Jesse W. Walters, for plaintiffs in error. R. Hobbs and D. F. Crosland, for defendant in error.

COBB, J. Carter & Woolfolk brought in the superior court a petition against A. R. Jackson, as administrator of the estate of W. R. Jackson, praying for the foreclosure of a mortgage which the defendant's intestate had executed and delivered to the plaintiffs. Upon this petition a rule nisi issued. In answer to the rule the defendant set up that his intestate was not indebted on the notes which the mortgage was given to secure, for the reason that they were without consideration, were executed under

duress, and at the time that the mortgage was executed the mortgagor did not have title to the land therein described; plaintiffs having notice of this want of title at the time the mortgage was filed for record. The case was referred to an auditor, whose authority seems by the order of reference to have been confined to reporting his findings upon the evidence. The order was so construed by the auditor, and he did not report any conclusions of law, and distinctly declined to decide any question of law which was raised in the case. The auditor found that the defendant's intestate owed the debt represented by the notes, that the amount of the notes was correct, that there was no duress, and that at the time the notes and mortgage were executed it appeared from the record of deeds in the clerk's office that the defendant's intestate had title to a one-half undivided interest in the property, though the auditor found that this title was not based on any valuable consideration. The plaintiffs filed no exceptions to the auditor's report. The defendant did file certain exceptions, but it does not appear what, if any, action was taken upon these exceptions, and the defendant is not complaining here of any ruling against him. The findings of the auditor are therefore conclusive upon both parties to the record. The case was submitted to the judge, without the intervention of a jury, upon the auditor's report; and upon that report the court entered a judgment in favor of the defendant, and denied the rule absolute. It does not distinctly appear upon what ground the court based this judgment, but, as the defendant was concluded by the auditor's report on the question of the validity and amount of the indebtedness, the court must have reached the conclusion that the other defense, viz., want of title in the defendant's intestate at the date of the mortgage, had been sustained. This conclusion of the judge was, we think, erroneous, for two reasons: First, as has been shown above, the auditor found that the defendant's intestate had paper title to the property described in the mortgage, but that this title was not based on any "valuable" consideration. So far as appears from the auditor's report, W. R. Jackson might have acquired title to the property in controversy by gift from his father; and certainly a finding merely that the written evidence of title was not based on any valuable consideration would not authorize a conclusion that the conveyance was void, as being entirely without consideration. But there is another reason, equally conclusive, why the judgment of the court was erroneous. Even conceding that the title of W. R. Jackson was not based on any consideration which the law recognizes, it did not lie in his mouth, and it does not lie in the mouth of his administrator, to raise this question. Having given a mortgage on the faith of a supposed title in him to the property describ-

ed in the mortgage, both the defendant's intestate and the defendant would be estopped to deny this title. The law will not tolerate such a defense from them. If, as matter of fact, the conveyances which apparently passed into W. R. Jackson title to the property described in the mortgage are void because without consideration, any person whose rights would be affected by a judgment in favor of the plaintiffs can raise this question of want of title in W. R. Jackson at the time the mortgage was given. Under the findings of the auditor, the plaintiffs were, as against the defendant, entitled to a judgment of foreclosure, and the court erred in denying the rule absolute.

It is contended by counsel for the defendant in error that this case should not be considered by this court, because there is no sufficient assignment of error on the judgment to which exception is sought to be taken. The bill of exceptions recites that the court passed an order entering a judgment in favor of the defendant and denying a rule absolute; and plaintiffs except to this judgment, and assign the same as error, and then proceed as follows: "And for specific error assigns as follows: (1) Because the court erred in holding that, at the time of executing the mortgage sought to be foreclosed, Walter R. Jackson, the maker thereof, did not have title to the mortgaged lands." The bill of exceptions then assigns error on two other "holdings" of the court. It is true, this court has repeatedly ruled that a general exception to a judgment of the court in a case submitted to the judge, on an agreed statement of facts, without the intervention of a jury, does not present any question for consideration by this court. *Collins v. Carr*, 111 Ga. 867, 36 S. E. 959, and cases cited; *City of Fitzgerald v. Merchants' & Planters' Bank*, 113 Ga. 1151, 39 S. E. 479, and cases cited. The proper way to assign error upon such a judgment is to state whether the court erred in his findings of fact or in his conclusions of law, and, if in the latter, it would probably be good practice to set out specifically wherein it is claimed the court erred in his conclusions of law upon which the judgment in favor of the defendant in error was based. In the present case the plaintiffs except generally to the judgment, and then, for specific assignment of error, say the court erred in certain "holdings." If the bill of exceptions means to allege that the general judgment was based on these rulings, and that they are erroneous, this is manifestly all that either the law or good practice would require. And when the bill of exceptions is construed in the light of the record, it becomes plain that this is exactly what is meant. The general judgment in favor of the defendant was necessarily based on the conclusion that the defendant's intestate had no title to the mortgaged property at the time the mortgage was executed. This is the only theory on which the judg-

ment could have been based. A general exception to the judgment, and a specific assignment of error on the special rulings upon which the judgment was based, are sufficient to present for consideration the question whether the court erred in the special ruling complained of, and in entering the general judgment in favor of the defendant based on this special ruling.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 744)

DWIGHT et al. v. JONES.

(Supreme Court of Georgia. June 10, 1902.)

SPECIFIC PERFORMANCE—ANSWER—ALTERNATIVE RELIEF—WITHDRAWAL OF ISSUE.

1. When a defendant in his answer sets up a particular state of facts, and thereupon bases a prayer for alternative relief, he is not, where he fails to establish by evidence a right to one form of the relief sought, in legal contemplation, injured by the court's withdrawing from the consideration of the jury this branch of the defense; nor can he justly complain of their verdict when he thereby obtains the full benefit of the other form of relief for which he prays.

2. Specific performance of a parol contract for the purchase of land will not be decreed when the evidence wholly fails to identify the land purchased.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by D. C. Jones against T. H. Dwight and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Haygood & Stewart, for plaintiffs in error. J. A. Edwards, for defendant in error.

FISH, J. Jones brought an action against T. H. Dwight and J. B. Dwight on a promissory note given by them for \$250. T. H. Dwight answered that, after the note was given, he sold to the plaintiff a certain described parcel of land for \$595, with the understanding that the note sued on was to be taken in part payment of the purchase money; that the sale was a cash transaction; that, in pursuance thereof, plaintiff went into possession of the land, and, after doing so, failed and refused to comply with his part of the contract, though defendant had ever been ready to convey the land to him upon payment of the purchase money. The defendant alleged that he had been deprived of the use of the land during the time plaintiff was in possession of it, to his damage in the sum of \$100. By way of affirmative relief, defendant prayed that the plaintiff be required to deliver up for cancellation the note sued on, and that defendant have judgment against plaintiff for the difference between the amount due on the note and the purchase price for the land; the defendant averring his readiness and willingness, upon this being done, to execute to plaintiff good and sufficient title to the land in question.

The defendant further prayed, in the event the court should hold that he was not entitled to the "specific performance" as prayed for, that he then have judgment against the plaintiff for the damages set forth in the answer. Upon the trial it appeared that the contract for the sale of the land was in parol, and the only evidence offered to identify the land sold was the testimony of the defendant T. H. Dwight, who testified: "I agreed to sell Jones seventy acres of land. The price he agreed to pay was \$8.50 per acre. I can't tell you the number of the land. I don't know the number. It was on Little Whitewater creek, back of the place where I live, but I could not give you the number of the land. * * * It was located in Macon county. * * * Mr. Billie Green measured this land off, which was agreed upon by me and Jones, both." It was shown that the plaintiff was in possession of land of the defendants for about a year, and then left it, whereupon defendants took possession of the same, and had since remained in possession up to the trial. The annual rental value of the land was proved to be from 75 cents to \$1.50 per acre. The verdict was in favor of the plaintiff for the amount due on the note, less \$60 for the rent of the land. Defendants moved for a new trial on the general grounds, and "because the court erred in withdrawing from the jury, over defendants' objection, the issue of specific performance, * * * and in submitting to the jury only the question of the rental of the seventy acres of land." A new trial was refused, and defendants excepted.

1, 2. In our opinion, the court did not err in withholding from the jury the issue as to specific performance; for, waiving the question as to whether, under the evidence, the contract for the sale of the land had been rescinded, the proof as to the identity of the land alleged to have been sold to the plaintiff, and to which defendant T. H. Dwight offered to make him a title, was wholly insufficient to show what specific land was the subject of the contract of sale. It is well settled that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258. In order for the court to have required the plaintiff to specifically perform his part of the contract in reference to the land it would have been necessary to have decreed that the defendant T. H. Dwight should, upon the payment of the purchase money by the plaintiff, convey to him the land sold; and, to do this, a particular description of the land should have been proved. See *Harper v. Kellar*, 110 Ga. 420, 85 S. E. 667, and cases cited. The verdict was fully authorized by the evidence, and the refusal of a new trial was not erroneous.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 689)

SOUTHERN RY. CO. v. GOODRUM.

(Supreme Court of Georgia. June 9, 1902.)

CERTIORARI TO JUSTICE—DISMISSAL.

1. Where the defendant in a suit in a justice's court appealed to a jury in that court, and gave a security on the appeal bond, and then, being dissatisfied with the finding of the jury, sued out a writ of certiorari, and gave the same security on the certiorari bond, and the certiorari was dismissed on the ground that there was no valid certiorari bond, the certiorari could not be renewed under Civ. Code, § 3786. The original certiorari was void, and could not be renewed. *Grimes v. Jones*, 48 Ga. 362, distinguished.

(Syllabus by the Court.)

Error from superior court, Monroe county; *E. J. Reagan, Judge.*

Action by W. E. Goodrum against the Southern Railway Company. Judgment for plaintiff before a justice, and defendant brings certiorari, and from an order dismissing the writ brings error. Affirmed.

Dessau, Harris & Harris, for plaintiff in error. W. M. Clark, for defendant in error.

SIMMONS, C. J. Suit was brought by Goodrum against the Southern Railway Company in a justice's court. The defendant lost the case before the magistrate, and appealed to a jury in the same court, giving an appeal bond with security. The jury found against the appellant, and it sued out a writ of certiorari to the superior court, giving a certiorari bond with the same security as was on the appeal bond. This certiorari was dismissed in the superior court on the ground that no valid certiorari bond had been given, the law requiring that the surety on this bond shall be an additional and different one from the one on the appeal bond. The defendant then, within six months from the dismissal of the first certiorari, sued out another certiorari in the same case. Upon the hearing this certiorari was also dismissed, the judge holding that the first proceeding by certiorari was void for want of a bond, and was a nullity, and that there was nothing to renew. To this ruling the railway company excepted.

There can be no doubt that section 3786 of the Civil Code applies to valid suits only. This has been held uniformly by this court from *Williamson v. Wardlaw*, 48 Ga. 126, to *Hamilton v. Insurance Co.*, 111 Ga. 875, 36 S. E. 960. This principle is now too well settled by this court for us to depart from it. The plaintiff in error relies upon *Grimes v. Jones*, 48 Ga. 362, which, it contends, establishes a contrary rule, and which has never been overruled. An examination of this case will show that the point now decided and the

point decided in *Williamson v. Wardlaw*, supra, was not decided, or even alluded to, in *Grimes v. Jones*. *Grimes* had sued out a certiorari, which had been dismissed on the ground that no affidavit in forma pauperis had been filed. Subsequently he undertook to renew the certiorari, and the judge refused to sanction it. *Grimes* excepted, and brought the case to this court. Why the judge refused to sanction the writ, or what points were made before him did not appear, but the only point decided by this court was, that under the decision in *Hendrix v. Kellogg*, 32 Ga. 435, a certiorari was a suit within the meaning of the act which is now section 3786 of the Civil Code. If the point had been made that the first certiorari was void, and a nullity, and for that reason could not be renewed, the opinion and decision of the court would doubtless have been different. But the point was not referred to, and the case was put merely on the ground that a certiorari is a suit, and can be renewed. That case is not binding in this, and we hold that a void process cannot be renewed under the section of the Code referred to above.

Judgment affirmed. All the justices concurring except LEWIS, J., absent on account of sickness.

(115 Ga. 679)

DWELLE et al. v. BLACKSHEAR BANK et al.

(Supreme Court of Georgia. June 7, 1902.)

FORECLOSURE SALE—DUTIES OF PURCHASER—TENDER OF PAYMENT.

A prospective purchaser at a sale of property to be had under a power contained in a mortgage is bound to inquire as to the terms and conditions upon which the person exercising the power is authorized to sell; and, when the power of sale provides that the sale shall be had at public outcry for cash, all who bid at the sale do so with full knowledge that, to complete the sale, payment or tender of the final bid in cash is essential; and one, although the highest and best bidder at the time the property is knocked off, is not entitled to demand a conveyance unless the amount of his bid is duly tendered in cash, if not immediately after the property is knocked off to him, at least during the legal hours of sale on the day upon which the sale is had.

(Syllabus by the Court.)

Error from superior court, Ware county; *Jos. W. Bennet, Judge.*

Action by Dwell & Daniel against the Blackshear Bank and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Bennett & Bennett, for plaintiffs in error. L. A. Wilson and Estes & Walker, for defendants in error.

COBB, J. Dwell & Daniel filed in the superior court their petition against the Blackshear Bank and others, alleging substantially as follows: On the 6th day of January, 1896, J. F. Miles borrowed from the Blackshear Bank a sum of money, and

¶ 1. See *Certiorari*, vol. 9, Cent. Dig. § 17; *Justices of the Peace*, vol. 31, Cent. Dig. § 804.

gave to the bank his promissory notes for the same, executing and delivering a mortgage upon certain described property to secure the payment of the notes. On the 10th of March, 1898, Miles gave to plaintiffs his promissory notes for a stated sum, and executed and delivered to them a mortgage upon certain property to secure the payment of these notes; a portion of the property described in the mortgage being the same property as that described in the mortgage to the bank. The bank had knowledge of the execution and delivery of the mortgage to the plaintiffs, and of the fact that it constituted a lien upon the same property as that described in its mortgage. On the 22d day of November, 1898, after Miles had made default in the payment of his debt to the bank, the property described in the mortgage to it was exposed to sale, after having been advertised in the manner prescribed in the mortgage; and, under a power of sale contained in the mortgage, the bank, through its duly authorized agent, offered the property for sale at public outcry. The power of sale contained in the mortgage provided that the sale should be had at public outcry "to the highest bidder for cash." At this sale the plaintiffs, through their duly authorized agent, were the highest and best bidders, and the property was knocked off to them at the amount of the bid. The agent of the plaintiffs tendered to the bank a draft on plaintiffs for the amount of the bid, which the bank refused to take, notwithstanding plaintiffs had wired it that the draft would be honored. No cash was paid or tendered during the day on which the sale was had, but thereafter the amount of the bid in cash was tendered to the bank, and the tender was refused. It is alleged that the agent of the Blackshear Bank who cried the sale agreed with the attorney of the plaintiffs to give them all the evening of the sale in which to raise the money and pay the bid, but that late in the afternoon a representative of the Blackshear Bank repaired to the court house and resold the property a short time before the expiration of the legal hours of sale. A conveyance was subsequently made by the Blackshear Bank to the bidder at this sale, and conveyances were made by him to the bank and to the wife of Miles. It is charged in the bill that this second sale was fraudulent and collusive, and that the conveyances made in pursuance of the same were void. Plaintiffs aver that they are ready, and have always been ready, to pay the amount of their bid. The prayers of the petition were that the Blackshear Bank be compelled to make to petitioners a deed to the property upon the payment of the amount of their bid; that the deeds executed as a result of the second sale be delivered up to be canceled; that the plaintiffs have judgment for the damages which they have sustained, in the event a specific performance cannot be de-

creed; and for process. By an amendment it was alleged that the president of the Blackshear Bank stated to the agent of plaintiffs that he would have the second sale, for the purpose of saving the expense of a re-advertisement, in the event plaintiffs failed to comply with their bid; that while the bidders were assembled at the time of the first sale, and before they had dispersed, the president of the bank approached the attorney of the plaintiffs and asked how he would expect to pay his bid; that the attorney told him, by draft on plaintiffs; that the sale had been then closed, the property knocked off to plaintiffs, and the bidders dispersed; that the second sale was had after the bidders had dispersed, and there was no person to bid for the property, except the agent of the bank, that it had sent there to bid on the property. The court sustained a general demurrer to the petition and dismissed the case, and to this ruling the plaintiffs excepted.

The power of sale contained in the mortgage to the Blackshear Bank restricted the authority of the bank to a sale for cash only. The plaintiffs, as bidders at the sale, were bound to inquire into the authority of the bank to sell, and the terms and conditions upon which the sale was to be had. This authority appeared of record, and the plaintiffs either knew or ought to have known that the bank could not sell upon any other terms than cash on the day of sale. Being charged with this notice when they became bidders for the property, they well knew that no sale could be completed until the cash was either paid or tendered. The plaintiffs not having tendered the amount of their bid in cash, either at the time of sale, or during the legal hours of sale on the day the property was put up for sale, they have no right to come into a court of equity and pray for the specific performance of a contract of sale which was never completed on account of their failure to comply with the terms of sale. A draft on plaintiffs, even though it had been accepted by them, was not payment of their bid, and the bank had no authority either to accept the draft in payment, or to give the plaintiffs until the next day to procure the cash. This being so, there was never any completed contract of sale to the plaintiffs, and they had no right to demand a conveyance from the bank. As they acquired no right under the first sale to demand a conveyance of the property, and as their petition is predicated solely upon this supposed right, it is immaterial, so far as this case is concerned, whether the second sale was fraudulent and void or not. Even if it was void, this was no concern of the plaintiffs, under their allegations. They pray simply that a conveyance be made to them of the property described in the mortgage to the bank, or that, in the event the bank is not in a position now to convey the property, they may have dam-

ages in lieu of a specific performance. The plaintiffs are not entitled to the relief prayed for. Those prayers which relate to the second sale are merely auxiliary to the main relief prayed for, which was specific performance. If the plaintiffs had been entitled to a specific performance, they might have been entitled to a cancellation of the deeds made as a result of the second sale. If the second sale was fraudulent and void, the plaintiffs may have some remedy in another proceeding to enforce their mortgage lien upon the property; but they are not entitled to a conveyance of the property as purchasers at the sale had at which they were bidders and failed to comply with their bid. The court did not err in sustaining a general demurrer to the petition.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 691)

ELDER v. JOHNSON et al.

(Supreme Court of Georgia. June 9, 1902.)

PLEADING—MOTION TO STRIKE—TENDER—SUFFICIENCY.

1. It is not erroneous to overrule a written motion to strike a part of an answer, when the part referred to is not set forth in the motion, and there is nothing in the answer to which the words used in the motion as descriptive of the portion of the answer sought to be stricken are applicable.

2. A tender by the holder of a bond for title to the maker thereof of the amount due upon a promissory note therein described, coupled with a condition that the latter shall execute the conveyance which such holder is entitled to receive upon paying the note, is not, under the law embraced in section 3728 of the Civil Code, a valid and lawful tender.

(Syllabus by the Court.)

Error from superior court, Fayette county; E. J. Reagan, Judge.

Action by M. A. Elder against B. L. Johnson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. W. Wise and Hugh M. Dorsey, for plaintiff in error. J. F. Golightly and King & Spalding, for defendants in error.

LUMPKIN, P. J. Miss M. A. Elder brought, in the superior court of Fayette county, an equitable proceeding against Mrs. Lula C. Elder, as administratrix on the estate of C. C. Elder, deceased, Margaret Hosford, and L. B. Nelson. Subsequently, B. L. Johnson was, at the instance of the plaintiff, made a party defendant. Answers were filed by both Mrs. Elder and Johnson.

1. At the trial, the plaintiff presented a written motion "to strike that part of the answer of Mrs. Lula C. Elder which alleges fraud on the part of C. C. Elder, her husband and deceased intestate," and also to strike all of the answer of Johnson "because it

sets up no defense other than the one above set out, upon which he jointly insists with Mrs. Lula C. Elder"; the grounds upon which this motion was based being that Mrs. Elder was estopped to set up this defense, and that Johnson, under the facts disclosed by his answer, had no interest whatever in the matter to which such defense related. The motion was overruled, and the plaintiff excepted. After a most careful examination of the answer of Mrs. Elder, as it appears in the record before us, we are unable to find any mention whatever of any alleged fraud on the part of C. C. Elder; and the same is true with respect to the answer filed by Johnson. This being so, we cannot undertake to further deal with the assignment of error touching the refusal of the trial judge to sustain the plaintiff's motion to strike.

2. After the close of the testimony offered in behalf of the plaintiff, a nonsuit was granted, and to this, also, she excepted. It is not necessary to set forth in detail the exact nature of her petition, or to state in full the facts brought to light by the evidence offered in support thereof. Suffice it to say that it was incumbent upon the plaintiff, in order to make out her case, to show that, as transferee of a bond for title which Margaret Hosford had executed and delivered to C. C. Elder, she (Miss Elder) had made a legal tender of the amount due upon a promissory note, the payment of which was a condition precedent to the right to demand the execution of a deed under that bond for title. The testimony introduced by the plaintiff, for the purpose of showing that such a tender had been duly made, failed to establish this branch of her case. It did appear that an agent of Miss Elder offered to pay Nelson, who was the agent of Margaret Hosford, the amount due upon the note, provided the deed called for by the bond for title should be delivered to Miss Elder; but according to the decision of this court in *De Graffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560, this proposal did not meet the requirements of section 3728 of the Civil Code. We are therefore constrained to hold that the plaintiff failed to establish a fact essential to her right to demand the relief sought; and accordingly, even granting that her case was in all other respects fully made out, it follows that the judgment of nonsuit must be sustained. As this ruling finally disposes of the case, we do not undertake to pass upon other questions presented by her bill of exceptions, a decision of which in her favor could not possibly lead to a disposition of this writ of error other than that just indicated.

Judgment affirmed; all the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 664)

SOUTHERN RY. CO. v. HORINE.

(Supreme Court of Georgia. June 7, 1902.)

RAILROADS—FIRES—PLEADING.

1. Under the ruling made in the case of *Railway Co. v. Pace*, 40 S. E. 723, 114 Ga. 712, and the cases which that decision followed, the evidence in the present case was not sufficient to authorize a verdict for the plaintiff, and a new trial should have been granted.

2. An allegation in a petition against a railway company, in which damages were claimed for the destruction by fire of the plaintiff's property, that the railway company "carelessly permitted fire from the engine of the local freight train going west to be thrown out, whereby the litter which said company had permitted [to] accumulate on said right of way was ignited, and the fire spread therefrom and burned and destroyed" the plaintiff's property, did not amount to an averment that the railway company negligently permitted combustible matter to accumulate upon its right of way.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by V. C. Horine against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hugh M. Dorsey, for plaintiff in error. Beall & Edwards, and Edwards & Ault, for defendant in error.

COBB, J. Horine sued the Southern Railway Company for damages growing out of the destruction of a fence by a fire; it being alleged that the defendant "carelessly permitted fire from the engine of the local freight train going west to be thrown out, whereby the litter which said company had permitted [to] accumulate on said right of way was ignited, and the fire spread therefrom and burned and destroyed said fence and rails so built and constructed on petitioner's farm." The trial resulted in a verdict in favor of the plaintiff, and the defendant complains that the court refused to grant it a new trial.

1. The evidence discloses a case very similar to that which was contained in the record in the case of *Railway Co. v. Pace*, 114 Ga. 712, 40 S. E. 723, and what is there said is applicable to the present case. Under the ruling there made, as well as the rulings in the cases which were then followed, a verdict in favor of the plaintiff was not authorized by the evidence, and a new trial should have been granted.

2. It is insisted in the brief of counsel for the defendant in error that the verdict should be sustained for the reason that the evidence showed that the defendant had negligently allowed broom sedge, trash, and other combustible matter to accumulate upon its right of way, and that the fire was communicated to the plaintiff's fence from this combustible matter. In reference to this contention, all that is necessary to be said is that the plaintiff did not, in his declaration, allege this as a ground of negligence. From the allega-

tions of the petition which are set forth in the headnote, as well as in the above statement of facts, it clearly appears that the negligence which the pleader relied upon in drafting the petition was either in the manner in which the engine was handled, or some defect therein, and there is nothing in the language of the petition which can be properly construed as an allegation that the defendant negligently allowed combustible matter to accumulate upon its right of way.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 670)

SPEARMAN v. EQUITABLE MORTG. CO.

(Supreme Court of Georgia. June 7, 1902.)

ACTION ON NOTE—PLEA—NON EST FACTUM—EVIDENCE.

1. There being affirmative evidence that the defendant's name was, by her agent, in her presence, and under her express direction, signed to the promissory note sued on, the verdict against her plea of non est factum was fully warranted. In view of this evidence, a finding in her favor was not demanded merely because it was shown that she could not write, and there appeared upon the note the words "her mark," so written as to indicate that there was originally an intention that she should sign the note in person by her cross mark, which did not, however, appear to have been actually made thereon.

2. None of the special grounds of the motion for a new trial were meritorious, and there was no error in overruling the motion.

(Syllabus by the Court.)

Error from superior court, Heard county; W. M. Henry, Judge.

Action by the Equitable Mortgage Company against T. O. Spearman. Judgment for plaintiff, and defendant brings error. Affirmed.

D. B. Whitaker and W. H. Daniel, for plaintiff in error. Payne & Tye, C. P. Gordon, and Adamson & Jackson, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 723)

McWATERS et al. v. EQUITABLE MORTG. CO. et al.

(Supreme Court of Georgia. June 10, 1902.)

APPEAL—REVIEW.

There was no error in rejecting evidence, nor in any of the rulings made during the progress of the trial upon which error is assigned. The evidence admitted demanded a finding, in favor of the plaintiff in execution, that the property was subject to the execution, and the court did not err in directing the jury to return a verdict to that effect.

(Syllabus by the Court.)

Error from superior court, Heard county; W. M. Henry, Judge.

Action between the Equitable Mortgage

Company and others and S. H. McWaters and others. Judgment for the mortgage company, and McWaters and others bring error. Affirmed.

T. B. Davis, C. P. Gordon, and Frank B. Loftin, for plaintiffs in error. W. H. Daniel and Payne & Tye, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 683)

OWEN v. PALMOUR.

(Supreme Court of Georgia. June 9, 1902.)

DIRECTING VERDICT—APPEAL—REVIEW—NEW TRIAL.

1. While a trial judge may, within the restrictions prescribed by Civ. Code, § 5331, direct a verdict, this court will in no case overrule, as erroneous, a refusal to do so.

2. Grounds of a motion for a new trial complaining of rulings on evidence cannot be considered unless the evidence is set forth, either literally or in substance, or attached to the motion as an exhibit.

3. The charge excepted to was not erroneous for the reasons assigned; the evidence, though conflicting, authorized the verdict; and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Hall county; G. H. Prior, Judge.

Action by M. M. Owen against B. T. Palmour. Judgment for defendant, and plaintiff brings error. Affirmed.

Hubert Estes, for plaintiff in error. H. H. Dean, for defendant in error.

COBB, J. In one ground of the motion for a new trial, complaint is made that the court erred in refusing to direct a verdict for the plaintiff. It has been held that this court will in no case overrule, as erroneous, a refusal to direct a verdict. Railroad Co. v. Callaway, 111 Ga. 889, 36 S. E. 967 (2). In the present case it appeared that, after the plaintiff's evidence had been concluded, the defendant offered in evidence a record which was excluded, and then announced that he had no further testimony to offer. At this point the motion to direct a verdict was made. The record further shows, however, that, after the motion to direct the verdict was overruled, the defendant was permitted by the court to introduce other evidence, notwithstanding the announcement that the defendant had no further evidence to offer. No complaint is made that the court abused its discretion in allowing the case to be opened for the introduction of new evidence, though the evidence thus offered and admitted was objected to for reasons which did not justify its rejection. There was no error in overruling the ground of the motion for a new trial above referred to.

The rulings announced in the headnotes

dispose of all the points presented by the present record. This is the third appearance of this controversy in this court. See Owen v. Palmour, 90 Ga. 92, 24 S. E. 859, Id., 111 Ga. 885, 36 S. E. 969. The case has been tried five times in the court below. There have been three verdicts for the plaintiff and two for the defendant. The present record discloses no sufficient reason for reversing the judgment of the trial judge in refusing to grant a new trial, and this long-standing controversy is now ended by the judgment which we enter in this case.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 666)

BROWN v. LATHAM.

(Supreme Court of Georgia. June 7, 1902.)

APPEAL—ASSIGNMENTS OF ERROR—HARMLESS ERROR—NEW TRIAL.

1. Where there is no assignment of error upon a charge of the court, save that the court erred in so charging, and the charge states a proposition of law which is, in the abstract, correct, this court will not consider whether the charge is applicable or appropriate in the case. Railway Co. v. Bond, 36 S. E. 299, 111 Ga. 14 (8); Wight v. Schmidt, 36 S. E. 937, 111 Ga. 858.

2. If there was any error in the failure of the court to charge upon a certain issue in the case, the error was cured by the plaintiff's writing off, in accordance with the order of the court, as much of the verdict as could possibly have resulted from the failure to charge upon this issue.

3. There was some evidence to authorize the verdict, and the trial judge was satisfied with it. This court, therefore, will not interfere with his refusal to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Haralson county; O. G. Janes, Judge.

Action by T. V. Latham against W. J. Brown, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Brown, Adamson & Jackson, and Edwards & Ault, for plaintiff in error. Edgar Latham and J. M. McBride, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 709)

McCLURE v. SMITH et al.

(Supreme Court of Georgia. June 10, 1902.)

DEED SECURING DEBT—RIGHT TO RECONVEYANCE—INCREASE OF DEBT—LIEN OF JUDGMENT.

Where A. borrowed a sum of money from B., and to secure the payment thereof executed and delivered to B. a warranty deed to certain land, the instrument not disclosing that it was a security deed, but purporting to convey absolute title, the borrower at the same time taking from the lender a bond to reconvey upon payment of the debt, and subsequently the maker of the deed borrowed another sum of money from the grantee, and

executed upon the bond for title a written agreement that the grantee should not be required to reconvey the property until this last-mentioned debt was fully paid, the effect of the second contract was to extend the security afforded by the deed to the new loan; and the transaction was not only good between the parties, but the lender was entitled to priority over the lien of a judgment, obtained by a third party, on an unsecured debt created after the deed was recorded. This is true notwithstanding the fact that the written agreement upon the bond for title, extending the security afforded by the deed to the second loan made by the grantee to the grantor, was never recorded.

(Syllabus by the Court.)

Error from superior court, Dawson county; G. H. Prior, Judge.

Action by R. B. McClure, administrator, against M. L. Smith and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. A. Charters, for plaintiff in error. W. B. Sloan and H. H. Perry, for defendants in error.

FISH, J. This case was, by agreement of the parties thereto, submitted to the presiding judge for determination, without the intervention of a jury, upon an agreed statement of facts.

The case as made by the pleading and this agreed statement of facts was as follows: On February 2, 1888, John D. Palmour borrowed \$2,000 from Marshall L. Smith, giving his note for this amount, with interest, and, to secure the payment of the same, made to Smith a warranty deed to certain described lands, the deed reciting a consideration of \$2,000, but not indicating that it was given to secure the payment of a debt. At the same time, Smith gave to Palmour a bond to reconvey the property to him upon the payment of the debt. The deed was recorded on January 5, 1880. On February 7, 1888, Palmour borrowed \$100 more from Smith, for which he gave him his note, and, to secure the payment of the same, executed upon the bond for title a written agreement, in which he stipulated that Smith should not be required to reconvey the lands until this debt was also paid. On November 1, 1888, Smith made him another loan of \$200, for which Palmour gave him another note, to secure the payment of which he executed, on the bond for title, a written agreement similar to the one just above mentioned. Neither of these two written agreements was ever recorded, and Palmour never paid any portion of either of the three loans. Smith brought a suit against Palmour on the first note, and on February 13, 1900, obtained a judgment, which was made a special lien on the lands described in the deed. He also brought a suit upon the two smaller notes, setting up the above-mentioned facts in reference to the two loans for which they were given, and claiming, by reason thereof, a special lien on the lands for the amounts due on these notes. On the same day that the judgment just men-

tioned was rendered, Smith obtained a judgment against Palmour for the amount due upon the two notes last given, which was made a special judgment for this amount against the lands described in the deed. Subsequently, Smith made a deed reconveying the lands to Palmour, and filed the same in the office of the clerk of the superior court; an entry having been made on the deed, at the time of the filing, which recited that it was executed and filed in the clerk's office in order that a levy might be made, upon the lands therein described, to satisfy the two executions issued from the above-mentioned judgments. After the deed was recorded, he had the executions which had been issued upon his two judgments levied on the lands, and, under these executions, the lands were sold by the sheriff. In 1898, McClure, as administrator upon the estate of Elizabeth Black, obtained a judgment for \$1,354.56 against Palmour, and, when the sheriff was proceeding to sell the lands under the executions in favor of Smith, McClure served him with a written notice to hold up a sufficiency of the proceeds of the sale to pay the judgment which he, as administrator, held against Palmour, and at the same time placed his execution in the hands of the sheriff. The sheriff having sold the lands, and not having paid to McClure, as administrator, the amount of his execution, he, after the sheriff had gone out of office, brought a rule against him to show cause why he should not be required to do so. Smith, by intervention, became a party to this proceeding. From the answer of the ex-sheriff it appeared that he had paid both of the Smith executions in full, and the costs involved, and had left in his hands an amount which was insufficient to pay the McClure execution. Upon the trial of the case, McClure admitted that the amount due on the judgment rendered in favor of Smith in the suit upon the \$2,000 note was properly paid by the sheriff, but he contended that the amount due upon Smith's other judgment was illegally paid by the sheriff, as the lien of such judgment was inferior to that of his judgment, which was of older date. The issue between the parties was whether the unrecorded written agreements which Palmour had executed upon the bond for titles, for the purpose of securing the payment of the two smaller loans which he had obtained from Smith, taken in connection with the deed which he had previously made to Smith, created liens upon the lands which were superior to the lien of the McClure judgment. The judge held that they did, and accordingly rendered a judgment ratifying and approving the payment by the sheriff of the amounts due upon both of Smith's judgments. McClure, as administrator, excepted to the judgment of the court, alleging that the court erred in holding that Smith's smaller judgment had any special lien upon the lands as against the McClure judgment.

Each of the written agreements executed

by Palmour upon the bond for titles which he held from Smith clearly indicated the purpose to create a lien, and the debt to secure which it was given, and described the lands upon which it was to take effect as the lands mentioned in the bond for title, which were, of course, those described in the deed. Undoubtedly, therefore, the legal effect of these written agreements was to extend the security, afforded by the deed, to the loans made by the grantee to the grantor subsequently to the one which the deed was originally given to secure. The parties had the right to contract that the security created by the deed for the protection of the first loan should be extended to cover the subsequent loans. Smith held the legal title to the land to secure the payment of the first loan, and Palmour could bind himself, by written agreement, to allow Smith to continue to hold this title until the additional loans were paid. This much is settled by the decision in *Wylly v. Screven*, 98 Ga. 213, 25 S. E. 435, where it was held: "Where a deed was executed to secure a specified debt, the security thus created could, by written contract between the parties, be so extended as to secure, as between them, another debt subsequently contracted by the grantor in favor of the grantee; and in such case it was not essential that this latter contract should in terms specifically describe the property covered by the original deed; this being sufficiently accomplished by references in the contract to the deed itself, and the description in the latter being full and accurate."

It is contended, however, that, as these written agreements were not recorded, the effort to extend the security, afforded by the deed, to the loans made by the grantee to the grantor subsequently to the loan which the deed was given to secure, failed of its purpose, so far at least as the rights of a judgment creditor of the grantor, who obtained his judgment after the record of the deed, are concerned; that is, the contention is that, as to the debts of Palmour to Smith mentioned in these agreements written on the bond for title, the record of the deed afforded no protection against the McClure judgment. A simple and sufficient reply to this contention is that there is nothing in the law which required the agreements extending the security afforded by the deed to these new loans to be recorded. In order that a security deed may be superior to a subsequently obtained judgment against the grantor, the law only requires the deed itself to be recorded within 30 days of its execution, or before such judgment is rendered. It does not require that the deed, or anything connected with the record thereof, shall show the amount of the indebtedness that it is given to secure. If the law required the record to show the amount of the indebtedness secured by the deed, the contention of the plaintiff in error

would be sound. Indeed, if such were the requirement of the law, the deed itself in the present case would have been postponed to the McClure judgment, for the deed did not even indicate that it was given as security for any debt whatever, but appeared to be an absolute warranty deed, and, therefore, its record did not show what indebtedness it was given to secure, or even that it was a security deed. As the statute does not require the deed itself, or anything connected with its record, to show how much indebtedness it secures, or even that it secures any debt at all, there was no necessity for the record of the written agreements extending the security created by the deed to loans subsequently made by the grantee to the grantor. There was no more necessity for the grantee to have recorded these agreements, showing the existence and the amount of the new loans which the deed secured, than there was for him to have the bond for title, which he had given to the grantor, recorded, which showed the existence and amount of the debt which the deed was originally given to secure. When the deed was recorded, the title which it conveyed to the grantee became superior to a general judgment subsequently obtained against the grantor; and, the title being superior to such a judgment, whatever that title, as between the grantor and grantee, protected and secured, was protected and secured against such a judgment.

The record put the world upon notice that the title to the lands conveyed by the deed was no longer in Palmour, but had been conveyed to Smith, and, as the deed appeared to be an absolute warranty deed, it is difficult to conceive how anybody subsequently dealing with Palmour could have been misled or injured by Smith's failure to put on record written instruments which showed that the deed was given to secure a debt, and that the security which it afforded had been extended to protect two designated debts in addition to the one which it originally covered. Prior to the passage of the act of September 30, 1835 (Acts 1834-35, p. 124), now codified in section 2772 of the Civil Code, a security deed executed in good faith, though unrecorded, was superior to a subsequently acquired lien against the grantor. *Phinzy v. Clark*, 62 Ga. 623; *Sosnowski v. Rape*, 69 Ga. 548. So, it is only by reason of the provisions of that statute that such a deed, if not recorded, is postponed to a general judgment subsequently obtained against the grantor. As this statute only requires the deed itself to be recorded, it cannot be extended, by construction, so as to require the record of any other instrument connected with or growing out of the contract between the grantor and the grantee.

Judgment affirmed; all the justices concurring, except LEWIS, J., absent on account or sickness.

(115 Ga. 666)

GARNER v. CLARK et al.

(Supreme Court of Georgia. June 7, 1902.)

ESTOPPEL—LEVY OF EXECUTION—DESCRIPTION OF PROPERTY.

1. When, in resistance to the levy upon personalty of an execution issued upon the foreclosure of a statutory lien, the defendant files a counter affidavit, and replevies the property actually seized by the officer by giving a bond for its forthcoming, the former is estopped from thereafter setting up that the entry of the levy did not sufficiently describe such property.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by W. R. Garner against Clark Bros. Judgment for defendants, and plaintiff brings error. Reversed.

Edwards & Ault, for plaintiff in error. E. L. & G. D. Griffith, for defendants in error.

LUMPKIN, P. J. An affidavit was made by Garner for the purpose of foreclosing a laborer's lien upon the property of Clark Bros. They filed a counter affidavit. When the issue thus made came on for trial, the defendants "moved to dismiss the said case on the ground that the levy of the lien by the constable did not sufficiently describe the property levied on." To meet this motion, the plaintiff "offered in evidence a forthcoming bond given by the defendants to the constable who made the levy, and given by virtue of said levy for the forthcoming of the said property levied upon, and by which they, the said defendants, took possession of the said property levied upon, and by which they still retain the same." The court refused to admit the bond in evidence, and passed an order dismissing the plaintiff's action. To this he excepted, and the case is here for review.

In our opinion, the court erred in refusing to admit the bond in evidence. Had it been introduced, and the plaintiff had shown the facts he proposed to establish in connection therewith, it would have appeared that the defendants, without making any point as to the sufficiency of the levy in the matter of description, in effect conceded that their property had been duly seized, and, by giving a forthcoming bond, obtained and retained possession of the same. After doing this they were estopped from setting up that the entry of levy made by the constable did not sufficiently describe the property in question. The point thus presented is, in principle, controlled by the decision of this court in *Lumber Co. v. Clements*, 108 Ga. 791, 33 S. E. 951, wherein it was held that "on the trial of a claim case involving title to personal property levied on under a *fi. fa.*, when the claimant has given a forthcoming bond for the property actually seized by the officer executing the *fi. fa.*, it is not error for the

judge to refuse to dismiss the levy on the ground that the entry thereof on the *fi. fa.* does not sufficiently describe the property."

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 646)

ATLANTA, K. & N. RY. CO. v. WHITAKER.

(Supreme Court of Georgia. June 7, 1902.)

CERTIORARI—DISMISSAL—FAILURE TO SERVE.

1. Failure to serve a writ of certiorari upon the officer whose decision is sought to be reviewed, "fifteen days previous to the court to which the return is to be made," is cause for dismissing the certiorari, unless the plaintiff therein makes it clearly to appear that the failure to serve was not due to his fault or negligence. *Zachery v. State*, 32 S. E. 22, 106 Ga. 123.

2. Where, because of such failure, the answer of the magistrate, though filed, was not made at the term to which the same was returnable, the certiorari will be dismissed. Aliter if, notwithstanding the failure to serve the writ, the magistrate does answer in due time.

3. In the case of *Crapp v. Morris*, 33 S. E. 951, 108 Ga. 795, the sole ground of the motion to dismiss was the failure to serve the magistrate, who nevertheless had filed an answer, and the point was not made that the same was not filed in due time.

(Syllabus by the Court.)

Error from superior court, Gilmer county; Geo. F. Gober, Judge.

Action by P. B. Whitaker against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff. From an order dismissing a writ of certiorari, defendant brings error. Affirmed.

John P. Perry and Smith, Hammond & Smith, for plaintiff in error. C. D. Phillips, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 661)

SOUTHERN RY. CO. v. CAMP.

(Supreme Court of Georgia. June 7, 1902.)

RAILROADS—KILLING STOCK—EVIDENCE.

The evidence in behalf of the plaintiff established a right to recover, and though the testimony of the defendant's witnesses, if credible, made out a complete defense, yet, as there was a conflict between their testimony and that of a witness for the plaintiff upon a material point,—the former swearing that the animal killed did not get upon the railroad track until the locomotive was within 10 or 15 feet of the place where the animal came upon the track, and the latter testifying that the animal was on the track when the train was 75 or 100 yards distant from it,—the verdict against the company was not unwarranted. In such a case the jury are authorized, because of the conflict, to reject the testimony in behalf of the defendant, and base their finding on that introduced by the plaintiff.

(Syllabus by the Court.)

¶ 1. See *Estoppel*, vol. 19, Cent. Dig. § 48; *Execution*, vol. 21, Cent. Dig. § 420.

Error from city court of Floyd county; John H. Reece, Judge.

Action by G. D. Camp against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error. Fouché & Fouché and Harris, Chamlee & Harris, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 736)

FENN et al. v. MADDOX et al.

(Supreme Court of Georgia. June 12, 1902.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This case falls within the thoroughly established rule that a judgment granting a first new trial will not be disturbed unless it affirmatively appears that the verdict was, under the law applicable, demanded by the evidence.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between L. H. and E. L. Fenn against J. J. and J. E. Maddox. From an order granting a new trial, L. H. and E. L. Fenn bring error. Affirmed.

Thos. L. Bishop, for plaintiffs in error. W. H. Terrell, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 714)

SOUTHERN RY. CO. v. RAGSDALE.

(Supreme Court of Georgia. June 10, 1902.)

PLEADING—GENERAL DEMURRER—APPEAL.

1. As against a general demurrer, the petition sets forth a cause of action.

2. The requests to charge which were refused were, so far as legal and pertinent, covered by the general charge. The portions of the charge upon which error was assigned were, when taken in connection with the general charge, free from error. The case was fairly submitted to the jury. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by J. T. Ragsdale against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hugh M. Dorsey, for plaintiff in error. C. D. Phillips, Enoch Faw, and P. D. McCleskey, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 763)

SMITH v. HEARN.

(Supreme Court of Georgia. June 11, 1902.)

APPEAL—REVIEW.

There was no error in the rulings on evidence which were complained of, nor in the charges which were assigned as error. The request to charge, so far as legal and pertinent, was covered by the general charge, which fairly submitted the issue to the jury. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Carrollton; W. C. Hodnett, Judge.

Action between Talbot Smith and J. T. Hearn. From the judgment, Smith brings error. Affirmed.

Oscar Reese and C. P. Gordon, for plaintiff in error. W. D. Hamrick, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 763)

NEWELL v. TURNER.

(Supreme Court of Georgia. June 11, 1902.)

APPEAL—REVIEW.

There was sufficient evidence to support the verdict, and none of the grounds of the motion for a new trial show that the trial judge committed any error of such materiality as required the grant of a new trial.

(Syllabus by the Court.)

Error from city court of Carrollton; W. C. Hodnett, Judge.

Action between W. L. Newell and R. F. Turner. From the judgment, Newell brings error. Affirmed.

Sidney Holderness and Oscar Reese, for plaintiff in error. L. D. McPherson, L. M. Richards, and C. P. Gordon, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 736)

MOORE v. PENN et al.

(Supreme Court of Georgia. June 12, 1902.)

APPEAL—HARMLESS ERROR—EXECUTION—LEVY ON EXEMPT PROPERTY—VERDICT OF JURY.

1. It is not prejudicial to a party to admit illegal testimony the only effect of which, if of any probative value, would be to establish a fact which is alleged in his own pleadings. Thus, where in an affidavit made, under the provisions of section 2850 of the Civil Code, in order to procure a levy upon exempted realty, it was averred that the same had been set apart as a homestead, it was not harmful to the plaintiff in the execution levied to allow the defendant therein, who had filed a counter affidavit based on numerous grounds, to introduce, for the purpose of showing that the property levied upon had been so set apart, a

schedule of exempted personalty and realty which did not sufficiently describe the latter.

2. If section 5330 of the Civil Code is in any instance applicable on the trial of a case such as that above indicated, the proper course to be pursued, when the jury returns a general verdict for the defendant, is to require them to retire, and frame their verdict so as to make it show what ground or grounds of the counter affidavit they sustain. It is not proper for the presiding judge or justice to orally ask them "upon what grounds they found their verdict."

3. There was sufficient evidence to support the verdict returned in this case.

(Syllabus by the Court.)

Error from superior court, De Kalb county; Jno. S. Candler, Judge.

Action by M. C. Moore against John Penn and Laura Penn. Judgment for plaintiff. On levy of execution, defendants file counter affidavit. Verdict for defendants. Petition for certiorari overruled, and plaintiff brings error. Affirmed.

A. C. McCalla, for plaintiff in error. Geo. W. Gleaton, for defendants in error.

LUMPKIN, P. J. The judgment now under review is one overruling a certiorari. It appears from the record that M. C. Moore, who held against John Penn and Laura Penn an execution which had been issued from a justice's court, caused the same to be levied on certain realty. Before having the levy made, the plaintiff had filed with the levying officer an affidavit reciting that this realty had been set apart as a homestead to the defendants, but that, for certain reasons set forth, it was nevertheless subject to his execution. This affidavit was based on section 2850 of the Civil Code. The defendants filed a counter affidavit, as therein provided for, and the issue thus formed was on appeal tried by a jury in a magistrate's court, and a verdict was rendered in favor of the defendants. The petition for certiorari complained of this verdict; and, so far as verified by the answer of the magistrate, presented for determination by the superior court the questions dealt with below.

1. At the trial in the justice's court, the defendants offered in evidence a schedule of exempted property, including both realty and personalty. The plaintiff objected thereto on the ground that the realty was not so described as to sufficiently identify it. The objection was overruled, and the evidence admitted. This ruling did not result prejudicially to the plaintiff. It was not incumbent on the defendants to show that the property levied on had been exempted; this fact having been averred in the plaintiff's affidavit for the purpose of having the levy made, and the only issue in the case being whether this property was or was not, though exempted, subject to the plaintiff's execution for the reasons set forth in his affidavit. If, in point of fact, the property in question had never been exempted, there was no occasion for the plaintiff's undertak-

ing to pursue the remedy provided for by the section of the Code above cited.

2. The counter affidavit set up various reasons why the execution should not be allowed to proceed. The verdict was a general one in favor of the defendants. It appears from the answer of the magistrate that "before the jury dispersed * * * one of the plaintiff's counsel requested [him] to ask the jury upon what grounds they found the verdict," but that the magistrate declined to comply with this request. If, under the facts of this case, the jury should, agreeably to the provisions of section 5330 of the Civil Code, have returned a verdict which showed "upon which" of the pleas their finding in favor of the defendants was based, the proper course to be pursued by the plaintiff was to request the magistrate to require the jury to retire and amend their verdict so as to make it show what ground or grounds of the counter affidavit they thereby sustained. Clearly, the plaintiff had no right to demand that the magistrate orally catechise the jury as to the reasons influencing them in returning a general verdict in favor of the defendants.

3. Complaint was also made that the verdict was contrary to the evidence. On this point it is sufficient to say that the testimony, while conflicting, fully warranted the jury's finding.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 688)

PIKE et al. v. SUTTON.

(Supreme Court of Georgia. June 9, 1902.)

GARNISHMENT—EXEMPTIONS—LABORER'S WAGES—NEW TRIAL.

1. A clerk in a retail store, whose duties are such as to keep him employed one-half of his time in "drudgery and hard work," one-fourth of his time "in waiting on customers in the sale of goods, and one-fourth waiting for customer," is a laborer within the meaning of the laws of this state exempting from garnishment the wages of laborers. *Oliver v. Hardware Co.*, 25 S. E. 408, 98 Ga. 249, 58 Am. St. Rep. 300; *Stuart v. Poole*, 38 S. E. 41, 112 Ga. 818, 81 Am. St. Rep. 81.

2. The court below was right in sustaining the certiorari, but, instead of rendering a final judgment, should have ordered a new trial in the magistrate's court. See *Holmes v. Pye*, 33 S. E. 816, 107 Ga. 784; *Railroad Co. v. Austin*, 37 S. E. 91, 112 Ga. 61.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action between Pike Bros. and E. M. Sutton. From a judgment, Pike Bros. bring error. Reversed.

E. T. Moon, for plaintiffs in error. A. H. Thompson, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

¶ 1. See Exemptions, vol. 22, Cent. Dig. §§ 69, 70.

(115 Ga. 737)

**AMERICAN FREEHOLD LAND MORTG.
CO. OF LONDON, Limited, et al.
v. WALKER.**

(Supreme Court of Georgia. June 10, 1902.)

**APPEAL—ASSIGNMENT OF ERROR—BILL OF
EXCEPTIONS—EVIDENCE.**

1. A direct assignment of error upon a ruling made during the trial of a civil case is presented too late for consideration by the supreme court when it first appears in a bill of exceptions tendered more than 30 days after the adjournment of the term at which such ruling was made; and unless it affirmatively appears that a bill of exceptions embracing such an assignment of error was, with respect thereto, tendered in due time, this court is without jurisdiction to pass upon that assignment.

2. The court erred in rejecting documentary evidence offered by the defendant which tended to establish material allegations embraced in its answer.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Action by A. M. Walker against the American Freehold Land Mortgage Company of London, Limited, and another. Verdict for plaintiff. From an order denying a new trial, the mortgage company brings error. Reversed.

W. E. Simmons, for plaintiff in error. Allen & Tisinger and O. M. Colbert, for defendant in error.

LUMPKIN, P. J. An equitable petition was filed by A. M. Walker against the mortgage company and Riley, as sheriff, to enjoin the enforcement of a writ of possession which had been issued in favor of the mortgage company and against Alice J. Walker, the plaintiff's wife. At the conclusion of the testimony the court directed a verdict in favor of the plaintiff. The mortgage company thereupon made a motion for a new trial, which was overruled, and it excepted. In its bill of exceptions it assigns error not only upon the refusal of the judge to grant this motion, but also upon various rulings made during the progress of the trial, which terminated on the 9th day of October, 1901. The motion for a new trial was overruled on November 16, 1901. The bill of exceptions is dated November 23, 1901, and recites that it was tendered to the presiding judge "within twenty days from the overruling of said motion." But neither the bill of exceptions nor the record discloses when the term of the court at which the case was tried finally adjourned, nor is it in any way made to appear that this term of the court continued for more than 30 days.

1. The first question presented for our consideration is whether or not, in view of the facts just stated, this court has jurisdiction to pass upon any of the assignments of error made in the bill of exceptions, save that re-

lating to the overruling of the motion for a new trial. "A direct assignment of error upon a ruling made during the progress of a trial comes too late if for the first time presented in a bill of exceptions sued out more than thirty days after the adjournment of the term at which such ruling was made." *Heery v. Burkhalter*, 113 Ga. 1043, 39 S. E. 406. So the sole point to be determined is, "Should this court presume that a bill of exceptions is in time when nothing to the contrary appears, or must it affirmatively appear that the bill of exceptions was tendered within the time prescribed by law?" This inquiry arose in the case of *Evans v. State*, 112 Ga. 763, 38 S. E. 78; and, in disposing thereof, Chief Justice Simmons, who delivered the opinion of the court, cited numerous prior decisions to the effect that the all-important jurisdictional fact just referred to was not a legitimate subject-matter of bare presumption, but that when it was not made to affirmatively appear, either from the bill of exceptions, or the transcript of the record accompanying the same, the writ of error must needs be dismissed. See, also, *Bourquin v. Bourquin*, 110 Ga. 440, 35 S. E. 710. It does affirmatively appear in the present case that the exception to the overruling of the motion for a new trial was made in time; so the proper practice to be pursued is not to dismiss the writ of error because the other assignments of error do not stand upon the same footing, but to ignore them, and deal alone with that which is properly before us for consideration. *Collins v. Carr*, 112 Ga. 808, 38 S. E. 346.

2. In the motion for a new trial, complaint is made that the court erred in rejecting certain documentary evidence. This evidence was improperly excluded. The case, in brief, was as follows: Walker, as will have been seen, was seeking to enjoin the mortgage company from enforcing a writ of possession which had been issued in its favor as the result of an action of ejectment brought by it against Walker's wife, and in which a judgment had been rendered in favor of the mortgage company. The theory of Walker's petition was that the land in dispute was in his possession as the head of a family, under and by virtue of a homestead which had been duly set apart. The documentary evidence tended to show that, after the homestead had been set apart, it was sold by the sheriff under an execution against Walker based upon a judgment to which the homestead was subject; that one Waters was the purchaser at the sheriff's sale; and that he had conveyed the land to Mrs. Walker. Obviously, the defendant should have been allowed to prove these facts by any competent evidence.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 638)

SOUTHERN MUT. INS. CO. v. HUDSON et al.

(Supreme Court of Georgia. June 7, 1902.)

SECOND APPEAL—LAW OF THE CASE—REVIEW—INSURANCE—INCREASE OF RISK—EVIDENCE.

1. The rulings heretofore made in this case to the effect that the evidence introduced by the plaintiff on the first trial was sufficient to require the submission to the jury of the question whether or not there had been such negligent use of the property as to materially increase the risk of insurance, and to cause the damage, are now the law of this case, and cannot now be reviewed or reversed. Practically the same evidence for the plaintiff appears in the present record, and, in returning a verdict for the plaintiff, the jury determined that such use did not materially increase the risk. This verdict having been approved by the trial judge by his refusal to set it aside, this court cannot reverse that judgment on the ground that the verdict is contrary to evidence and against the law.

2. There was no error in excluding the testimony of the witnesses who were asked their opinions whether named acts of the plaintiff increased the risk of fire to the dwelling house which was burned. The facts set out in the question were not only capable of being clearly detailed and described to the jury, but they were actually so detailed and described; and the matter under examination was not, therefore, such as rendered the opinion of witnesses admissible, as an exception to the general rule which declares opinions to be inadmissible in evidence.

(Syllabus by the Court.)

Error from superior court, Hall county; J. B. Estes, Judge.

Action by J. W. Hudson and others against the Southern Mutual Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Erwin & Erwin, S. C. Dunlap, and H. H. Dean, for plaintiff in error. W. R. Hammond, for defendants in error.

LITTLE, J. 1. In 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122, this court reversed the judgment of the trial judge, who granted a nonsuit when this case was first tried in the superior court; and in 113 Ga. 434, 38 S. E. 964, appear our rulings by which a new trial was granted to the insurance company, for errors committed by the judge on the second trial of the case. It has been tried again, the plaintiff securing a verdict. The judge again overruled a motion for a new trial, the insurance company excepted, and for the third time we are to determine whether or not any such errors were committed as require or authorize a reversal of the judgment rendered in the superior court. It may be that the evidence in the case is, to a certain extent, different from that which appeared in the two previous records; but whether so or not, the evidence now before us, under the rulings made in 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122, raised issues of fact to be determined by a jury, and under those rulings

the findings of fact made by the jury under the evidence in the present record must stand. Considering the evidence which was then submitted, we ruled in 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. Rep. 122, that there was sufficient testimony introduced by the plaintiff to require the submission to the jury of the issues of fact as to whether or not there had been such negligent use of the property as to materially increase the risk of insurance, and to cause the damage complained of. Conceding that the evidence of such negligent use of the property insured, as it appears in the present record, has been materially strengthened, there still remains the particular evidence on the part of the plaintiff which then influenced this court to declare that it raised an issue of fact, as to whether the acts of the plaintiff materially increased the risk of insurance and caused the damage. Consequently that decision must be taken and held as *res adjudicata* of the point that the court could not, as a matter of law, say that the use of the property as made by the insured materially increased the risk and caused the damage. It may be that we were not correct in our ruling there made, that the judge erred in granting a nonsuit. Subsequent reflection and renewed investigation of the facts have at least caused some of us to doubt whether there was then sufficient evidence introduced by the plaintiff to require the submission to the jury of the issue of fact as to whether or not there had been such negligent use of the property in question as to materially increase the risk of insurance and to cause the damage. But that ruling is now the settled law of this case, whenever the evidence which was submitted by the plaintiff on the first trial appears. That same evidence practically appears in the record now before us, and, as it does, we are not at liberty now either to consider or pass upon the point that such evidence was, as a matter of law, insufficient to form the basis of a verdict that the plaintiff was so negligent in the use of the property as to increase the risk and cause the damage, when the jury have found to the contrary.

2. Error is further assigned in the refusal of the trial judge to allow two witnesses on cross-examination to answer a certain hypothetical question propounded to each, to wit, whether, in the opinion of the witnesses, certain acts done by the plaintiff increased the risk of fire to the dwelling house of plaintiff, which was consumed. The acts referred to were founded on the evidence in the case, and were the hauling of a quantity of wheat to thrash, then putting a wood-burning engine, without a spark arrester, not further than 84 feet from the house, then firing up the engine with wood, and putting the separator nearly halfway between the house and the engine, and proceeding to thrash the grain, placing the straw at from about 15 to 30 feet of the

house, when the engine, being used, emitted sparks of fire, flying into the air, and flying where they might drift, etc. At the time this question was propounded, counsel for the defendant stated that he expected to prove by the witnesses that the facts enumerated would, in their opinion, increase the risk of fire to that house, and that he also expected that the witnesses would give their reasons for such opinion. The question was objected to by counsel for the plaintiff, and the court sustained the objection, on the ground that that was a matter to be determined by the jury from the facts, and not from the opinions of witnesses. So the naked question is presented whether the opinion of a witness, when he gives reasons therefor, is admissible as evidence to prove the fact that the acts indicated in the question increased the risk of fire. When the case was here the second time, as will be seen by reference to 113 Ga. 434, 38 S. E. 964, the question was made whether the exclusion of an answer to a question which was similar in some, but not in all, respects to the one we are now considering, was error. Our conclusion was that, where the question under examination was one of opinion, any witness might testify as to his opinion, giving his reasons therefor, but a question seeking to elicit an opinion should not be so framed as to require the witness to review the testimony given by other witnesses in the case. The question there dealt with was not only hypothetical, but in reference to the facts stated it contained this additional clause: "All as detailed by the witnesses on the stand in your presence in this case." In dealing with the admissibility of the answer to that question, this court confined its rulings to the question as a whole, without determining that the question then in issue was one in which opinions were admissible. We simply determined the proposition of law that, where the question was one of opinion, a witness might testify in answer to such question as to his opinion, if he gave his reasons for such opinion, but a question which sought to elicit an opinion should not be so framed as to require the witnesses to review the testimony given by the other witnesses in the case; and we therefore held that an answer to the question so framed was, for the reason indicated, admissible. We by no means decided that the question then under examination was one of opinion, but, even had it been, that it was not properly framed, because of the reference to the evidence given by other witnesses in the case. When considered in this light, nothing will be found either in the headnotes or the opinion which indicates a conclusion on the part of this court that the question under examination there was one in which the opinion of the witness on a hypothetical question was admissible. In the case of *Mayor, etc., v. Wood*, 114 Ga. 370, 40 S. E. 239, which was an action against a munic-

ipal corporation to recover damages alleged to have been sustained in consequence of physical injuries due to the defective and unsafe condition of a part of one of the streets of the city, these questions were asked: "Was not that street broad enough and wide enough at that point, and on out, for all reasonable purposes?" "I will ask you your opinion as to whether or not that place was dangerous?" It was ruled by this court that there was no error in excluding the answer to either of these questions, because each sought an expression of opinion from the witnesses. In dealing with this subject, Mr. Justice Fish said: "As a general rule, a witness should be confined to a statement of facts, his opinions being irrelevant and inadmissible. It is the peculiar province of the jury to draw deductions and form conclusions from the facts shown by the evidence, and it is only from the necessity of the case that a witness is allowed to give his opinion to aid the jury in arriving at a correct conclusion upon the facts before them. Thus experts on questions relating to a particular art or science, or which come under the observation and experience of persons engaged in a particular profession, trade, or occupation, who, from their superior facilities and experience, are better qualified than ordinary jurors to form correct conclusions thereon, are permitted to give their opinions to the jury, based upon given facts which they have testified to themselves, have heard others testify to in the case, or which have been hypothetically stated to them. And in this state, at least, where the question under consideration is a proper one to be illustrated by the opinion of an expert, one who is not an expert may give his opinion thereon, provided he testifies to the facts upon which such opinion is based;" citing *Railroad Co. v. Dorsey*, 68 Ga. 228; *Railroad v. Coggin*, 73 Ga. 689. Mr. Justice Fish also quoted rule 63 from *Lawson, Exp. Ev.* 505, in these words: "The opinions of an ordinary witness, derived from observation, are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal; e. g., questions relating to time, number, dimensions, height, speed, distance, or the like." He also quoted the following from *Town of Cavendish v. Town of Troy*, 41 Vt. 107, with approval: "Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of the witness to a conclusion are incapable of being detailed and described so as to enable any one but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion, or the conclusion of his own mind." The following rule in *Clifford v. Richardson*, 18 Vt. 626, is also quoted: "When all the pertinent facts can be sufficiently detailed and described,

and when the triors are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed." The ruling of this court in the case then under consideration was as follows: "The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described, so that the jurors may be able readily to form correct conclusions therefrom." For a very comprehensive and valuable treatise on the rule for the admission in evidence of the opinions of witnesses, see 1 Greenl. Ev. (16th Ed.) p. 549. Under the ruling made by this court in the case above cited, it is clear that the court committed no error in excluding the opinion of the witnesses who were asked if the acts stated in the question would increase the risk of fire to the dwelling house, as the facts and circumstances upon which the witness must have based his opinion were not only capable of being, but, as a matter of fact, were, clearly detailed and described in the evidence of other witnesses who testified in the case; and from these facts and circumstances the jurors could as readily have drawn conclusions as could these witnesses. Their opinions could have added nothing to the facts in evidence. It was the judgment and opinion of the jurors from those facts which should have been the basis of their verdict, and not the conclusions of witnesses who, without any knowledge of the facts, merely had opinions for themselves as to whether the risk was increased; and the matter to be determined could only properly have been determined from the facts, and not from the opinions of witnesses. These remarks are applicable to the fourth and fifth grounds of the amended motion for new trial, and neither of these grounds presents a good cause for setting aside the verdict which was rendered; nor do we find that any error was committed by the trial judge which requires a reversal of his judgment.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness, and COBB, J., disqualified.

(115 Ga. 768)

OWENS v. READ PHOSPHATE CO.

(Supreme Court of Georgia. June 11, 1902.)

WRIT OF ERROR—ELECTION—DISMISSAL.

Where a plaintiff brings suit and recovers a money judgment against a defendant in an amount less than he claims, and then files a bill of exceptions alleging that errors were committed on the trial in which the judgment was rendered, but subsequently has execution issued on his judgment and levied on the property of the defendant, and the same is paid off and discharged by the defendant, such plaintiff cannot afterwards prosecute his writ of error in this court. Having coerced the payment of his judgment, he will be held to have elected to take it as rendered. When such facts are made to appear to this court, the

writ of error will be dismissed. Elliott, App. Proc. § 150, and cases cited in note 3, p. 126; 2 Cycl. Law & Proc. 652, and numerous cases cited in note 76, p. 653.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Action by C. F. Owens against the Read Phosphate Company. Judgment for plaintiff, and defendant brings error. Dismissed.

W. D. Crawford and Simon Blue, for plaintiff in error. J. H. Lumpkin and J. J. Dunham, for defendant in error.

PER CURIAM. Writ of error dismissed.

LEWIS, J., absent on account of sickness.

(115 Ga. 748)

TRAMMELL v. MALLORY et al.

(Supreme Court of Georgia. June 10, 1902.)

TROVER—ANSWER—TENDER BY DEFENDANT—VERDICT.

1. When the defendant in an action of trover for the recovery of personalty and its hire, at the first term, tenders the property sued for, and files an answer disclaiming title thereto, and in such answer also alleges that the property was worth nothing for hire, and that no demand was made before suit, and also sets up facts showing that there has been no conversion, such answer substantially meets the requirements of section 3897 of the Civil Code, and the plaintiff cannot have a money verdict for the value of the property, but the trial should proceed for the purpose of determining whether or not the plaintiff is entitled to recover hire and costs.

2. Where, in such a case, the property sued for consists of cumbrous articles, such as an engine and boiler and cotton gin, and the plaintiff is a nonresident of the county in which the same is situated, a bona fide offer to deliver the property at any railroad station in that county which the plaintiff may select is sufficient to constitute a proper tender.

(Syllabus by the Court.)

Error from superior court, Worth county; W. N. Spence, Judge.

Action by Mallory Bros. & Co. against J. W. Trammell. Judgment for plaintiffs. Defendant brings error. Reversed.

Frank Park, for plaintiff in error. D. H. Pope & Son, for defendants in error.

FISH, J. Mallory Bros. & Co. brought an action of ball trover against J. W. Trammell, to recover an engine, boiler, and cotton gin and hire for the same. At the first term the defendant tendered to the plaintiffs the property sued for, and filed an answer disclaiming title thereto, and alleging that the property was worth nothing for hire, that no demand for the property had been made upon him prior to the filing of the suit, and setting up facts showing that there had been no conversion. Upon the trial the defendant insisted that, in view of his tender and disclaimer of title at the first term, the only issue to be tried was as to whether any hire or costs should be recovered by the

plaintiffs, and requested the court to submit that issue only to the jury. The court declined to comply with this request, and defendant excepted. It appeared upon the trial that plaintiffs had sold the property sued for to defendant, on credit, taking his notes for the purchase money; the notes reciting that title to the property should remain in the plaintiffs till all the purchase price should be paid. The evidence submitted in behalf of the defendant tended to show that the gin was practically worthless, and that, on this account, defendant was unable to run the machinery for ginning cotton, the purpose for which it was bought. It also appeared that the defendant, after full knowledge of the alleged defects in the machinery, renewed the purchase-money notes, which were in evidence, and gave additional security for their payment. There was no evidence either of a demand upon the defendant for the property, or of an actual conversion of the same by him, before suit. After all the evidence was submitted, the plaintiffs asked for a verdict for the amount appearing to be due on the renewal notes for the purchase money, and the court directed a verdict in accordance with this request. Defendant excepted to such direction upon various grounds.

We deem it necessary to deal with only one of these grounds of exception, viz., that after tender and disclaimer of title made by defendant at the first term, together with the allegations in his answer then filed, to the effect that the property was worth nothing for hire, and that no demand for the property had been made, and there had been no conversion, the trial could proceed for the purpose of determining only whether or not the plaintiffs were entitled to recover hire and costs. We think this exception well taken. Section 3897 of the Civil Code declares: "In all actions for the recovery of personal property, if the defendant at the first term will tender the property to the plaintiff, together with reasonable hire for the same since the conversion, disclaiming all claim of title, the costs of the action shall be paid by the plaintiff, unless he can prove a previous demand of the defendant, and a refusal to deliver it up." The defendant substantially met the requirements of this section. At the first term he filed an answer in which he expressly disclaimed all claim of title to the property sued for, and tendered it to the plaintiffs, offering and agreeing, as it was impracticable to bring it into court, to place it free on board the cars at any railway station in Worth county the plaintiffs might designate. The property was cumbersome, and it appeared that the plaintiffs did not reside in Worth county, where the property was situated, and where the suit was pending, but in Bibb county. Under the circumstances, we think this was a good tender. Civ. Code. § 3729. It is true that defendant did not tender reasonable hire for the property "since the conversion," but he

alleged, as a reason for his failure to do so, that the property was worth nothing for hire, that there had been no demand made upon him for the property, and that there had been no conversion of it. If there had been no conversion, or if the property was worth nothing for hire, the plaintiffs could not recover hire. Under section 5335 of the Civil Code, the plaintiff in an action to recover personal property may say, upon the trial, whether he will accept an alternative verdict for the property or its value, or whether he will demand a verdict for the damages alone, or for the property alone and its hire, if any; and it is the duty of the court to instruct the jury, if they believe the plaintiff entitled to recover, to render the verdict as the plaintiff may thus elect. But this section must be construed in connection with section 3897, and where the action is to recover the property and its hire, and the defendant, at the first term, tenders the property to the plaintiff, together with reasonable hire for the same since the conversion, disclaiming all claim of title, the costs of the action shall be paid by the plaintiff, unless he can prove a previous demand of the defendant, and a refusal to deliver up. Where, in such a case, the defendant has complied, at the first term, with the provisions of section 3897, and thereby has become entitled to the rights therein conferred, he cannot thereafter be divested of such rights by the plaintiff, at the trial term, electing to take a verdict for damages, instead of one for the property and its hire. Where the defendant fails to comply with section 3897, then the plaintiff may elect as to the verdict he will take, in the event of recovery, as provided in section 5335. From the foregoing, it follows that the court erred in directing the verdict complained of, and in not limiting the issue to be tried by the jury to the question whether or not the plaintiffs were entitled to recover hire and costs.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 770)

DAVIS v. MAYOR, ETC., OF CITY OF CORDELE.

(Supreme Court of Georgia. June 11, 1902.)
MUNICIPAL CORPORATION—REMOVAL OF OFFICER—ACTION FOR SALARY.

If a municipal officer is removed from his office by the city council, and thereafter brings an action against the municipality for his salary, claiming that he was unlawfully removed, the municipality is not confined in its defense to the cause of removal specified in the resolution removing him, but may plead and prove other matters sufficient in law to justify the removal.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Felton, Jr., Judge.

Action by J. M. Davis against the mayor,

etc., of the city of Cordele. Judgment for defendant, and plaintiff brings error. Affirmed.

Shipp & Sheppard, for plaintiff in error.
S. R. Fields, for defendant in error.

SIMMONS, C. J. In January, 1900, Davis was elected clerk and treasurer of the city of Cordele. In February thereafter a majority of the city council adopted a resolution which, after reciting that Davis had been an alderman at the time of his election, and had participated therein, and that he was therefore ineligible, under section 739 of the Political Code, to hold his office, declared the office vacant. The council thereupon elected another clerk and treasurer to fill the unexpired term of Davis, and the latter was no longer allowed to fill the office. After the expiration of the term for which he had been elected, Davis brought suit to recover his salary for the full term. The defendant answered by denying all the material allegations as to the merits, and pleaded specially that the plaintiff had been rightfully discharged, because he was not competent to fill the office or discharge its duties, and also that he was an alderman at the time he was elected, and was therefore ineligible. At the trial of the case the plaintiff testified as to taking the oath of office and giving bond, and that he was competent to discharge the duties of the office, and had done so until removed. He also testified that he had received his salary up to the time of his removal. The defendant introduced evidence tending to show that the plaintiff was not competent to perform the duties of the office, and had not properly performed them while he was in office. It also introduced a resolution of the city council in which it was recited that Davis had been an alderman at the time of his election, and participated therein, and was therefore ineligible, and the office was vacant; also a resolution showing the election of another in the place of Davis to fill the unexpired term. It was also shown by Davis that the term of office for which he had been elected was 12 months. The jury found for the defendant. The plaintiff made a motion for a new trial, which was overruled. He excepted. This motion complained principally of the admission of certain evidence over the objections of the plaintiff. This evidence was the testimony of two of the aldermen to the effect that Davis was incompetent to discharge the duties of the office, and had not properly performed them. Complaint was also made of the admission over objection of the minutes of the city council showing the cause of his removal.

We think that there was no error in the admission of any of this evidence. The minutes showed that the plaintiff had been removed formally by a resolution of council. They also showed that he was removed because, in the opinion of a majority of the

council, he was ineligible to hold the office. The fact recited, that he was an alderman at the time of his election, would not itself have justified his removal, for section 739 of the Political Code, as amended by the act of 1899, p. 26 (Van Epps' Code Supp. § 6132), expressly provides that nothing therein shall render an alderman ineligible to be elected during his term of office to serve in another municipal office in a term immediately succeeding his term as alderman. If the resolution contained in the minutes had gone further, and declared that Davis was then an alderman, at the time of his removal, or that his term as alderman had not expired until after the commencement of his term as clerk and treasurer, it would, of course, have shown a sufficient reason for his removal. The record, however, is utterly silent as to whether Davis was an alderman at the time of his removal, or whether his term had expired before he qualified as clerk and treasurer. No sufficient reason for his removal was, therefore stated in the resolution of removal. The city, however, had a right to show, in a suit by him against it for his salary, that there was sufficient legal cause for his removal, other than the invalid cause shown in the resolution. Had his removal been a judicial act on the part of the council, and he had sued out a writ of certiorari on the ground that the reasons alleged were not sufficient to authorize his removal, the city would in such a proceeding have been limited to the reasons specified in the resolution of removal. But when he acquiesced in the ministerial act of removal, and then brought suit for his salary, the city is not restricted to the ground stated in the resolution, but may plead and prove any other good, existing cause for the removal. In *Mayor, etc., v. Hays*, 25 Ga. 590, it appeared that the city marshal had been removed on a specified ground. He sued out a writ of certiorari, and the judge of the superior court quashed the proceedings of the council. This judgment was affirmed by this court in *Mayor, etc., v. Shaw*, 16 Ga. 172. The marshal then brought suit for the recovery of his salary and fees. The city sought to justify his removal by proof of other matters good in law to justify a removal, and the trial judge excluded this evidence. This court reversed the judgment of the lower court; *McDonald, J.*, saying: "The presiding judge excluded the evidence, no doubt, on the view which he took of the judgment of the court above cited, in which it was held that the marshal was improperly removed for the cause specified in that record. When he sues for his fees, however, the case comes up in a different aspect, and the defendant may plead and prove any cause which would justify the removal, so far as it respects his duties as an officer of the corporation. To violate a public law, may not be a breach of duty, as such officer, and that is all that this court decided in the case first brought up. But if there was other

good cause for the removal of the intestate, as marshal, there is no good reason why the case should not be defended on that ground. If his term of office had not expired when this suit was instituted, and he had moved for a mandamus to restore him, instead of bringing an action for his salary and fees, the court would not have interfered, if good cause for his removal had been shown, although he may have been removed without notice." This case is controlling in the present one. See, also, Tied. Mun. Corp. § 85, where it is said: "An official of a municipal corporation, who has been illegally removed, can also recover the amount of compensation due him from the date of his removal to that of his reinstatement, or to the expiration of his term. But in determining whether the removal was unlawful, the reviewing court will not be confined to the consideration of the grounds which were assigned for the removal, but may and should consider all the facts and circumstances of the case which affect the question of legality of the removal, and find for the city whenever there is sufficient justification for the removal, whether the authorities made the removal on that ground, or on some other untenable ground." There was therefore no error in admitting the evidence showing reasons or grounds for the discharge of the plaintiff other than the one specified in the resolution, and this evidence was sufficient to support the verdict. We will therefore not interfere with the discretion of the trial judge in refusing a new trial.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 659)

BARNETT v. TANT.

(Supreme Court of Georgia. June 7, 1902.)

LABORER'S LIEN — ENFORCEMENT — JUDGMENT—CERTIORARI—APPEAL—REVIEW.

1. Where a laborer forecloses his lien, and has it levied upon personal property belonging to his employer, and the latter files a counter affidavit, but no replevy bond is given, the only judgment to which the laborer is entitled, if he succeeds in the suit, is a special judgment against the property. If the defendant sues out a certiorari to the superior court, and at the hearing the certiorari is overruled and a final disposition of the case made by the judge, the latter is not authorized to enter up a general judgment against the plaintiff in certiorari and his surety on the certiorari bond. He can only enter a judgment affirming the judgment of the justice of the peace, and ordering the execution to proceed against the property levied upon, and give judgment for costs on the certiorari bond. The cases of *Triest v. Watts*, 58 Ga. 73, and *Argo v. Fields*, 37 S. E. 995, 112 Ga. 677, which are here controlling, reviewed and adhered to.

2. Where in such case the judge has entered up a general judgment on the certiorari bond, it is not error to set it aside on motion of the surety on the bond.

3. Where the record does not affirmatively show whether or not a replevy bond was given, and at the hearing of the motion to set aside the judgment rendered by the superior court

42 S.E.—5

on the certiorari bond both parties agree that no replevy bond was given, and the judge predicates his judgment upon this admission, the losing party cannot complain in this court that the judge erred in considering a fact not appearing in the record.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action between W. J. Barnett and M. M. Tant. From the judgment, Barnett brings error. Affirmed.

Harris, Chamlee & Harris, for plaintiff in error. M. B. Eubanks, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 721)

SOUTHERN RY. CO. v. BROCK.

(Supreme Court of Georgia. June 10, 1902.)

ACTION AGAINST RAILROAD—VENUE—KILLING STOCK—EVIDENCE.

1. A judgment against a railroad company upon a suit for damages resulting from an injury to property, rendered in any other county than the one in which the cause of action originated, is "utterly void," except in cases where the suit is brought in the county where the principal office of the company is located, and it is shown that the company had no agent in the county where the cause of action originated. Civ. Code, § 2334.

2. Even if in the present case the evidence was sufficient to authorize a finding that the animal for the killing of which damages were claimed was killed by the agents and servants of the defendant, there was no sufficient evidence to authorize a finding that the injuries which resulted in the death of the animal were inflicted in the county in which the suit was brought; and it not appearing that the suit was brought in the county where the principal office of the defendant was located, and that there was no agent in the county in which the animal was killed, a verdict in favor of the plaintiff was unauthorized, and the court erred in not sustaining the certiorari upon the ground that the verdict was contrary to the evidence.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by A. Brock against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox, for plaintiff in error. B. Z. Herndon and Jones & Martin, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 769)

JONES v. DANNENBERG CO.

(Supreme Court of Georgia. June 11, 1902.)

SECOND APPEAL—LAW OF CASE—DIRECTING VERDICT.

The law of this case was settled at the October term, 1900, of this court. See 37 S.

E. 729, 112 Ga. 426, 52 L. R. A. 271. It does not appear that at the trial now under review the court below erred in rejecting testimony; but as there were, in view of the evidence introduced, issues of fact which should have been submitted to and passed upon by the jury, the court erred in directing a verdict.

(Syllabus by the Court.)

Error from superior court, Sumter county; **Z. A. Littlejohn, Judge.**

Action by the Dannenberg Company against R. L. Jones. Judgment for plaintiff, and defendant brings error. Reversed.

Allen Fort & Son and J. B. Pillsbury, for plaintiff in error. Greer & Felton, J. A. Hixon, and Hall & Wimberly, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 748)

SEABOARD AIR LINE RY. v. CHRISTIAN.

(Supreme Court of Georgia. June 10, 1902.)

CERTIORARI TO JUSTICE—CORRECTION OF VERDICT.

1. When a superior court properly overrules all the grounds of a petition for certiorari save one presenting the point that the verdict under review was contrary to law because for an amount larger than that sued for, that court may, with the assent of the plaintiff, correct the verdict and the judgment entered thereon by reducing them to the amount claimed in the action, and then allow the same to stand.

(Syllabus by the Court.)

Error from superior court, Stewart county; **E. J. Reagan, Judge.**

Action by M. M. Christian against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

E. T. Hickey and **E. A. Hawkins**, for plaintiff in error. **Clarke & Harrison** and **G. Y. Harrell**, for defendant in error.

LUMPKIN, P. J. Mrs. Christian brought in a justice's court an action against the railway company for the killing of a cow, laying her damages at \$40. At the trial, on an appeal in the magistrate's court, she obtained a verdict for \$50. The defendant thereupon sued out a certiorari, complaining that the verdict was contrary to law and the evidence, and making the special point that a verdict for \$50 was unwarranted in an action wherein the plaintiff claimed only \$40. The only testimony as to value offered on the trial before the jury was that of one witness, who swore that the cow was worth \$50. Upon the question of liability, the evidence was conflicting, though sufficient to sustain a finding in favor of the plaintiff. On the hearing of the certiorari in the superior court, she offered to write off from her judgment the

sum of \$10, and the judge accordingly passed an order in which provision was made for reducing the amount of the judgment to \$40, and which contained a recital that, save as to amount, the verdict of the jury was approved, and the certiorari therefore overruled in so far as it related to the complaint of the defendant that no liability on its part was established by the evidence. To this action by the court below, the railway company excepted.

We certainly cannot undertake to reverse the judgment complained of on the ground that the finding of the jury was unwarranted, in so far as the question of the company's liability was concerned. So the question upon which the case must turn is: Did the judge, under the facts appearing, have authority to give to it the direction above indicated? As a matter of course, a verdict for \$50, in a suit wherein the pleadings authorize a recovery of no more than \$40, should be set aside unless the plaintiff be willing to write off the excess. *Railroad Co. v. Crawley*, 87 Ga. 191, 13 S. E. 508; *Moomaugh v. Everett*, 88 Ga. 67, 13 S. E. 837. Such a verdict is not, however, void, and may be cured in this court by a proper direction whereby the plaintiff's recovery is limited to the amount for which he brought suit. *Hunnicut v. Perot*, 100 Ga. 312, 27 S. E. 787; *Railroad Co. v. Calhoun*, 104 Ga. 384, 30 S. E. 868. This being so, we know of no reason why a judge of the superior court may not, under the authority conferred upon him by section 4652 of the Civil Code, give such a direction in disposing of a writ of certiorari. That section makes it the duty of the judge to enter a final judgment, in a certiorari case, "when the error complained of is an error in law which must finally govern the case, and the court shall be satisfied there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below." We understand this language to mean that, when the correction of an error of law committed in the trial court will finally dispose of a case upon its merits, the judge has authority to enter up a final judgment therein, there being in that event no necessity for another hearing in the court in which the case originated. Whether or not a question of fact is involved depends, of course, upon the character of the case presented by the petition for certiorari and the answer thereto. The cases of *Grimsley v. Alexander*, 106 Ga. 165, 32 S. E. 24; *Holmes v. Pye*, 107 Ga. 784, 33 S. E. 816; *Walker v. Reese*, 110 Ga. 582, 35 S. E. 771; and *Railroad Co. v. Austin*, 112 Ga. 61, 37 S. E. 91,—established the doctrine that, while the superior court may on certiorari set aside a verdict unsupported by evidence, it cannot properly, when there are issues of fact involved, render a final judgment in favor of the plaintiff in certiorari. In other words, the superior court is without power to substitute, for a verdict which it

¶ 1. See *Certiorari*, vol. 2, Cent. Dig. §§ 125, 126.

does not approve, another which, in the opinion of the judge, the jury should have rendered. It is to be noted, however, that these cases are wholly unlike the one now before us. Here, it is manifest that the judge was not of the opinion that the verdict under review was unsupported by the evidence, or open to attack on any ground save that it exceeded in amount the sum for which the plaintiff brought suit. The judge did not undertake to substitute for the verdict of the jury another of his own making, in favor of the losing party, but merely took steps to cure their verdict in order that it might lawfully stand. In pursuing this course he was, as authorized to do by the section of the Code above cited, simply correcting an error of law, and thereby bringing to a legitimate end a case which there was no necessity of sending "back for a new hearing before the tribunal below."

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 778)

WING v. BLOCKER.

(Supreme Court of Georgia. June 11, 1902.)
CERTIORARI TO JUSTICE—OBJECTIONS RAISED
—RIGHT TO COSTS.

1. Where the plaintiff, in an action in a justice's court upon an open account for a specified sum, obtains a verdict for a less sum, and in his petition for certiorari makes no complaint as to the amount of the verdict, but merely alleges that the same is contrary to law and evidence, "because there was no evidence to show that the plaintiff should pay the cost," the complaint of the verdict should be treated as raising but a single exception thereto, viz., that it embraced a finding of costs against the plaintiff.

2. When, upon the trial of such a case in a magistrate's court, the defendant tendered to the plaintiff the exact amount, which the jury afterwards found in the latter's favor, and he refused to accept the same, he was lawfully chargeable with all the costs accruing after such refusal, but not with the costs which had accrued before the tender was made.

3. The superior court was right in sustaining the certiorari; but as the only question involved is one of costs, as indicated above, direction is given that the judgment of the superior court be amended, so as to embrace an instruction to the justice's court that, when the case is again called in that court, the verdict and judgment therein rendered be so amended as to relieve the plaintiff in the original action of the payment of all costs save those which accrued after his refusal to accept the tender, and that after being so amended that verdict and judgment be allowed to stand.

(Syllabus by the Court.)

Error from superior court, Montgomery county; D. M. Roberts, Judge.

Action by Monroe Wing against T. A. Blocker. From a judgment sustaining a certiorari to a judgment for plaintiff, he brings error. Affirmed.

J. B. Gelger, for plaintiff in error. W. L. Wilson, A. B. Hutcheson, and Jas. K. Hines, for defendant in error.

PER CURIAM. Judgment affirmed, with direction.

LEWIS, J., absent on account of sickness.

(115 Ga. 651)

ABBOTT v. DANEWOOD.

(Supreme Court of Georgia. June 12, 1902.)
GARNISHMENT—ANSWER OF GARNISHEE—
TRAVERSE—EVIDENCE.

Where, in the trial of a traverse of an answer to a summons of garnishment, it was shown by the plaintiff that the garnishee had, more than three years before the service of the summons, admitted indebtedness to the defendant, while the garnishee testified that, subsequently to the time the admissions were made, a full settlement with the defendant had proved that the garnishee was not in any wise indebted to the defendant, and there was no evidence to contradict this testimony of the garnishee, the evidence was not sufficient to support a verdict sustaining the traverse.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Flite, Judge.

Action by Ellen Danewood against M. P. Abbott. Judgment for plaintiff, and defendant brings error. Reversed.

R. J. & J. McCamy and Cantrell & Ram-sour, for plaintiff in error. Starr & Erwin, for defendant in error.

SIMMONS, C. J. Suit upon an account was brought by Mrs. Danewood against Harris to the April term, 1901, of a justice's court. The plaintiff also sued out a summons of garnishment against Abbott. The latter answered, denying indebtedness to Harris, and this answer was traversed. Upon the trial of the traverse, Mrs. Danewood and two other witnesses testified, in substance, that they had gone in the latter part of the year 1897, or January, 1898, to see Abbott, and presented him an order from Harris on Abbott to pay Mrs. Danewood the amount owed by Harris; that Abbott at the time stated he owed Harris that amount; that he and Harris were jointly interested in the accounts for the services of a stallion; that he had not had a settlement with Harris, but that as soon as he collected the money he would pay Mrs. Danewood. Abbott testified that, when Mrs. Danewood and the others called, he stated to them that he had not had a settlement with Harris, and did not know whether he was indebted to him or not, but that if, upon settlement, it turned out that he owed Harris, he would pay Mrs. Danewood. He further testified that when, subsequently, he settled with Harris, it was ascertained that he did not owe Harris anything, but that, on the contrary, Harris was indebted to him, and that he, therefore, did not pay Mrs. Danewood's claim. He further testified that he had not since that time become indebted to Harris. Under this evidence the jury returned a verdict in favor of the traverse, and judgment

was rendered against Abbott for the amount of Mrs. Danewood's judgment against Harris. Abbott, being dissatisfied with the verdict, sued out a writ of certiorari to the superior court. Upon the hearing in that court, the certiorari was overruled, and Abbott excepted.

In our opinion, the court erred in not sustaining the certiorari. The admissions proved by the plaintiff's witnesses were made not later than January, 1898. The evidence showed that, when Abbott made these admissions of indebtedness, he also stated that he and Harris had not had any settlement of their accounts, and promised that when he collected the money he would pay Mrs. Danewood. Abbott testified that he subsequently ascertained, upon a full settlement, that Harris owed him. It will be seen that the admissions were made more than three years before the summons of garnishment was served upon the garnishee. In the meantime the settlement had been had, and it had turned out that Harris was indebted to Abbott. The evidence of the plaintiff did not contradict this. There was nothing to show that after the settlement Harris did not owe Abbott, as the latter testified. The admissions, made three years before the summons was served, were, in our opinion, fully overcome by the evidence of the garnishee, and it was accordingly error to overrule the certiorari.

It was argued that Abbott was bound by his verbal acceptance of the order on him by Harris in favor of Mrs. Danewood. It is a sufficient reply to say that the proceeding was by garnishment, to ascertain what he owed Harris, and not a suit against him on the acceptance of the order. Conceding the binding force of the acceptance of the order, it does not follow that he owed Harris three years later.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 768)

GORDON et al. v. McELROY.

(Supreme Court of Georgia. June 11, 1902.)

PARTITION—RETURN OF PARTITIONERS—RIGHTS OF DEVISEES.

1. Where partitioners report that "said lands cannot be divided by metes and bounds, as it would decrease the value of the entire lands by said partition," an objection to their return merely setting forth, in general terms, that the lands in question "cannot be sold without great sacrifice and injury to the parties at interest," is not good, in the absence of any allegation showing why this is so.

2. Though, in a devise of lands to a daughter of the testator and her children, it be declared that "the property willed to my [daughter] is to be kept for [her] and [her] children's own use and benefit, free from all debts and control of any husband or person whatever," it is nevertheless the right of any one of the several devisees to have the realty partitioned. The word "kept" must be construed in connection with the words "free from all

debts," etc.; and, thus construed, the devise does not mean that the property must be kept together indefinitely, as against the rights of the tenants in common to a partition.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Action between R. W. Gordon and others and K. McElroy. From a judgment, Gordon and others bring error. Affirmed.

H. O. Cameron, for plaintiffs in error. B. H. Walton, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 790)

EDMONDSON v. SOUTH GEORGIA RY. CO.

(Supreme Court of Georgia. June 12, 1902.)
WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS.

It not affirmatively appearing from the bill of exceptions that the same was served within 10 days, and filed in the office of the clerk of the trial court within 15 days, after having been certified by the judge, and counsel for defendant in error having acknowledged service in these words only: "I hereby acknowledge service of a true copy of the foregoing bill of exceptions, and further service thereof is waived,"—the writ of error must be dismissed. *Vickers v. Sanders*, 32 S. E. 102, 106 Ga. 265.

(Syllabus by the Court.)

Error from superior court, Brooks county; Jno. C. Hart, Judge.

Action between W. A. Edmondson and the South Georgia Railway Company. From a judgment, Edmondson brings error. Dismissed.

M. Baum and S. S. Bennet, for plaintiff in error. H. G. Turner, for defendant in error.

PER CURIAM. Writ of error dismissed.

LEWIS, J., absent on account of sickness.

(115 Ga. 759)

STICKNEY et ux. v. CHAPMAN.

(Supreme Court of Georgia. June 11, 1902.)

ATTACHMENT—NONRESIDENCE—EVIDENCE.

Under the facts disclosed by the record in this case, the evidence demanded a finding that the defendant was a nonresident of the state of Georgia, and it was erroneous to direct a verdict to the contrary.

(Syllabus by the Court.)

Error from city court of Floyd county; Jno. H. Reece, Judge.

Action by R. S. Stickney and wife against J. T. Chapman. Judgment for defendant, and plaintiffs bring error. Reversed.

O. E. Carpenter, for plaintiffs in error. Harris, Chamlee & Harris, for defendant in error.

LITTLE, J. Stickney and wife caused an attachment to issue against the property of Chapman on the ground that he was a nonresident of the state of Georgia, which was levied on two certain lots of land in the city of Rome, Ga. To the declaration in attachment, which was filed, the defendant interposed a plea, and also filed a traverse of the grounds of attachment, in which he denied that he was a nonresident of the state of Georgia, but averred that he did reside in the state, and in Floyd county, at the time the affidavit to obtain the attachment was made, and had resided in said county for a period of time previous to the issuance of said attachment. On the trial of the case, the court struck the plea on demurrer, and rendered a common-law judgment in favor of the plaintiffs against the defendant for the amount sued for. A jury was then empaneled to try the issue made by the traverse of the grounds of the attachment, and evidence was submitted on the question of residence, which is not reported, as we base our opinion on evidence given by the defendant himself, to which reference is hereafter made. At the close of the evidence, the court directed a verdict sustaining the traverse filed by the defendant. To this order and ruling, plaintiffs excepted, as they did, also, to the refusal of the court to direct a verdict for the plaintiffs.

The only question presented for our consideration is whether the defendant, Chapman, was in law a nonresident of the state of Georgia at the time the attachment was sued out. If he was, the direction of a verdict in favor of the traverse of the grounds of the attachment was wrong. On the contrary, if he was a resident of the state of Georgia at the time of suing out the attachment, such direction would be upheld. The question of residence is a mixed one of law and fact; the jury determining the facts, and the judge determining whether the facts as established constitute residence. Ordinarily, the evidence relied on should go to the jury, whose province it is to determine the fact of residence under proper instructions from the court; and had there been any conflict in the evidence in this case it would have been error to direct a verdict either way. It happens, however, that there is no such conflict, and the sole question is whether the facts in evidence show that the defendant, Chapman, was a resident of this state at the time the attachment was sued out. It is contended, on the part of the defendant in error, that at no time did he ever claim any other place than Rome as his home or residence, and that he was only temporarily absent from Rome when the attachment issued, traveling, and exhibiting a circus, and therefore did not acquire a residence at any place other than Rome. He himself testified that he was born in the state of Georgia, and Rome has been his home and place of business for 25 years; that he was tem-

porarily absent in South America for awhile, but still claimed Rome as his home and residence.

Evidently, the theory of the defendant was that if he was legally domiciled in Floyd county, then without regard to the fact that for the purposes of business he continuously remained out of the state, he was a resident of the state; and, further, that the fact that he had acquired no domicile elsewhere determined the question of his residence. This contention, when applied to the construction of laws relating to attachments of the property of nonresident debtors, is not sound. It is said by the compilers of the *American & English Encyclopedia of Law*, on authority (volume 3 [2d Ed.] p. 198), that residence and domicile are not synonymous terms as used in attachment laws, though the distinction is not always accurately drawn. It is the actual, and not the legal, residence which is meant in attachment statutes. Judge Drake, in his work on Attachments, in section 58, also declares on authority that, in determining whether a debtor is a resident of a particular state, the question as to his domicile is not always involved, for he may have a residence which is not in law his domicile. Domicile includes residence with an intention to remain, while no length of residence without intention of remaining constitutes domicile. Our law declares that an attachment may issue when the debtor resides out of the state, and the point of our inquiry is directed to the question whether the evidence showed that, at the time the attachment was sued out, Chapman resided out of the state of Georgia, and not to the question of where he was domiciled. If he was continuously without the state for a considerable period of time, so that ordinary processes of the law could not be served on him, he was unquestionably, under the authorities generally, a nonresident within the contemplation of the statute; but in the case of *Hickson v. Brown*, 92 Ga. 228, 17 S. E. 1035, Mr. Justice Lumpkin went further, and said in the opinion: "The mere fact that a nonresident may be found and served does not prevent a creditor from exercising his right to sue by attachment." In the case of *Keller v. Carr*, 40 Minn. 428, 42 N. W. 292, it was ruled that: "A debtor may reside or remain out of the state so long and under such circumstances as to be a nonresident, within the meaning of the statute relating to attachments, although, by reason of his intention to return, his political domicile continues to be in the state. It is the question of actual residence, and not of domicile merely; and this is a fact to be determined by the ordinary and obvious indicia of residence; but a mere casual or temporary absence of a debtor from the state, on business or pleasure, will not render him a nonresident, even although he may not have a house of usual abode here, at which a summons against him might be served dur-

ing such absence." In the opinion delivered in that case, "residence" was defined as "an act," "domicile" as "an act coupled with an intent"; and it was said that "a man may have a residence in one state or country, and his domicile in another, and he may be a nonresident of the state of his domicile in the sense that his place of actual residence is not there. Hence the great weight of authority holds, rightly so, as we think, that a debtor, although his legal domicile is in the state, may reside or remain out of it for so long a time, and under such circumstances, as to acquire, so to speak, an actual nonresidence, within the meaning of the attachment statute." The supreme court of California, in *Egener v. Juch*, 101 Cal. 105, 35 Pac. 432, 873, ruled that the residence referred to by attachment laws was actual, as contradistinguished from constructive or legal, residence or domicile. In the case of *Carden v. Carden*, 107 N. C. 216, 12 S. E. 197, 22 Am. St. Rep. 876, Shepherd, J., quotes the following from a former decision of that court: "Without deciding who, in law, is a nonresident in other respects, but confining this decision to the construction of this statute [relating to attachments] the conclusion is that where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which require his continued presence there for an unlimited time, such a one is a nonresident of this state for the purposes of an attachment, and that, notwithstanding he may occasionally visit this state, and may have the intent to return at some future time." He says further: "The prominent idea is that the debtor must be a nonresident of this state, where the attachment is sued out, not that he must be a resident elsewhere." If we apply these rules, which seem to be sound and reasonable, to the facts proved in this case by the evidence of the defendant himself, it must be ruled that he was such a nonresident of this state at the time the attachment was sued out as to authorize its issue on that ground. The statute is fully met when it is shown that Chapman was a nonresident of Floyd county; that is, that he did not do the act of residing there, as under the evidence it does not appear that he claimed residence in any other county of Georgia. He himself testified on cross-examination that about 11 years ago (1891) he was employed as conductor on a railroad in South America; that he returned "sometimes every year, sometimes two years, and never less than three years," to his home in Georgia. He remained there until 1898, when he was injured. He then came, not to Georgia, but to New York, for medical treatment. Most of the time afterwards was spent by him in the city of New York, where he was being treated, and where he had a pending suit against the railroad. Afterwards he returned to Rome,—the latter part of 1900,—and then

went to South America on a matter of business, where he remained until the spring of 1901. He had never been to Georgia but once since he went to South America, in October or November, 1900, and on that occasion he remained three or four days, and then returned to South America to look after his business, and returned to New York in October, 1901. He was there at the time the interrogatories were executed. The attachment issued in April, 1901. There was much other evidence, as to the domicile and residence of Chapman, than that which we have extracted from his evidence, but we are at liberty to take this evidence most strongly against himself. Doing so, we extract that which appears above as conclusive of the facts touching his residence. Wherever the legal domicile of the defendant in attachment may have been, it is clear that he did not reside in Georgia in the sense contemplated by the attachment law, which authorizes such a writ to issue against a nonresident of the state.

The judgment of the court below, directing a verdict in favor of the traverse of the ground that the defendant was a nonresident, is reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 790)

FITZGERALD MILITARY BAND v. COLONY BANK et al.

(Supreme Court of Georgia. June 12, 1902.)

GARNISHMENT—NOTICE OF DISSOLUTION—LIABILITY OF GARNISHEE—BOND.

1. Where a suit was pending in a county court, and a summons of garnishment was issued and served upon a debtor of the defendant, and the garnishee answered, admitting funds in his hands, and thereafter the defendant gave a bond to dissolve the garnishment, and the clerk of the court notified the garnishee that the garnishment had been dissolved, and the garnishee paid to the defendant the amount in his hands, and where the bond given to dissolve the garnishment was fatally defective, *held*: (1) That there is no law requiring the clerk to give such notice, and one who acts upon it does so at his peril; (2) that, the bond having been fatally defective, the garnishee is not protected. *Rogers v. Moore*, 40 Ga. 386, distinguished.

(Syllabus by the Court.)

Error from superior court, Irwin county; D. M. Roberts, Judge.

Action by the Fitzgerald Military Band against the Fitzgerald Driving Association. The Colony Bank and Bauder & Bowen were garnishees. Judgment was obtained against defendant. From an order directing a verdict in favor of the garnishees, plaintiff brings error. Reversed.

Eldridge Cutts and Hal Lawson, for plaintiff in error. L. Kennedy and J. H. Martin, for defendants in error.

¶ 1. See *Garnishment*, vol. 24, Cent. Dig. §§ 237, 238.

SIMMONS, C. J. The Fitzgerald Military Band, a partnership, brought suit against the Fitzgerald Driving Association. Pending this suit the plaintiff sued out summons of garnishment against the Colony Bank and Bauder & Bowen. The garnishees answered, admitting funds in their hands. Afterwards the defendant filed in the office of the clerk of the court a bond to dissolve the garnishment. The clerk gave notice to the garnishees that the garnishment had been dissolved, whereupon the garnishees paid over to the defendant the amount they owed it. Judgment was obtained against the defendant, and the plaintiff moved to enter up judgment against the garnishees for the amount admitted to have been in their hands at the time of the service of the summons of garnishment. The garnishees resisted this motion, and by leave of the court filed an amendment to their answer, setting out the above facts as to the notice of the dissolution of the garnishment and the payment of the funds of the defendant. This was objected to by the plaintiff, and the objection overruled. The bond which had been filed was on its face fatally defective in several particulars. It is unnecessary to mention the defects, as they were admitted by all parties. The court directed a verdict in favor of the garnishees, holding that, as they had been given notice by the clerk that the garnishment had been dissolved, they were protected. The plaintiff filed a bill of exceptions complaining of this ruling of the court and of the allowance of the amendment to the garnishees' answer.

We think the exceptions were well taken. That the bond was fatally defective was admitted. It was not such a bond as the statute requires. It did not protect the rights of the plaintiff. The only way in this state to dissolve a garnishment is by giving a statutory bond. Civ. Code, § 4718; *Moore v. Allen*, 55 Ga. 67. When such a bond is given and filed in the office of the clerk of the court in which the suit is pending, it dissolves the garnishment, and the plaintiff is entitled, if he recovers judgment against the principal, to enter up judgment against the securities on the bond given to dissolve the garnishment. The trial judge seems to have lost sight of this view of the law, and directed a verdict for the garnishees simply because they had acted upon the notice from the clerk that the garnishment had been dissolved. We have diligently searched the Code, and can find no law requiring or authorizing the clerk to give any such notice. His notice is, therefore, no more effectual to protect the garnishees than if any other individual had voluntarily given it. The garnishees acted upon the notice at their peril. If the bond had been a valid one, they would have been protected. As it was fatally defective, and not a good, statutory bond, the garnishees were not protected by it. The notice can, of itself, be no protection what-

ever. It was given by the clerk voluntarily, and the garnishees could not rely upon its correctness, as they could have done had it been his duty as a public officer to give such notice.

The defendants in error relied upon *Rogers v. Moore*, 40 Ga. 386. In that case there was a garnishment founded upon an attachment. At the time of that decision there was no law for dissolving garnishments in cases of attachment. The sheriff, however, took a bond to dissolve the garnishment, and notified the garnishees of the fact. They paid to the defendant the funds in their hands, and this court held that they were protected. The reasoning of the court was that, inasmuch as the sheriff had a right to take a replevy bond from the defendant in attachment, and as the summons of garnishment had seized funds belonging to the defendant, the bond taken by the sheriff was in the nature of a replevy bond, and, although it proved defective, the garnishees were protected in paying over the money. While this reasoning may be unsound, it is unnecessary to review the case, as it differs from the one with which we are dealing. At any rate, we are not disposed to follow it, except in a case in which the facts are identical with those of that case. The decision was made before the act of 1869 (Civ. Code, § 4554), allowing garnishments on attachments to be dissolved as in other cases, and before the act of 1884-85 (Civ. Code, § 4718), which applies to all garnishments. For the reasons given, we think the judge erred in the rulings complained of, although he may have predicated his judgment upon the case of *Rogers v. Moore*, supra.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 767)

HARRIS COUNTY v. BRADY.

(Supreme Court of Georgia. June 11, 1902.)
ACTION AGAINST COUNTY—PLEADING—DEMUR-
RER—APPEAL.

1. Whenever a county is by statute made liable for a given demand, an action against it will lie therefor, though the statute does not in express terms authorize or provide for the bringing of such an action. *Mackey v. Ordinaries*, 59 Ga. 832; *Davis v. Horne*, 64 Ga. 69; *Smith v. Floyd Co.*, 11 S. E. 850, 85 Ga. 420. See, also, *Scales v. Ordinary*, 41 Ga. 225; *Hammond v. Richmond Co.*, 72 Ga. 188.

2. An action upon an account against a county is not open to general demurrer if any one or more of the items of such account constitutes a lawful demand against the county. *Mayor, etc., v. Smith*, 36 S. E. 955, 111 Ga. 870. See, also, *Higginbotham v. Conway*, 39 S. E. 550, 113 Ga. 1155.

3. One of the items of the account sued on in the present case was for the expenses of the arresting officer in carrying the prisoner to the county where the alleged offense was committed, and such county was liable at least for these expenses (Pen. Code, § 898), and therefore liable to suit.

¶ 1. See Counties, vol. 13, Cent. Dig. §§ 232, 240.

4. Points not properly made by special demurrer as they should be will not, though argued here, be considered or passed upon.

5. As no evidence was brought up in the record, it does not appear that the court erred in directing the verdict to which exception was taken.

(Syllabus by the Court.)

Error from superior court, Harris county; W. R. Butt, Judge.

Action by H. N. Brady against Harris county. Judgment for plaintiff, and defendant brings error. Affirmed.

B. H. Walton, J. B. Burnside, and J. R. Terrell, for plaintiff in error. Harwell & Lovejoy, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 778)

WALL v. MACON, D. & S. R. CO.
(Supreme Court of Georgia. June 11, 1902.)
CERTIORARI—EVIDENCE.

The verdict which the jury in the magistrate's court returned in favor of the defendant being amply supported by testimony, there was no error in overruling a certiorari sued out by the plaintiff on the grounds that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Twiggs county; D. M. Roberts, Judge.

Action by J. J. Wall against the Macon, Dublin & Savannah Railroad Company. From a judgment overruling a certiorari to a magistrate's court, plaintiff brings error. Affirmed.

Henry Bunn Wimberly, for plaintiff in error. L. D. Shannon, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 766)

TALBOT COUNTY v. MANSFIELD.
(Supreme Court of Georgia. June 11, 1902.)
COUNTIES—LIABILITIES—EXPENSES OF JAIL PRISONERS—MEDICAL ATTENTION.

1. Under section 920 of the Penal Code, a person charged with crime may, under certain circumstances, be sent or committed to the jail of a county other than that in which the crime was committed, for safe-keeping. When this has been done, the person so committed is in the full care and custody of the county authorities which by statute have charge of the jail in which such person is confined, so long as he remains in such jail.

2. An obligation is imposed by law on the county where the crime was committed, and from which such person was sent, to pay to the county in the jail of which he was confined all necessary jail fees, costs, etc., incurred in behalf of the prisoner, among which is necessary medical attention rendered to such prisoner; and if payment thereof is refused, or is not made, the county incurring such expense has a right of action, against the county from

which such prisoner was sent, to recover the same.

3. The law, however, creates no liability, against the county from which the accused person was sent, in favor of an individual who gave medical attention to such prisoner on the request of, and under a contract to do so made with, the keeper of the jail.

4. A county is not liable to be sued unless liability is fixed, or the suit is authorized by statute.

5. The trial judge erred in overruling the motion for nonsuit, and in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by E. E. Mansfield against Talbot county. Judgment for plaintiff. Defendant brings error. Reversed.

Persons & McGehee, for plaintiff in error. J. J. Bull, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 779)

MAYOR, ETC., OF BRUNSWICK v. WENTZ.

(Supreme Court of Georgia. June 11, 1902.)
APPEAL—REVIEW.

None of the special grounds of the motion for a new trial disclose the commission of any error, and there was sufficient evidence to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Glynn county; Jos. W. Bennet, Judge.

Action by the mayor, etc., of Brunswick against M. E. Wentz. From a judgment, the mayor brings error. Affirmed.

W. E. Kay and C. B. Conyers, for plaintiff in error. J. D. Sparks, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 692)

SMITH v. SMITH.
(Supreme Court of Georgia. June 9, 1902.)
WIDOW'S ALLOWANCE—YEAR'S SUPPORT—RETURN OF APPRAISERS.

1. Though the estate of a decedent is solvent, and exceeds in value the sum of \$500, his widow is not, under section 3465 of the Civil Code, as a matter of right, absolutely entitled to a year's support of at least that amount in value, but the same may be fixed at \$100 or more; the amount to be "estimated according to the circumstances and standing of the family previous to the death" of the husband.

2. The return of the appraisers appointed to set apart a year's support is prima facie correct, and, if caveated by the widow on the ground that the allowance is too small, the burden is upon her of showing by appropriate evidence that such is the fact.

8. A widow, though left childless, is under the law entitled to have set apart to her, as a part of her year's support, "a sufficient amount of the household furniture" left by her deceased husband.

(Syllabus by the Court.)

Error from superior court, Jones county; Jno. C. Hart, Judge.

Proceeding by J. M. Smith against Moses Smith, administrator, to recover a widow's allowance. From the judgment, J. M. Smith brings error. Reversed.

Hardeman, Davis, Turner & Jones, for plaintiff in error. Johnson & Johnson and J. M. Terrell, for defendant in error.

FISH, J. The points presented for adjudication by the record in this case are those referred to in the headnotes.

1. The first question is, if the estate of a decedent is solvent, and exceeds in value the sum of \$500, is his widow, as a matter of right, absolutely entitled to a year's support, of at least that amount in value, from the estate? Under the provisions of section 3465 of the Civil Code, this question, in our opinion, must be answered in the negative. That section declares: "The provision set apart for the family shall in no event be less than the sum of one hundred dollars, and if it shall appear upon a just appraisalment of the estate that it does not exceed in value the sum of five hundred dollars, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or if no surviving widow, to the lawful guardian of the child or children, for their benefit." It is only where the estate shall appear, upon a just appraisalment of the same, not to exceed in value \$500, that the appraisers are required to set apart the whole of the estate; and when this so appears, they must set apart all of it, whether the estate be solvent or insolvent. Under such circumstances, the question of solvency is wholly immaterial. Where, however, the estate is of greater value than \$500 the appraisers shall set apart therefrom, as a year's support, what in their judgment will be a sufficiency for the support and maintenance of the widow, or minor child or children, or widow and minor child or children, as the case may be, for the space of 12 months; the amount "to be estimated according to the circumstances and standing of the family previous to the death of the testator or intestate, and keeping in view also the solvency of the estate." If it be claimed that there is a want of harmony in these provisions of the statute, in that the appraisers are required to set apart the whole of the estate, if it be of less value than \$500, while they may set apart only \$100 if the estate be of greater value than \$500, the only reply we have to make to such criticism is that such is the law, and this court is powerless to change it. If there be in-

congruity in the statute in this respect, it came about in this way: Our first Civil Code was adopted by the act of December 19, 1860, which provided that the Code should be of force, and take effect, on January 1, 1862. This act was amended by the act of December 16, 1861, which declared that the Code should go into operation January 1, 1863, and not before. This Code (section 2531), in relation to a year's support, provided that "the provision set apart for the family shall, in no event, be less than the sum of one hundred dollars, and may extend to the whole estate." On December 9, 1862, an act was passed amending the act of February 19, 1856, providing for setting apart a year's support, in which amending act it was declared: "It shall be the duty of said appraisers appointed in pursuance of said act, if it shall appear upon a just appraisalment of such estate that it does not exceed in value the sum of five hundred dollars, to set apart the whole of such estate for the support and maintenance of such widow and child or children." Acts 1862-63, p. 30. It is needless to inquire what effect the act of December 9, 1862, had upon the section above quoted of the Code, which was not to go into operation until January 1, 1863, for the reason that the provisions quoted, in the first part of this opinion, of section 3465 of the Code of 1895, all the sections of which were by the adopting act of December 16, 1895, enacted into statutory laws (Central of Georgia Ry. Co. v. State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518), are clear and specific, and must be taken as the law on the subject, though they may not operate in every instance with entire harmony. It may be noted that the language quoted from section 3465 of the Code of 1895 is the same as that employed in the Codes of 1868 (section 2530), 1873 (section 2571), and 1882 (section 2571), neither of which three last mentioned Codes, however, was ever adopted by an act of the legislature.

2. The principles announced in the second headnote are supported by Robson v. Harris, 82 Ga. 153, 7 S. E. 926. In the present case, the appraisers set apart the sum of \$100 as a year's support to the widow. One of the grounds of her caveat to the return was that the amount set apart was insufficient for her support and maintenance for 12 months. Upon the trial, on appeal, of this issue before the jury, the only evidence submitted was that she was the widow of F. M. Smith; that he died, testate, in 1900, leaving his whole estate to his brothers and sisters and their children; that Moses Smith had been duly appointed administrator upon the estate, with the will annexed; that the estate was worth over \$1,500, including household furniture of the value of \$21.30; and that the widow had duly applied for a year's support, and the appraisers had set apart to her the sum of \$100 in cash, and no household or kitchen furniture. There was

no evidence as to the standing or manner of living of the family previous to the death of the husband, and the prima facie correctness of the return of the appraisers was not overcome.

3. The widow caveated the return upon the additional ground that the appraisers had not set apart to her any household furniture. The jury found against her on this issue, although the evidence showed that her husband left household furniture of the value of \$21.30. We think this finding was contrary to law and the evidence, and that the trial judge should have granted a new trial upon the ground of the motion making this point. The statute declares: "If there be a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of the household furniture;" and where the decedent leaves furniture, and none of it is so set apart, the return is illegal. While the statute says the furniture shall be "for the use of herself and children," we think it is evidence that the widow is entitled to a sufficiency of furniture even though there be no children. The statute declares, "If there be a widow," a sufficiency of furniture shall be set apart, and, taking this literally, it would appear that, if there be no widow, no furniture could be set apart to the children. Yet in *Taylor v. Flint*, 35 Ga. 124, it was held: "When the family of a decedent embraces two sets of children, each set is entitled to an allowance of furniture or to an equivalent in lieu thereof."

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 715)

WESTERN & A. R. CO. v. COX.

(Supreme Court of Georgia. June 10, 1902.)
EVIDENCE—CARLISLE TABLES—REMARKS OF COUNSEL—NEW TRIAL.

1. It is not a good objection to the admission in evidence of the Carlisle mortality table, and the table showing the value of annuities according to the Carlisle mortality table, that the accuracy and correctness of such tables have not been shown. These, being standard tables, are admissible in evidence, not as conclusive proof of the expectancy of life of a certain person, and the present value of an annuity, but as data which may be considered by the jury in determining such questions when made.

2. On account of the improper and prejudicial remarks made in his concluding address to the jury by counsel for the plaintiff in the court below, a mistrial should have been granted; and, inasmuch as the motion of counsel for the defendant to grant a mistrial was overruled, it was error not to set aside the verdict for the plaintiff and grant a new trial.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by R. H. Cox against the Western & Atlantic Railroad Company. Judgment

for plaintiff, and defendant brings error. Reversed.

Clay & Blair and Payne & Tye, for plaintiff in error. J. Z. Foster and Morris & Green, for defendant in error.

LITTLE, J. Cox instituted an action against the Western & Atlantic Railroad Company to recover damages for personal injuries which he alleged he sustained on account of the negligence of the servants and employes of the company in the running and operation of one of its trains. All the material allegations of the petition were denied by the defendant. It appears from the evidence that the plaintiff, a man 80 years old, attempted to drive across a track of the defendant in a buggy, when a freight train ran into the buggy, inflicting the injuries upon the person and property of the plaintiff for which he sued. The jury returned a verdict for the plaintiff for \$750. The defendant made a motion for a new trial, which was overruled, and it excepted. Inasmuch as the judgment of the court below is reversed on one of the grounds of the motion for a new trial hereafter considered, no attempt is here made to set out the evidence in detail, or to pass upon those grounds of the motion which complain that the verdict is contrary to the evidence.

1. It is insisted on the part of the plaintiff in error that the court erred in admitting in evidence, over the defendant's objection, certain tables, known as the "Carlisle Mortality Table" and the "Annuity Table," published in the appendix to the seventieth volume of the Georgia Reports. The defendant urged that these tables were not admissible in evidence, because their accuracy had not been proved, and there was no evidence as to whether they were correct. In their briefs, counsel for the plaintiff in error insist that as there was no evidence before the court that these tables are what they purport to be, or that they are correctly figured in the volume of the Georgia Reports referred to, that they were inadmissible as evidence, and, when challenged, were not evidence to prove any fact in any court. To support this contention they cite the case of *Railroad Co. v. Hyer*, 113 Ga. 776, 39 S. E. 447, which, in our judgment, does not aid them in sustaining their position. In the case cited there appeared in the brief of evidence simply the statement that "plaintiff here introduced in evidence the mortality and annuity tables in the seventieth Georgia Report," and nothing further appeared in the brief of evidence in relation to the tables. It was ruled in that case that a mere statement in the brief of evidence that the plaintiff introduced in evidence the mortality and annuity tables in the seventieth volume of the Georgia Reports does not authorize this court to take judicial cognizance of the contents of the tables published by the official reporter as an appendix

to that volume. The point made in that case was that as the brief of evidence showed that certain tables were introduced, which appear as an appendix in one volume of the Reports of cases decided by this court, judicial cognizance should be taken of what was there shown; but it was held that the mere recital of the fact that certain mortality and annuity tables were introduced in evidence did not authorize this court to take judicial notice of what the tables contained. In the opinion, Lumpkin, P. J., said, "we have no authority to look outside of the record of any given case for the purpose of discovering something which that record should, but does not, itself disclose." This we understand to be a very different proposition from the question whether the correctness of such tables must be proved, as a condition precedent to their admission in evidence. The record in the *Hyer Case* did not contain the tables. The question here is whether the Carlisle mortality table and the annuity table are of themselves admissible in evidence. That they are, without any proof of their correctness, is not an open question. In the case of *Railroad Co. v. Johnson*, 66 Ga. 259, this court ruled that "it is not improper to introduce in evidence standard life tables to show the expectancy of life of a person of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover"; and in the case of *Railroad Co. v. Crosby*, 74 Ga. 738, 58 Am. Rep. 463, it was held: "The Carlisle tables of mortality are admissible in evidence. They are not conclusive, but may be considered by the jury as data on which they may act." It will be remembered that the objection to the introduction of the tables in this case was not urged because they were not the Carlisle tables of mortality, but because the correctness of the tables had not been proved. The case last cited is direct authority for the proposition that the Carlisle tables are admissible in evidence; that is to say, that, when it appears that the table of mortality offered in evidence is the Carlisle table, it is admissible, and it is admissible because it is a standard table. Such admission does not conclude the fact of expectancy as shown by the table, but, being a recognized standard table, what it contains may, not must, be taken and considered by the jury. Again, in the case of *Railroad Co. v. Garner*, 91 Ga. 27, 16 S. E. 110, this court ruled that, where the evidence bearing on the question whether the injury of the plaintiff was permanent was conflicting, it was not error to admit in his behalf the mortality and annuity tables in 70 Ga. to aid the jury in arriving at the proper amount of damages in case they should determine that the plaintiff was entitled to recover, and that the injuries were permanent. So it must be ruled in this case that the trial judge did not err in the admission of the tables referred to.

2. Another reason alleged why the trial

judge erred in overruling the motion for a new trial is that while counsel for the plaintiff was concluding his address to the jury he used the following language: "The only way to reach a railroad is to make it pay money. A railroad has no soul, no conscience, no sympathy, and no God." When this language was used, counsel for the defendant asked that the jury be retired, and moved the court to declare a mistrial on the ground that this language was inflammatory and improper. The motion was overruled, and it is here contended that it should have been sustained. It must be conceded that the language used was improper, irrelevant, inflammatory, and prejudicial to the rights of the defendant to have its case tried under the same rules and regulations that would govern the trial of a similar action against a natural person. It has always been held in this and other states, and in all countries where justice is sought to be done to parties litigant, that counsel, in their addresses to the jury, shall be confined to legitimate argument. An attorney is not only an officer of the court, but his office is that of a helper of the court to administer justice impartially. In the case of *Thompson v. State*, 43 Tex. 268, Mr. Justice Moore, delivering the opinion, said: "Zeal in behalf of their clients, or desire for success, should never induce counsel in civil cases—much less, those representing the state in criminal cases—to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case, and the conclusions legitimately deducible from the law applicable to them." Mr. Thompson, in his treatise on the Law of Trials, in section 966 of volume 1 gives a number of instances where, under the application of the rule just quoted, judgments of the trial court have been reversed. Among these numerous instances is stated the rule laid down by the supreme court of Alabama in the case of *Cross v. State*, 68 Ala. 476, where it is said: "There must be an objection in the court below, the objection overruled, and an exception reserved; the statement must be as of fact; the fact stated must be unsupported by any evidence, must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury,—or the case is not brought within the influence of this rule. * * * We would not embarrass free discussion, or regard the many hasty or exaggerated statements counsel often make in the heat of debate, which cannot, and are not expected to, become factors in the formation of their verdict. * * * It is only when the statement is of a substantive outside fact, stated as a fact, and which manifestly bears on a material inquiry before the jury, that the court can interfere and arrest discussion." In the case of *Pierson v. State*, 18 Tex. App. 524, Wilson, J., said: "In view of the frequency of exceptions of this character, we will take

occasion here to say that, before we will reverse a conviction because of remarks of prosecuting counsel, it must appear to us (1) that the remarks were improper; and (2) that they were of a material character, and such as, under the circumstances, were calculated to injuriously affect the defendant's rights." It was ruled in the case of *School Town v. Shaw*, 100 Ind. 268, that an appeal to local prejudice in these words: "Stand by your own citizen. * * * The school directors, people, and citizens of Fulton county are trying to disgrace and oppress a citizen of Marshall county,"—affords ground for a new trial. In the case of *Willis v. McNeill*, 57 Tex. 465, it was ruled to be an abuse of the right of argument, and a ground for awarding a new trial, for counsel for the plaintiff in an action for maliciously suing out an attachment to discuss in his closing argument the wealth of the defendant, and to insist that, the wealthier they were, the greater the amount of damages that should be assessed against them. For a similar reason it was held in the case of *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, to be ground for a new trial for counsel for the plaintiff, in an action against an officer in a railway company for a tort which might be the subject of exemplary damages, to comment to the jury in the concluding argument upon the defendant's connection with the railway company, upon the wealth and power of the company, and upon the defendant's ability, from these circumstances, to pay any judgment which might be rendered against him, although no evidence had been given as to his pecuniary ability. For illustration of the rules under which new trials are granted for improper statements by counsel in addresses to the jury, see 1 *Thomp. Trials*, § 974 et seq. These rules have been recognized and enforced by this court since its organization. In the case of *Berry v. State*, 10 Ga. 511, the court ruled that for counsel to attempt surreptitiously to get before the jury facts by way of supposition which have not been proved is highly reprehensible, and that the practice should be repressed by the court without waiting to be called on by the opposite party. In his opinion delivered in that case, where counsel for the state was permitted to indulge in certain suppositions, which were fully stated, Lumpkin, J., said: "Does not history, ancient and modern, nature, art, science, and philosophy, the moral, political, financial, commercial, and legal, all open to counsel their rich and inexhaustible treasures for illustration? Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions in thoughts that breathe and words that burn. Nay, more; giving rein to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time. * * * But let nothing tempt them to pervert the testimony, or surreptitiously

array before the jury facts which, whether true or not, have not been proven." In the case of *Mitchum v. State*, 11 Ga. 616, it was ruled: "It is error in the court, when requested to prevent it, to permit counsel to comment on facts in their argument to the jury not in evidence." In the opinion in that case, Nesbit, J., said: "We have had occasion to consider the habit of counsel, in addressing the jury, of commenting upon matters not proven and not growing out of the pleadings, before, and have been content with visiting it with a decided and emphatic disapproval. [Citing *Berry v. State*, supra.] We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments, and, in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial." So, too, in later cases the same rule has been observed. In the case of *Railroad Co. v. Randall*, 85 Ga. 297, 11 S. E. 706, counsel for the plaintiff, after indulging in remarks before the jury implying that the superintendent of the railroad company was responsible for keeping a witness away from the court, which he withdrew on an intimation from the court that he was not authorized to make the statement without evidence, said: "At all events, gentlemen, I believe, before high heaven, that, if Mr. Mosher had not paid this visit to our witness this morning, she would have fulfilled her promise, and would have come to court and testified in this case. It would be improper for me to say what she would have testified to; but we deemed her testimony important,—in fact, our most important witness,—and were very anxious to have her present." The court said that the remarks of counsel were calculated to, and doubtless did, prejudice the minds of the jury against the defendant, and ruled that the court below should not have refused to grant a new trial on this ground. And as late as the case of *Ivey v. State*, 113 Ga. 1062, 39 S. E. 423, 54 L. R. A. 959, this court—citing *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Ga. 615; *Forsyth v. Cothran*, 61 Ga. 278; *Railroad Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465; *Washington v. State*, 87 Ga. 12, 13 S. E. 131; *Johnson v. State*, 88 Ga. 606, 15 S. E. 667; *Farmer v. State*, 91 Ga. 720, 18 S. E. 987; *Bowens v. State*, 106 Ga. 760, 32 S. E. 666—adhered to the same rule. Under these authorities, there can be no question that the court below, when the defendant's counsel requested the grant of a mistrial, should have granted the motion. It may have been that, had the trial judge fully and explicitly instructed the jury that no consideration of

the objectionable remarks should affect their verdict, and satisfied himself that the evil effects of the remarks which counsel made had not found lodgment in the minds of the jurors, this would have sufficed. But however this may be, in the absence of any interposition a mistrial should have been ordered, and the failure to so order it is cause for a new trial.

The grounds of the motion which have not been specifically referred to present no legal cause for the grant of a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 644)

ANDERSON et al. v. BRUMBY, Mayor
(three cases).

(Supreme Court of Georgia. June 7, 1902.)
CLERK OF CITY COUNCIL—LIABILITY ON BOND.

An official bond, which fails to meet the requirements of a statute in that it is given to an officer other than the one to whom it should have been made payable, is not enforceable at the suit of a successor in office of the obligee, nor can an action thereon be maintained by such obligee, if he be not an official authorized by law to institute and prosecute legal proceedings in his representative capacity. (Syllabus by the Court.)

Error from superior court, Cobb county;
J. H. Lumpkin, Judge.

Actions by T. M. Brumby, mayor, against S. A. Anderson and others. Judgments for plaintiff, and defendants bring error. Reversed.

Sessions & Moss, for plaintiffs in error.
D. W. Blair and J. B. Mozley, for defendant in error.

LUMPKIN, P. J. An action was brought in the superior court of Cobb county by T. M. Brumby, as mayor of the city of Marietta, against R. E. Lawhon, as principal, and Saxon A. Anderson and G. S. Owen, as sureties, upon a bond given by Lawhon as clerk of the city council of Marietta, conditioned for the faithful performance of all of his duties as such clerk. It was made payable to "D. W. Blair, mayor of said city of Marietta for the time being, and to his successors in office." The plaintiff alleged in his petition that he was the "successor in office" of D. W. Blair, who was mayor at the time the bond was given, and upon this allegation predicated his right to sue on the bond for the breach thereof which he averred had been made. The sureties filed a demurrer, based on numerous grounds, one of which was that "the bond sued upon and sought to be enforced is shown by said petition to have been made to an obligee other than that designated by the charter" of the city of Marietta, and "for this reason said bond cannot be sued upon by a successor." A wholly independent action was also brought by Brumby, in his representative

capacity, against Lawhon, as principal, and Anderson and A. Y. Leake, as sureties, upon another bond, reciting that it was given to "R. N. Holland, mayor of said city of Marietta for the time being, and to his successors in office," on condition that it was to become inoperative should Lawhon well and truly perform the duties devolving upon him as city clerk. This action was met by a demurrer precisely like that above referred to. Still another action, brought in the name of "Thomas M. Brumby, mayor of the city of Marietta," upon a similar bond, was instituted against Lawhon, as principal, and Anderson and J. Paige, as sureties. This bond was made payable to "T. M. Brumby, mayor of said city of Marietta for the time being, and his successors in office." The petition filed in this case specifically alleged that: "Petitioner is mayor of the city of Marietta, and in such representative capacity he brings this suit, for the use of the board of education of the city of Marietta." To this petition Anderson and Paige demurred on the ground, among others, that "the mayor of the city of Marietta, in his representative capacity, has no authority in law to bring a suit, * * * because the charter creating said office of mayor fails to confer such authority upon said officer." These three cases are now before this court for review, having been brought here by separate writs of error. Each calls for a determination of the question whether or not the court below erred in holding that Brumby, in his representative capacity, was a proper party plaintiff. We entertain the view that he was not. By an act approved January 22, 1852, the town of Marietta was incorporated as a city, and provision was made for the election of a governing body, to consist of a mayor and six councilmen. Acts 1851-52, p. 390. It was in the fifth section of this act declared "that the mayor and members of the council, as before mentioned, shall be known as the mayor and council of the city of Marietta, and by such, their corporate name, shall sue and be sued, plead and be impleaded, and do all other acts relating to their corporate capacity." Provision was also made for the election of a marshal, treasurer, and clerk of council; and in the tenth section it was declared that these officers should be required to "give bond and security to the mayor and council of the city of Marietta, in a sum each to be fixed by the mayor and council, for the faithful performance of his or their duties." So it will readily be perceived that the official bond which Lawhon, as city clerk, was legally called upon to make, was one payable, not to the mayor of the city, but to its duly incorporated governing body,—the mayor and council of the city of Marietta." Indeed, it was very frankly conceded by the able counsel who appeared in this court in behalf of Mayor Brumby that the instruments upon which these suits were instituted could not

properly be regarded as valid statutory bonds; and the sole contention upon which counsel based the alleged right to sue thereon was that they were, under the rules of the common law, enforceable as voluntary bonds. In this connection section 263 of the Political Code was cited and relied on. It declares that: "Whenever any officer required by law to give an official bond acts under a bond which is not in the penalty payable and conditioned, nor approved and filed as required by law, such bond is not void, but stands in the place of the official bond, subject, on its condition being broken, to all the remedies, including the several recoveries, which the persons aggrieved might have maintained on the official bond." It does not, however, undertake to prescribe at whose suit such a defective bond is to be enforced. Granting, then, for the sake of the argument, that the provisions of this section were intended to apply to bonds required of municipal officers, it furnishes no aid in determining whether or not Brumby had any right in his official character to maintain any one or all of the actions instituted by him in that capacity. It is undoubtedly true that a bond given by a public officer is not to be considered void merely because it is made "payable to an obligee other than as required by statute." 2 Am. & Eng. Enc. Law, 467. On the contrary, "all such bonds are good as common-law bonds, and may be enforced by suit in the name of the obligees or their personal representatives." Id. 467a, note. But "where a bond purporting to be official is made payable to official persons, whom the statute does not authorize to become the obligees, the successors of such obligees cannot maintain an action on the bond." Id. 467, note 10. In support of the proposition last stated numerous authorities are cited. Of these we select as specially pertinent the following: In *Stuart v. Lee*, 3 Call, 422, it appeared that a statute of Virginia prescribed that the official bonds required of sheriffs should be made payable "to the justices." The bond sued on was made payable to Gov. Randolph. His successor in office, Gov. Lee, sought to enforce it, but the court held that he had no right to sue thereon. It was, in the case of *White v. Quarles*, 14 Mass. 451, ruled that a bond given to a probate judge and his successors in office could not be enforced by the probate judge who succeeded him, the reason assigned being that, as the bond was not executed in conformity to statute, the plaintiff had no legal interest therein. The supreme court of Alabama, in the case of *Calhoun v. Lunsford*, 4 Port. 345, held that: "No action can be maintained by the successor of a judge of the county court upon the bond of an assessor and collector of taxes, made payable to the judge; such bond, by statute, being required to be made payable to the governor." The bond sued on was made payable to "Richard S. Clinton, judge

of the county court of Dallas county, or his successors in office." In discussing the question whether his successor, Judge Calhoun, could lawfully maintain an action upon such a bond, Chief Justice Hopkins, who pronounced the judgment of the court, said (pages 346, 347, 4 Port.): "A judge of a county court has corporate powers so far as to enable him to discharge his official duties. The successor in office of such a judge would be entitled to an action upon any contract that the judge was authorized to make and had entered into in his official capacity, and upon which the judge would have a right of action if he had continued in the office. But it was not necessary for Judge Clinton to take the bond in this case payable to himself to enable him to perform any official duty which was required of him. His duties in relation to the official bond of the assessor and tax collector were definite. He was required to fix the penalty of the bond, to approve it, and cause it to be recorded in the office of the clerk of his court. In taking the bond payable to himself, he acted in his natural capacity; and, although the bond was made payable to him as the judge of the county court of Dallas county, or his successors in office, yet as he had no authority to take it to himself in his official capacity, the legal effect of the bond is the same that it would be if his official character had been omitted in the bond." In *Hibbitts v. Canada*, 10 Yerg. 465, a suit brought by the personal representatives of one James Hibbitts upon a bond made payable to him and to his successors in office was held by the supreme court of Tennessee to be maintainable, the conclusion reached by that court being stated as follows: "An administration bond, made payable to the chairman of the county court and his successors in office, instead of the governor of the state, as required by law, cannot be sued upon by the successor in office, but is a good voluntary bond, and suit may be brought upon it in the name of the original payee, or his personal representative, if he be dead." A similar ruling was announced in the case of *Jones v. Wiley*, 4 Humph. 146. The supreme court of Maine had under consideration, in *Lord v. Lancey*, 21 Me. 468, an obligation like that referred to immediately above, and seems to have entertained no doubt that the successor in office of the payee named therein had no right to sue upon it. Another case directly in point is that of *Stevens v. Hay*, 6 Cush. 229, in which Metcalf, J., reviews the leading authorities on the subject. See, also, *Governor v. Twitty*, 13 N. C. 176. Clearly, where a bond required by statute is improperly made payable to a public officer who is without power in his official capacity to sue thereon, his successor in office can, in his official capacity, have no greater authority in the premises. It is to be borne in mind that, as a general rule, a public officer has no right, as such, to maintain a suit of any

character. Accordingly, it is only where, by express statute, he is constituted a corporation sole, and is given the right to sue or is made subject to suit, that he can properly be regarded as having any standing whatever in a court of justice. *Overseers of Poor of City of Boston v. Sears*, 22 Pick. 126.

As remarked above, an official bond is not void merely because given to an officer other than the one to whom, under the provisions of a statute, it should have been made payable; and, where such obligee has authority to institute legal proceedings in his representative capacity, such a bond is enforceable at his instance. *Justices of Christian v. Smith*, 2 J. J. Marsh. 472; *Sweetser v. Hay*, 2 Gray, 49. But this is necessarily otherwise when he is clearly without such authority, and therefore cannot become a proper party plaintiff. In that event the bond may, perhaps, be construed as an obligation given to the payee in his individual capacity, and enforceable by a suit brought in his name and right as a private citizen for the use of the person or persons aggrieved by a breach thereof. See *Iredell v. Barbee*, 31 N. C. 250; *Fitts v. Green*, 14 N. C. 291, 296; *Williams v. Ehringhaus*, Id. 297; *Hibbits v. Canada*, 10 Yerg. 465. This is, however, a matter which we are not now called upon to decide. Suffice it to say that all three of the actions instituted by Brumby were avowedly brought by him in his representative capacity as mayor of the city of Marietta. The act incorporating that city certainly did not confer upon its mayor any of the powers incident to a corporation sole; and, so far as we are informed, there is no law of force in this state authorizing that official to maintain an action of any sort under any circumstances whatever. This court is fully committed to the proposition that no suit can be lawfully prosecuted save in the name of a plaintiff having a legal entity either as a natural or as an artificial person. See *Mutual Life Ins. Co. of New York v. Inman Park Presbyterian Church*, 111 Ga. 677, 38 S. E. 880, and cases cited.

The views expressed above in no way conflict with the decision rendered in *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680, and followed in another case between the same parties reported in 3 Ga. 499. The bond then under consideration was, as it should have been, made payable to the governor of this state and his successors in office; and it was in all respects a good statutory bond, save that it was not given within the time prescribed by law. Suit thereon was instituted in the name of Gov. Crawford, as the successor of Gov. McDonald, who was in office at the time it was executed. The court held that, as this bond was properly made payable to the governor and his successors in office, an action thereon by Crawford was maintainable, he having in his representative capacity authority to prosecute suits of this character, and the makers of the bond being,

therefore, estopped from questioning his right to sue thereon in accordance with its express terms. It was further held that, as it was enforceable only as a voluntary bond, the rules of the common law applied, and accordingly there could be but one recovery thereon. This is now otherwise under section 263 of the Political Code, the provisions of which we have hereinbefore quoted, which expressly authorizes "the several recoveries" which might formerly be had upon an official bond executed in strict conformity to statutory requirements. The doctrine established by the two decisions last above mentioned is simply this: A bond made payable to a public official, who is authorized by law to enforce by suit obligations of that character, may likewise be enforced by his successor in office, if the bond so stipulates; but the remedy to be pursued in case the bond does not conform to all statutory requirements is, not that pointed out by statute as applicable to obligations given in strict compliance therewith, but that afforded by the rules of the common law. This doctrine was recognized and given effect by the supreme court of Tennessee in the case of *Polk v. Plummer*, 2 Humph. 500, 37 Am. Dec. 566, in which Reese, J., filed an elaborate and well-reasoned opinion. When the obligee of a voluntary bond is a public official, who has been by law constituted a corporation sole, there can be no impropriety in entertaining a suit thereon instituted by him or by his successor in office; but it is quite another thing for a court to ignore the settled policy of the law by giving countenance to a suit filed in the name of a public servant who is legally incapable, as such, of maintaining an action of any description. Accordingly, we do not feel authorized to give our sanction to the further prosecution of the legal proceedings instituted in the court below with a view to recovering on the three bonds under consideration, which, because of apparently inexcusable ignorance and neglect of duty on the part of the municipal authorities, have given rise to useless, annoying, and expensive litigation.

Judgment in each case reversed. All the justices concurring, except LEWIS, J., absent on account of sickness

(115 Ga. 662)

LINDLEY v. FREY.

(Supreme Court of Georgia. June 7, 1902.)

DEED—FAILURE TO RECORD—PRIORITIES— BONA FIDE PURCHASER.

Where, in 1890, one made a deed to land to one person, and subsequently made a deed to the same land to another person, who took it without notice of the former deed, and had it recorded prior to the record of the former deed, the second deed, under sections 2778 and 3618 of the Civil Code, has priority over the first.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by E. W. Frey, administrator, against Charles Lindley. Judgment for plaintiff, and defendant brings error. Reversed.

W. A. James, for plaintiff in error. J. S. James and B. T. Frey, for defendant in error.

SIMMONS, C. J. Frey, as administrator of Morse, brought complaint for land against Charles Lindley. Upon the trial of the case the plaintiff introduced a deed from Mack Lindley conveying the land in dispute to Morse executed January 23, 1890, and recorded in the office of the clerk of the superior court November 19, 1900. He showed his authority as administrator, proved the value of the premises for rent, and closed. The defendant introduced a deed to the same land, executed in 1876, from A. H. S. McEwen to A. D. McEwen; a deed to the land from A. D. McEwen to Mack, Charles, Moses, Virgil, and James Lindley, dated in 1888, and recorded May 7, 1900; also a deed from Mack Lindley to defendant, conveying a one-fifth interest in the same land, dated July 28, 1891, and recorded May 7, 1900. The defendant testified that when he purchased and paid for a one-fifth undivided interest from his brother Mack he had no knowledge or notice that the latter had sold the land to any one else. There was no evidence whatever to contradict this statement. The court directed the jury to find for the plaintiff a one-fifth interest in the land in dispute and mesne profits. A verdict was returned accordingly, and judgment entered thereon. The defendant excepted to the direction of the verdict by the court.

We think the judge erred in directing a verdict for the plaintiff. In doing so he was evidently controlled by the old law upon the subject of the registration of deeds. Before the passage of the act of 1889 and the adoption of the present Code, the law was that the grantee of a deed should record it within 12 months from its execution. If the deed was not recorded within that time, and another deed was made by the same vendor to a different vendee, and recorded in time, the younger deed prevailed. But, if neither deed was recorded within a year, the older took precedence. The legislature changed this rule by the act of 1889 (now Civ. Code, § 2778), and by the change made in section 3618 of the Civil Code. It will be seen by a reference to section 2778 that of two deeds to the same tract of land, made by the same grantor to different parties, the younger, if it be recorded before the older, and was taken in good faith, and without notice of the older, takes precedence. It will also be seen that the codifiers made a corresponding change in section 3618. Prior to the present Code this section (2705, Code 1882) required that a deed should be recorded within one year from its execution. These words were omitted from the present code section, which declares that "the record may be made

at any time, but such deed [the older and unrecorded deed] loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first." The record in this case clearly shows that the grantee in the younger deed took that conveyance without notice of the plaintiff's older deed, and that the younger deed was recorded some six months before the older deed was filed for record. Under this section of the Code the younger deed took priority over the older, and it was error to direct a verdict for the plaintiff. Under the facts appearing, the verdict should have been directed for the defendant.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 793)

SOUTHERN RY. CO. v. CARTER.

(Supreme Court of Georgia. June 12, 1902.)

CERTIORARI—EVIDENCE.

There was no evidence to authorize the verdict for the plaintiff in the justice's court, and it was error to overrule the certiorari.

(Syllabus by the Court.)

Error from superior court, Appling county; Jos. W. Bennet, Judge.

Action by F. M. Carter against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

De Lacy & Bishop, for plaintiff in error. Bennett & Bennett, for defendant in error.

PER OURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 764)

PITTSBURGH SPRING CO. v. SMITH et al.

(Supreme Court of Georgia. June 11, 1902.)

APPEAL—REVIEW—INSTRUCTIONS.

1. The defendant having joined issue with the plaintiffs without demurring to their petition, and they having introduced sufficient testimony to prove their case as laid, the verdict in their favor was warranted. *Railway Co. v. Ladson*, 40 S. E. 699, 114 Ga. 762.

2. The failure of the court to charge upon a ground of defense not set up in the defendant's answer certainly does not entitle the latter to a new trial.

(Syllabus by the Court.)

Error from superior court, Pike county; E. J. Reagan, Judge.

Action by Smith & Sons against the Pittsburgh Spring Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

G. D. Dominick and A. A. Murphey, for plaintiff in error. W. W. Lambdin, for defendants in error.

PER OURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 776)

WESTER v. MARTIN.(Supreme Court of Georgia. June 11, 1902.)
DIVORCE—TEMPORARY ALIMONY—CONTEMPT.

1. A judgment awarding temporary alimony is subject to revision by the court at any time. Where, therefore, a judgment has been rendered awarding temporary alimony and counsel fees to the wife, and a rule nisi is issued calling upon the husband to show cause why he should not be attached for contempt for not having paid the counsel fees, and he answers that he is unable, on account of his poverty, to pay them, it was error to reject evidence offered to prove the truth of this answer. It is also error in such a case to strike the answer, and to attach the husband for contempt without permitting him to be heard.

(Syllabus by the Court.)

Error from superior court, Pulaski county; D. M. Roberts, Judge.

Application of J. H. Martin for rule against W. H. Wester to show cause why he should not be attached for contempt. From a judgment committing Wester to jail, he brings error. Reversed.

H. E. Coates and Black & Jackson, for plaintiff in error. J. H. Martin, for defendant in error.

SIMMONS, C. J. Suit for divorce was brought by Mrs. Wester against her husband. She applied for temporary alimony and counsel fees, and at the hearing of the application the court rendered judgment awarding her a certain sum per month and a certain sum for counsel fees. This latter was to be paid within 30 days. Subsequently the husband and wife became reconciled. The wife returned to the husband, and they again lived together as man and wife. Martin, the attorney of Mrs. Wester, applied to the court for a rule nisi against Wester calling upon him to show cause why he should not be attached for contempt for failing to pay the attorney's fees. The rule issued, and Wester answered that he was unable then, and had been since the rendition of the judgment, to pay the counsel fees; that he intended no disrespect to the court in failing to comply with its order, but that his poverty rendered compliance impossible. He offered to show by evidence the truth of his answer. The court rejected this evidence, struck the answer, and committed Wester to jail for contempt of court. Wester excepted.

It is the settled law in this state that an order for a husband to pay temporary alimony and counsel fees is always within the discretion and control of the court. Civ. Code, § 2459. It is not a final adjudication that binds the husband so as to prevent his showing his inability to pay. The court may at any time, upon proper application and proof, change, modify, or alter the order, or even annul it altogether. The answer of

Wester was sworn to, and was not traversed, and for the purposes of this argument it will be assumed to be true. Assuming this, the order of the court granting the alimony and counsel fees must have been improvidently granted, or else some change has since occurred in the pecuniary affairs of Wester so as to render the amount awarded excessive. Pinckard v. Pinckard, 23 Ga. 286, is on its facts almost identical with this. There Pinckard had been ordered to pay alimony and counsel fees. A rule nisi was issued against him to show cause why he should not be attached for contempt for failing to comply with the order. He answered by showing his inability, on account of poverty, to pay the sum awarded. The judge made the rule absolute, and this court held that he should have reduced the sum required of Pinckard in the order granting the alimony. This case controls the case under consideration, and it follows that the judge erred in refusing to hear evidence in support of the answer and in striking the answer. See, also, 1 Enc. Pl. & Prac. pp. 437, 438. The above is on the assumption that the answer is true. Of course, Martin may traverse it, and show the court that it is untrue. If this is done, the court may regulate its judgment accordingly. Briesnick v. Briesnick, 100 Ga. 57, 28 S. E. 154, and the other cases relied upon by the defendant in error are cases wherein permanent alimony had been granted by the verdict of a jury and a judgment of the court. There is a great difference between an order allowing temporary alimony and a verdict and judgment for permanent alimony.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 793)

WILLIS et al. v. GALBREATH et al.

(Supreme Court of Georgia. June 12, 1902.)

ACTION—JOINDER OF CAUSES.

1. An action of tort, based upon an alleged malicious abuse of process by the principals named in an attachment bond, cannot properly be joined with an action ex contractu upon that bond against them and the person who signed it as surety.

(Syllabus by the Court.)

Error from superior court, Montgomery county; D. M. Roberts, Judge.

Action by T. J. Willis and others against A. H. W. Galbreath and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. T. Burkhalter, for plaintiffs in error. J. B. Gerger, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

¶ 1. See Divorce, vol. 17, Cent. Dig. § 700.

¶ 1. See Action, vol. 1, Cent. Dig. § 400.

(115 Ga. 779)

GRUBER v. DECKER et al.

(Supreme Court of Georgia. June 11, 1902.)

NEW TRIAL—HARMLESS ERROR—APPEAL.

1. A slight inaccuracy by the court in stating to the jury the contentions of the party against whom the verdict is rendered will not require the granting of a new trial, when it is manifest from the record that the jurors understood the nature of the issues involved, and intelligently passed upon the same, in the light of the evidence.

2. The immaterial error indicated above being the only one which appears to have been committed by the presiding judge, there was no error in overruling the special grounds of the motion for a new trial; nor was there any abuse of discretion in refusing to grant the same on the general grounds, for the evidence, though conflicting, was amply sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Appling county; Jos. W. Bennet, Judge.

Action between V. A. Gruber and F. W. Decker and others. From the judgment, Gruber brings error. Affirmed.

Bennett & Bennett, for plaintiff in error. G. J. Holton & Son and T. A. Parker, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 651)

EQUITABLE MORTG. CO. v. BELL.

(Supreme Court of Georgia. June 7, 1902.)

APPEAL—REVIEW—BRIEF OF EVIDENCE.

1. This court will not review evidence when it is apparent that there has been no bona fide effort to brief it as required by law, and when the document purporting to be a brief of the evidence is extensively interspersed with objections to testimony, statements and arguments of counsel, and rulings of the court, none of which should find place in a brief of evidence. Culver v. Silver, 39 S. E. 472, 113 Ga. 1142, and cases cited.

2. In so far as the questions presented for decision can be determined without reference to the evidence, there was no error in the rulings complained of.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by P. C. Bell against the Equitable Mortgage Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Starr & Erwin and Payne & Tye, for plaintiff in error. W. R. Rankin and R. J. & J. McCawry, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 638)

ATLANTA & W. P. R. CO. v. UPSHAW.

(Supreme Court of Georgia. June 9, 1902.)

APPEAL—BRIEF OF EVIDENCE—AFFIRMANCE.

1. The document filed as a brief of the evidence shows clearly that there was no bona

fide effort to brief the evidence as is required by the statute, and this court will not consider it. Mortgage Co. v. Bell, ubi supra, 115 Ga. 651.

2. No questions are presented which can be decided without reference to the evidence, and the judgment of the court below must accordingly be affirmed.

(Syllabus by the Court.)

Error from superior court, Coweta county; E. J. Reagan, Judge.

Action by N. H. Upshaw against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Hall and W. G. Post, for plaintiff in error. W. C. Wright, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 793)

SOUTHERN RY. CO. v. MOORE.

(Supreme Court of Georgia. June 12, 1902.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

The plaintiff made out a prima facie case; and while the testimony of the defendant's witnesses, if in all respects true, established a complete defense, yet, as there was a conflict between their testimony and that of a witness for the plaintiff as to a material matter,—they swearing that the stock alarm was given and the train slowed up, and this witness swearing positively to the contrary,—the verdict against the company was not unwarranted, and there was no abuse of discretion in not sustaining its certiorari.

(Syllabus by the Court.)

Error from superior court, Appling county; Jos. W. Bennet, Judge.

Action by H. G. Moore against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

De Lacy & Bishop, for plaintiff in error. E. P. Padgett & Son, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 476)

CENTRAL OF GEORGIA RY. CO. v. McWHORTER.

(Supreme Court of Georgia. April 26, 1902.)

RAILROADS—INJURY TO EMPLOYEES—DUTIES OF CONDUCTOR—CONTRIBUTORY NEGLIGENCE.

1. Under the rules of the railroad company which were involved in the present case, no duty was imposed upon the conductor to examine or repair the brake, or any appliance connected with the operation of the same; such duty resting, under the rules, upon the subordinates of the conductor, and the duties of the conductor being simply those of supervision and direction.

2. It follows from the foregoing that when the plaintiff went between the engine and the cars for the purpose of examining the air hose used in operating the air brake (the same being in a defective condition), there being no

pressing emergency requiring him to perform this duty, which the rules imposed upon his subordinates, he was guilty of such fault as will preclude him from recovering damages for injuries sustained as a direct result of his having unnecessarily abandoned his position as conductor for the purpose of performing duties which, under the rules of the company, should have been performed by his subordinate.

3. When a railway conductor, in the absence of any emergency, or of circumstances so requiring, goes outside of the line of his duties as prescribed by the rules of the company, and thus places himself in a position of danger, and is injured by the moving of a train, he is guilty of negligence, and cannot hold the company liable, even though the engineer causes such movement to be made without ringing the bell of the locomotive, and in doing so violates a rule of the company; and more especially is this true when the conductor, by reason of past experience, must be aware that the engineer, in the absence of any knowledge that the conductor is so exposing himself to danger, can, as to him, safely omit the ringing of the bell, and yet fails to inform the engineer of the intended risk which will render such omission hazardous to the conductor.

(Syllabus by the Court.)

Error from superior court, Clayton county; J. S. Candler, Judge.

Action by B. F. McWhorter against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lloyd Cleveland, Hall & Boynton, W. L. Watterson, W. O. Beeks, and R. L. Berner, for plaintiff in error. Hoke Smith and H. C. Peoples, for defendant in error.

COBB, J. The plaintiff sued the railway company for damages. At the trial it appeared that the plaintiff was the conductor of an accommodation train which ran between Atlanta and Jonesboro. It had reached Jonesboro, and he was making up the train to put it in place and have it ready to start to Atlanta the next morning. His entire crew on the train consisted of an engineer, a fireman, and a train hand. The engine had been disconnected from the other cars, and was brought back and coupled to them. After the coupling was made and the air hose attached, the plaintiff noticed a serious leak, or some other defect, in the air hose. He stepped in between the engine and the car to find out what the defect was. The engineer started the train, throwing the plaintiff down and cutting off his arm. The plaintiff's description of the manner in which he was injured was as follows: "When the engine backed and made a coupling, I was standing on the end of the passenger car, on the right-hand side looking towards Atlanta. The engineer is on the right-hand side. The engine was headed for Atlanta. Immediately after this coupling was made, and as soon as I threw the pressure in by turning the angle cock, the engine threw the air pressure back on the train. The air escaped, or a good portion of it, at about the coupling of the air hose. I could not, from the outside,

determine what the character of that leak was. When I discovered that the air hose was leaking, I went to examine it, and to see what was the matter with it, and in making the examination there was no way to examine it except to take exactly the position I did, getting between the car and the engine. When I went in to make the examination, the engine was, without notice to me, and without any signal from me, started immediately off, just as I was in the act of making that examination, and threw me forward to the ground, and came very near running over me. But I got out with the loss of an arm." The testimony shows that what was done on the occasion that the plaintiff was injured was the course usually pursued when the train of which he was conductor arrived at Jonesboro and preparations were being made to store the train away for the night; that, as soon as the brakeman coupled the engine to the cars, and informed the engineer that everything was all right, the engineer then "pulled out." It is true that the plaintiff testified that this was the way they did when everything was all right, but there is nothing in the evidence to show that the engineer on this occasion knew that anything was wrong. The plaintiff did not tell him that there was, nor did he inform him that he was going between the engine and the cars. Did the engineer, under these circumstances, owe to the conductor the duty of ringing the bell or giving any other signal before starting the train? But suppose that the engineer was negligent in not ringing the bell or giving other signals that the engine was about to move, was not the plaintiff at fault? He knew the customary way in which the engineer acted on such occasions, viz., that he was liable to start as soon as the brakeman informed him that everything was all right. Was not the plaintiff, then, grossly negligent in taking the risk of going between the cars without informing the engineer that something was wrong, and warning the engineer not to move the train, for the reason that he was about to go between the engine and the cars to investigate the matter? Let it be conceded, however, that the evidence authorized a finding that the company was negligent for the reason that the engineer moved the train, in violation of a rule of the company, without ringing the bell or giving other signals, or for any other reason, and let it also be conceded that the plaintiff was free from fault in the particular above referred to, was not the injury sustained by the plaintiff the direct result of a departure by him from the rules of the company, and an undertaking by him to perform duties which, by the rules, were not required of him, and under circumstances where there was no necessity for him to depart from the line of his ordinary duty under the rules? The plaintiff's injury directly resulted from his going between the car and the engine to examine the air hose. Was it his duty to place himself in that posi-

tion for the purpose of examining the apparatus in question when it was out of order? The answer to this question depends upon the proper construction to be placed upon certain rules of the company. Rule 72, which was in evidence, provided that passenger conductors "must report for duty at the appointed time with their train men and signals, and, when necessary, assist in switching and making up their train." Rule 74 was as follows: "The air brake must be tested by applying and releasing the brakes from the engine before starting from terminal stations, and all other points where engine or cars have been detached or hose couplings separated. After all couplings have been made, the brakemen must be required to ask the engineer to apply brakes, and will then pass to the rear of the train, noticing that the brakes are properly applied to each car. The signal cord will be pulled twice from the rear platform as notice to engineer to release brakes. The brakeman must then pass to the engine noticing brakes to ascertain if they all release. If so, he will report to the engineer that the brakes are working all right. Should the brakes on any car fail to work, proper steps must be taken immediately to put them in order before starting train." Rule 89 provided that: "The general directions and government of a train from the time it receives its passengers until it arrives at its destination is vested in the conductor, and all men employed on the train are required to yield willing obedience to his proper orders. He is responsible for the prompt movement and proper care of the train, and for the equipment intrusted to him." The foregoing rules appear in the rule book of the company under the head: "Duties of Passenger Conductors." Under the head: "Duties of Flagmen and Porters" was rule 91, as follows: "They are charged with the management of the brakes and the proper display and use of the train signals, and must not go between cars under any circumstances for the purpose of coupling or uncoupling, or for adjusting pins, etc., while cars are in motion."

The first rule above quoted, numbered 72, can, by its terms, apply only at the place where the conductor is required to report for the purpose of taking out a train. The rule, in effect, says that the conductors must report at the appointed time to take charge of their trains, and, if necessary, assist in making up the trains, so that they can be taken out. The rule is framed for the purpose of informing a conductor who is not on duty as to what shall be done by him at the time he is required to go on duty, as well as what shall be done by him in seeing and doing what is necessary to place his train in a proper condition to be taken out at the appointed time. This rule can have no application in a case where a conductor, who, having reported for duty at the appointed time, has reached the destination of his train, and is

preparing at that point to place it in a position where he and the members of his crew can leave it in safety until it is his duty to take charge of it again, and return with it to the place whence he came. Under this rule, no doubt, the plaintiff had, on the day he was injured, reported for duty in Atlanta to take out his train to Jonesboro, and after that he had no further concern with the rule until the time came for him to report for duty next day, when his train was scheduled to leave Jonesboro on its return trip to Atlanta. The rule was not operative when the plaintiff was switching his train preparatory to placing it upon the side track for the night. There is nothing in the rule numbered 74 which expressly makes it the duty of the conductor to examine or repair an air hose when it is out of order. Is there anything in this rule from which such a duty can be legitimately inferred? Is the language of the rule so equivocal that the rule can be so interpreted as to place this duty on the conductor? We do not think so. The rule numbered 89 places the train under the direction of the conductor, and all employees on the train are required to obey his orders. He is in command. He is to direct others; others are to obey him. While he is, under the rule last referred to, responsible for the prompt movement and proper care of the train, and for the equipment intrusted to him, there is nothing in the rule which casts upon him any other duty than that of a supervising superior, so far as the movement of the train or the management of its machinery is concerned. It is no more his duty to adjust or repair the brakes or the air hose than it is his duty to operate or repair the engine. All these duties are cast upon his subordinates, but they are to be performed subject to his supervision and direction. Construing together the two rules 72 and 89, the former is incapable of a construction which would place the duty of adjusting, handling, or repairing the air hose upon the conductor. The first portion of rule 74 places the duty upon the conductor of having the air brake tested at certain points on his route, but the rule distinctly prescribes that the testing shall be done by the brakeman and engineer. The conductor takes no part therein, except to see that it is done according to the rule. If the brakes fail to work, the rule says "proper steps must be taken" immediately to put them in order. Taken by whom? By the conductor, who has so far had nothing whatever to do with the actual handling or manipulation of any part of the machinery of the train? Not at all; but by the subordinates of the conductor, who are charged with these duties,—the brakeman, the flagman, the porter, and, if need be, the engineer and the fireman,—all or any who are under the rules charged with duties growing out of the actual operation of machinery and the handling of its various parts; but never by the conductor, who, so far as the machinery of the

train is concerned, is a supervising superior only. Even if there should be any doubt about the matter under the terms of rule 74, this doubt is entirely removed when that rule is construed in the light of rule 91, which charges flagmen and porters "with the management of the brakes." It was argued that the actual management of the air brakes was, from the nature of the machinery, confided to the engineer, and that, therefore, rule 91 could not apply to trains equipped with air brakes. While it is true that the power that applies or releases air brakes is controlled by the engineer, we think the word "management" in rule 91 was intended to mean more than the mere application of the power to the brake. The adjustment and repair of brakes or the hose is in a sense a part of the management of the brakes, and this was the duty which devolved upon the flagmen and porters under the rule. The evidence authorized a finding that it was the policy of the company that its conductors should be proficient in the knowledge of air machinery, and to this end had, at considerable expense, fitted up a room and employed an expert to instruct its conductors in the principles and operation of air machinery, and that the plaintiff had been so instructed. It was argued that the rules of the company should be interpreted in the light of this fact, and that, when so interpreted, the rules would place upon the conductor the duty to repair the air machinery when it was out of order. We cannot agree with the learned counsel in this view. The air machinery of the train is to be handled, operated, and repaired by the subordinates of the conductor, under his supervision and direction; and he must have a competent knowledge of the character of this machinery, and the principles by which it is operated and controlled, to enable him to efficiently discharge the duties of supervision and direction which the rules placed upon him. A knowledge of the principles controlling the operation of air machinery is just as important, if it is not more essential, to the conductor standing by the side of his train directing and supervising the work of repair being done by a brakeman who is between the cars actually handling the machinery as it is to the brakeman. It was also argued that the rules of the company, if ambiguous or equivocal, should be construed most favorably to the employé, and that they must not, by implication, be given an interpretation beyond their clear and obvious meaning, and that they must be unequivocal, and within the comprehension of the class of persons upon whom they are designed to operate. We recognize all these as general propositions of law bearing upon the subject of the meaning and force of rules prescribed for the government of employés by railroad companies and others operating dangerous machinery. See *Railroad Co. v. Moore*, 94 Ga. 457, 20 S. E. 640; *Railroad Co. v. Bussey*, 95 Ga. 584, 23 S. E. 207. When we look at the

rules of the company involved in the present case in the light of each other and in the light of the testimony in the case, and when we apply to them all the rules of interpretation which are invoked and are applicable, we can reach no other conclusion than that there was nothing in the rules to authorize or require the plaintiff, the conductor in charge of the train at its destination, when he was preparing to store it away for the night, to go in between the engine and the cars for the purpose of an actual examination of the air hose, in order to discover the defect there, if any existed. Such being the case, the plaintiff was out of his proper place when he was injured, was not free from fault substantially contributing to the injury, and is not entitled to recover in the action brought by him. There was nothing in the evidence authorizing a finding that there was such a pressing emergency upon the plaintiff that he was warranted in leaving his position as a supervising superior in charge of the train and performing the duties of a subordinate who was charged with the actual handling of a portion of the machinery of the train. This case, upon its merits, is controlled by the principle involved in the case of *Whitton v. Railroad Co.*, 106 Ga. 796, 32 S. E. 857, and the cases which were there followed.

The court erred in refusing to grant a second new trial in the case. A second verdict in favor of a plaintiff is a reason for refusing a new trial when there has been a fair trial and a right to recover exists, but no number of verdicts in favor of a party can create a cause of action in a case where none exists under the law and the facts.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

Application for Rehearing.

COBB, J. No sufficient reason has been shown for granting a rehearing in this case. One ground, only, of the motion for a rehearing requires any special notice. It is said that a rehearing should be granted because the court overlooked a rule of the company which appears in the brief of evidence. At the conclusion of the brief of evidence we find the following statement: "Mr. Berner offered in evidence rule No. 11 of the special rules, which defendant produced under notice, as follows: 'Conductors will make telegraphic report to trainmaster of all defects in trains handled by them.'" The words quoted formed the last lines of the brief of evidence immediately preceding the usual entries thereon. That this rule was in evidence in the case was overlooked by us. It was not considered. The case was decided upon the rules which were referred to in the original opinion. In the very elaborate and able brief of the learned counsel for the defendant in error, which we had before us when the case was decided, and which was carefully examined and earnestly

considered, there was not one line that referred to the rule which has been quoted, and nothing in the original brief or in any of the supplemental briefs filed by counsel for the defendant in error had any reference to that rule. It appears from the record, as will be seen, that the rule was not introduced by the plaintiff in the court below, but it was evidence offered in behalf of the railroad company. This would indicate that counsel for the defendant in error did not rely upon this rule in the court below, and the failure to notice this rule in his argument here indicates that he did not rely upon the same as having any material bearing upon the case in this court. In any event, there was nothing to call the attention of this court to the fact that counsel for the defendant in error relied on the rule which was offered in evidence by the plaintiff in error, and counsel cannot now be heard, on an application for a rehearing, to present a phase of the case that was either overlooked when the case was argued or was not considered of sufficient importance at that time to be alluded to in the briefs. A rehearing will never be granted when the application therefor is based upon a ground that the judgment rendered was erroneous for a reason which was not set up or insisted on when the case was submitted, even though such reason might have been, if insisted on at the proper time, sufficient to cause a different judgment to be rendered. In the present instance, however, there is no merit whatever in the application for rehearing. The rule in question, which was, for the reason above stated, overlooked by us, has no material bearing on the case. This is the view entertained by counsel both in the court below and in this court when the case was submitted. As the first position taken by counsel in reference to this rule was so clearly correct, we do not deem it proper to grant a rehearing for the purpose of allowing a contrary view to be set up and attempted to be sustained.

Application for rehearing denied. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 733)

GAY v. WARREN.

(Supreme Court of Georgia. June 10, 1902.)

JUDICIAL SALE—RIGHTS OF PURCHASER.

A purchaser of land at a judicial sale obtains no right by the purchase to the deeds constituting the chain of title to the land, in the hands of the original owner.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Action by D. T. Warren against C. M. Gay. Judgment for plaintiff, and defendant brings error. Reversed.

Howard & Armistead, for plaintiff in error. T. L. Griner, E. S. Baldwin, and Jas. K. Hines, for defendant in error.

SIMMONS, C. J. A considerable quantity of land was owned by John Gay in Laurens county. He died, leaving C. M. Gay as one of his executors. Shortly after the latter qualified, disputes arose between him and the other heirs at law. A receiver was appointed to take charge of the estate. It seems that the receiver obtained an order of court to sell certain of the lands of the estate. Warren became the purchaser of one of the lots so sold. After some years he brought an action of trover against C. M. Gay to recover two deeds constituting part of the chain of title of John Gay. On the trial much evidence was introduced on the question as to whether C. M. Gay was in possession at any time of the deeds sought to be recovered, also evidence as to the value of the lot purchased by Warren, and some evidence as to the damage he had sustained by reason of his not having the deeds. It seems that Warren owned the land at the time suit was brought, but had, pending the litigation, sold it to his son. The plaintiff having elected to take a money verdict, the jury found in his favor for \$600, which was but little less than the value of the land. The defendant moved for a new trial. The motion was overruled, and he excepted.

Where a plaintiff brings an action of trover, he must show title in himself, or that he has the right of possession. If he fails to do so, he cannot recover. Trover will lie for the recovery of title deeds, but the plaintiff must show that he has a right to them before he can recover. The back deeds constituting the chain of title of one whose lands are sold under judicial process do not, we think, belong to the purchaser at the sale. If one holding land under a single deed sells it in parts to a number of purchasers, he would, of course, be unable to furnish each with his chain of title. In some states such a vendor is required to furnish his vendee a correct abstract of the title, and, if the warranty of the vendor fails, he can be sued upon this abstract. And in 2 Jones, Conv. § 1369, it is said with reference to private sales of land: "The English law in regard to the possession of title deeds has generally no application in this country, on account of the prevalence here of a general system of registry. Under our registry laws, the record being notice to all the world, it is not necessary that the grantee should have possession of the title papers." If the purchaser at a private sale is not entitled by law to the back deeds, much less is the purchaser at a judicial sale. The law has provided for such a purchaser by declaring that the deed made in pursuance of such a sale shall be an original title in the hands of the purchaser. Section 5446 of the Civil Code declares: "A sale regu-

larly made by virtue of judicial process issuing from a court of competent jurisdiction shall convey the title as effectually as if the sale was made by the person against whom the process issues." The next section declares: "In all controversies in the courts of this state, the purchaser at such a sale shall not be required to show title-deeds back of his purchase, unless it be necessary for his case to show good title in the person whose interest he purchased." In the case of *Whitley v. Newsom*, 10 Ga. 74, from which the two sections above quoted were doubtless codified, Judge Lumpkin, in discussing the question, said: "To require the purchaser to go further would be to impose a burthen which, in the end, would prove highly injurious both to debtor and creditor, as it would drive off bidders and purchasers from these public sales. The debtor's property being seized and sold against his will, it is not to be supposed that he will surrender up to the purchaser the muniments of his title." For these reasons, we think that a purchaser at a judicial sale gets no title to the deeds which constitute the chain of title of the person whose property is sold. The plaintiff in this case showed no other right to the deeds, and a verdict in his favor was therefore contrary to law.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 746)

**EQUITABLE BUILDING & LOAN ASS'N
OF ALBANY v. STATE et al.**

(Supreme Court of Georgia. June 10, 1902.)
TAX EXECUTION—VALIDITY.

Since a tax execution is not founded upon the judgment of any court, but is a purely summary process, it is essential to the validity of such an execution that all the necessary jurisdictional facts authorizing its issuance should appear upon its face. It follows that a writing purporting to be such an execution, but which merely commands the levying officers to whom it is directed to make of the property of a named corporation a specified sum, as "now due and owing to said state and county for taxes, back taxes up to 1899, as well as all lawful costs," is void.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Action by the state and others against the Equitable Building & Loan Association of Albany. Judgment for plaintiffs, and defendant brings error. Reversed.

S. J. Jones, for plaintiff in error. D. H. Pope & Son, for the State.

LUMPKIN, P. J. The tax collector of Dougherty county issued what purported to be a tax execution against the Equitable Building & Loan Association of Albany, Ga. It was in the following words: "Georgia, Dougherty County. To All and Singular the Sheriffs and Constables of This State: You

are hereby commanded that of the goods and chattels, lands and tenements, of Equitable B/L Ass'n, Albany, Ga., you levy, and by distress and sale thereof, sufficient to make the sum of five hundred thirty-five dollars (\$35.35) and 38 cents, now due and owing to said state and county for taxes, back taxes up to 1899, as well as all lawful costs, and you make due return according to law. Given under my hand and seal this 23d day of July, 1900. [Signed] J. T. Hester, Tax Collector." The case now before us presents for determination the question whether or not this was a lawful and valid tax execution. It was in the court below attacked as void upon the following grounds: (1) Because it "did not show on its face the proper legal authority for its issuance"; (2) that it "did not show for what years said 'back taxes' were due and owing, nor how much was due each year"; and (3) that it "was not issued from any return or assessment entered on the tax digests of said county." The trial judge held that it was a legally sufficient execution. We are of a contrary opinion. Section 847 of the Political Code reads as follows: "If a person fails to make a return, in whole or in part, or fails to affix a value to his property, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain; and having done so, he shall double the tax in the last column of the digest against such defaulters, after having placed the proper market value or specific return in the proper column; and for every year's default the defaulter shall be taxed double until a return is made." Section 848 is in the following language: "If there is taxable property, real or personal, in a county, that to the satisfaction of the receiver when he comes to conclude his digest, is not returned by any person, and he does not know the owner or possessor, it is his duty to assess and double tax it, describing it particularly; and the same power is conferred on the tax collector as to such property, when not assessed, or overlooked by the receiver." Section 908 declares that: "When property is assessed for taxes which has not been returned by any one, as soon as assessed the tax collector shall at once issue an execution against it for the amount due and costs, and the sheriff shall advertise it for sale in some public gazette ninety days before the day of sale, and if by said day the taxes are not paid, it shall be sold: provided, renting or hiring will not bring the requisite amount. Whatever overplus there may be shall be paid over to the ordinary as a part of the educational fund, with a statement of the property and account of sales, subject to the claim of the true owner within four years." If the building and loan association failed to make for any year a return of portion of its taxable property, it was, un-

section 847, the duty of the tax receiver, if this fact became known to him, to assess the value of such property, and make a return for the association from the best information he could obtain, and, having done this, to double the tax against the association. After such assessment and return had been made, if the tax due was not paid within the time prescribed by law, it then became the duty of the tax collector, under section 894, to immediately issue against the association an execution for the unpaid tax. If the association had unreturned taxable property, and its ownership thereof was unknown to the tax receiver, it was, under section 848, his duty to assess and double tax this property, describing it particularly, and to make appropriate entries upon the tax digest. Under that section the tax collector had like powers as to any property which was overlooked by the receiver, and not assessed by him. As to all the property thus assessed, it was, under section 908, the duty of the tax collector to issue an execution against the property itself. See, in connection with what is said above, *Norris v. Coley*, 100 Ga. 547, 28 S. E. 222, wherein sections 847, 848, and 908 of the Political Code were construed by this court, and given the meaning which we now place upon them. The so-called tax execution which the present case brings under consideration was open to all of the objections urged against it. It certainly did not show on its face any authority for its issuance. Indeed, it is impossible, from an inspection of it, to determine under which, if any, of the above-mentioned Code sections it was issued. A tax execution not being founded upon the judgment of any court, but being a purely summary process, it is "essential that all necessary jurisdictional facts should appear on the face of the execution." *Pine Co. v. Kirkland*, 112 Ga. 216, 37 S. E. 302. To the same effect, see *Leonard v. Pilkinton*, 99 Ga. 738, 27 S. E. 753.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 774)

SAVANNAH, F. & W. RY. CO. v. RENFROE.

(Supreme Court of Georgia. June 11, 1902.)
NEW TRIAL—OVERRULING DEMURRER—
EVIDENCE.

1. Overruling a demurrer to a petition, or to so much thereof as seeks to set forth the cause of action, is not a proper ground of a motion for a new trial. Assignments of error upon such a ruling should be presented by exceptions pendente lite, or by direct exception timely made.

2. That a petition is not, for a stated reason, legally sufficient, affords no ground for rejecting evidence directly tending to establish the plaintiff's allegations.

3. The evidence was sufficient to warrant the verdict, and it does not appear that the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Lowndes county; Jno. O. Hart, Judge.

Action by E. A. Renfroe against the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilkinson & Cranford and D. H. Pope, for plaintiff in error. G. A. Whitaker, for defendant in error.

FISH, J. Mrs. E. A. Renfroe sued the Savannah, Florida & Western Railway Company for damages alleged to have been sustained by her by reason of the burning of certain property belonging to her by fire set out by the negligent running of the defendant's locomotive and cars. The first paragraph of the petition alleged that on June 1, 1898, plaintiff was the owner of certain described land lying in Lowndes county, bounded on the north by the defendant's right of way, which land she still owned. The second paragraph alleged that the land was inclosed with fences, and was used for farming and grazing purposes, and trees and grasses were growing thereon. The third paragraph alleged that the defendant had a place of business in Lowndes county, and operated its cars along a line of railway adjacent to plaintiff's land, and, while so doing, the defendant's locomotive, on account of its defective construction and the carelessness of defendant's servants, emitted sparks of fire, which caused plaintiff's fences, trees, grass, and muck on said land to be destroyed. The damages alleged to have been sustained by the burning of these different kinds of property were set out, and the paragraph contained a prayer for judgment and process. The defendant demurred to the third paragraph of the petition on the ground that it did not "comply with the law, in setting out in an orderly way and in separate paragraphs the facts pleaded" therein. The demurrer was overruled. There was a verdict for the plaintiff. The defendant moved for a new trial, which was refused; one ground of the motion being that the court erred in overruling the demurrer. There were no exceptions pendente lite filed to the overruling of the demurrer, and the only assignment of error in the bill of exceptions was to the overruling of the motion for a new trial.

1. The demurrer was, in effect, to the whole petition, as it was only in the third paragraph that the plaintiff sought to set out the cause of action; and, had the demurrer been sustained, there would have been no case left for trial. This court has held many times that the overruling of a demurrer to a petition is not a proper ground of a motion for a new trial. *Carter v. Johnson*, 112 Ga. 494, 37 S. E. 786; *Holleman v. Fertilizer Co.*, 106 Ga. 157, 32 S. E. 83, where it was held: "Alleged error in overruling an amendment filed to a petition cannot be made the subject-matter of review in a motion for new trial"; *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448;

Willbanks v. Untriner, 98 Ga. 801, 25 S. E. 841. These are only a few of the decisions of this court to the effect that an assignment of error upon the overruling of a demurrer to a petition can be presented only by exceptions pendente lite, or by a direct exception timely made.

2. Another ground of the motion for new trial was that the court erred in permitting the plaintiff to prove, over defendant's objection, the various items of damages set out in the third paragraph of the petition; the objection to the admission of such evidence being that the petition "did not set out the cause of action in orderly paragraphs, and itemize the various items of damage by giving the amount and value of each." There was no merit in this ground. The demurrer to the petition having been overruled, the plaintiff had the right to prove her case as laid. The evidence objected to directly tended to establish the allegations of the petition. If the petition was defective, demurrer was the remedy; and, when the demurrer was overruled, error should have been assigned upon such ruling in the manner above indicated.

3. We have carefully examined the evidence in the record, and while conflicting, it was sufficient to authorize the verdict, and it does not appear that the court erred in refusing to grant a new trial.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 725)

WESTERN UNION TEL. CO. v. BAILEY.

(Supreme Court of Georgia. June 10, 1902.)

ACTION AGAINST TELEGRAPH COMPANY—PLEADING—CERTIORARI—NONDELIVERY OF TELEGRAM—DAMAGES.

1. A petition against a telegraph company alleging that it has "an office and agent in [the] county doing business therein" sufficiently shows jurisdiction in the courts of the county under section 2348, Civ. Code.

2. The law requiring a plaintiff in certiorari to cause written notice of the sanction of the writ, and of the time and place of hearing, to be given the defendant therein, a message containing a proper notice, and signed by the plaintiff in certiorari, or by another as his attorney, sent by telegraph and properly delivered in writing, is a sufficient notice.

3. Where the attorney at law for the plaintiff in certiorari contracts with a telegraph company for the sending of such a message, and the company fails to deliver it within the time agreed upon, and in consequence the certiorari is dismissed for want of said notice, and where the attorney, after having paid his client the amount involved in the certiorari proceeding, sues the company for the nondelivery of the message, such attorney occupies the position of the plaintiff, and it is incumbent upon him to show that he would have succeeded in the certiorari proceeding, and was damaged by its dismissal.

4. The evidence in the record disclosing that the attorney failed to show this, but paid his client under what he thought was a moral obligation, the finding of the jury in his favor

was contrary to law, and should have been set aside.

Little, J., dissenting in part.
(Syllabus by the Court.)

Error from superior court, Butts county; E. J. Reagan, Judge.

Action by B. P. Bailey against the Western Union Telegraph Company. Judgment for plaintiff. Defendant brings error. Reversed.

Dorsey, Brewster & Howell and Hugh M. Dorsey, for plaintiff in error. M. W. Beck and Y. A. Wright, for defendant in error.

SIMMONS, C. J. A lien for supplies was foreclosed in a justice's court by Gilmore against Smith as his tenant. Certain property of Smith's was levied upon under this *fi. fa.*, and sold. The constable refused to turn over the proceeds to Gilmore, and the latter obtained a rule nisi against him. The constable answered that he had other *fi. fas.* in his hands claiming the funds. On the trial of the case, on appeal to a jury, in the justice's court, the verdict was unsatisfactory to Gilmore, and he sued out a writ of certiorari, which was sanctioned by the judge of the superior court. Bailey was the attorney at law for Gilmore. He waited until the last day allowed by law to give the opposite party notice of the sanction and of the time and place of hearing. Ascertaining that he then had not sufficient time to serve the notice personally or by mail on the opposite party (who lived in a distant city), he went to a telegraph office, and, according to his testimony, made a contract for the delivery, before midnight of that day, of a telegram, which he wrote out, and delivered to the agent. For some reason, the message was not delivered until the next day, which was after the time for giving notice of the certiorari had expired. Upon the call of the case in the superior court, the certiorari was dismissed, on motion, because notice had not been given. Thereupon Bailey paid his client the amount involved in the certiorari proceeding, and brought his action against the telegraph company in a justice's court for damages. The case was appealed to the superior court. Upon the trial in that court, a motion was made to dismiss the case because the petition did not allege that the company had an agency or place of business in the county, and because no cause of action was set out; it being argued that the message sent would not, even if delivered promptly, have been sufficient written notice of the certiorari under the law. This motion or demurrer was overruled. The trial proceeded, and resulted in a verdict and judgment for the plaintiff. The defendant made a motion for a new trial, which was overruled. The company excepted; assigning error on the overruling of its motion for a new trial, and on the exceptions pendente lite which had been filed to the overruling of the demurrers and motion to dismiss.

1. We think the petition substantially showed jurisdiction in the court under the requirements of section 2348, Civ. Code. It alleged that the company had an office and agent in the county doing business therein. The Code authorizes suit against a telegraph company "in any county where such telegraph company may have an agency or place of business." If the defendant had an office in the county, and had also an agent in the county, and was doing business therein, we think it had an agency or place of business. This case differs from that of *Association v. Bragg*, 102 Ga. 748, 29 S. E. 708, relied upon by the plaintiff in error. In that case the allegation was that the corporation had an agent and transacted business in the county. There was no allegation that the company had an office, while in the present case it is alleged that the defendant had an office and agent in the county doing business therein. In the case just cited, *Atkinson, J.*, said that the word "agency," in a similar statute, was intended to designate a place at which the company's business was transacted by an agent. If this be true, the allegations in the petition in the present case are sufficient to show jurisdiction. They are substantially in accord with the statute, and there was no error in holding that the court had jurisdiction.

2. After much reflection, we have come to the conclusion that the second point made by the demurrer or motion to dismiss was not well founded. Civ. Code, § 4644, requires that "the plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable." Is a telegram such "written notice" as would be effectual? It will be observed that the section does not require the notice to be served by any particular or designated person. It merely declares that the plaintiff in certiorari shall cause written notice to be given. The object of the notice is to give the opposite party timely information that the judge has sanctioned the writ, and that it will be heard at a certain time and place. The object of requiring it to be in writing is to prevent, as far as possible, all disputes as to the correctness and sufficiency of the notice, and as to whether it was given. When the opposite party has received a notice in writing which contains the information prescribed the object of the statute is accomplished, and there has been, in our opinion, a sufficient compliance with the law. Why, then, cannot the notice be delivered by any person authorized by the plaintiff in certiorari? Were he to write the notice himself, and send it by another, it would clearly be sufficient; so if his attorney were to write it, and have it delivered by a messenger. If the attorney authorized his clerk to

write and deliver the notice, and the clerk did so, that would clearly be sufficient. Why, then, can the attorney not employ the telegraph company as his agent, and why, if it sends the message as written by the attorney, and delivers to the opposite party a written transcript of it, would this not be a sufficient compliance with the law? We think that it is. It is true the notice actually written by the attorney is not delivered, but the same words are sent in symbols and signals, and are transcribed in writing at the office where received, and the written transcript delivered to the opposite party. The paper delivered contains the same words, and is in writing. It affords to the opposite party all the information that could have been given by a delivery of the original. This mode of service of the notice is not the usual one, but the telegraph and telephone are used daily in all business transactions, and have been frequently recognized by the courts. Had Bailey telephoned to a friend living near the party to be served, and asked that friend to write the notice as dictated over the telephone, and deliver the writing to the party to be served, a compliance with this request would have been as effectual as though Bailey had delivered the notice himself. The case does not seem different when, by his contract with the telegraph company, he authorizes the company's agent in the receiving office to deliver a written transcript of the words which are transmitted over the wire. The statute requires that the notice shall be in writing, but not that it shall be written or signed by the party or his attorney. A writing by an employé of the company is just as good. The telegraph is used very commonly now to make contracts, and such contracts are uniformly upheld by the courts. It has been held that a contract so made is in writing within the meaning of the statute of frauds. *Crow. Electricity*, § 690; *Joyce, Electric Law*, § 901. For these reasons, we hold that if Bailey's telegram had been sent properly, and delivered in time, it would have been sufficient notice of the certiorari.

3. In the motion for a new trial, one of the grounds alleges that the verdict was contrary to law and the evidence. The record discloses that Bailey, in his petition, alleges that he was "forced" to pay his client. In his evidence he states that he paid it because he had a contract to protect his client's rights. He does not state the nature of this contract, or whether he guaranteed his client against loss. However this may be, we think he was not entitled to recover at all. When he paid his client the money, and brought the suit against the telegraph company, he stood in the shoes of his client. Had the suit been brought by the client, damage must have been shown before a recovery could have been had; and so, we think, when suit was brought by the attorney. Unless Gilmore could, as a result of his pro-

ceeding by certiorari, have recovered all or a part of what was therein claimed, no damage was done by the dismissal of the certiorari. In order to show damage it was incumbent upon Bailey to show, *prima facie* at least, that he would have obtained a reversal of the case on certiorari, and that the judge would have entered up final judgment in his favor in the superior court. There is no evidence tending to show this except the petition for certiorari. In that petition, the only specific assignments of error of law were without merit. The petition also contained the general assignments that the verdict was contrary to law and the evidence. Even if these grounds were good, the evidence was conflicting, and the judge, if he sustained the certiorari, could not have entered final judgment in the case, but must have ordered another trial in the justice's court. These observations are made upon the petition for certiorari. The record does not contain the answer of the magistrate, and we cannot determine whether he would have verified the allegations made in the petition. If the magistrate's answer had been filed, and doubtless it had been, the plaintiff should have produced it on the trial of this case. If the magistrate in his answer had not verified the statements of the petition, the answer would have been controlling, and would have been alone considered by the judge unless it was traversed, and the traverse sustained. The plaintiff not having shown that his client was damaged, and having shown by his own evidence that he paid the money under what he considered a moral obligation, we think the verdict in his favor was contrary to law, and that the court erred in not setting it aside.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

LITTLE, J. I concur in the judgment in this case, but dissent from the proposition announced in the second headnote.

(115 Ga. 782)

**PEOPLE'S NAT. BANK OF AMERICUS
v. WHEEDON.**

(Supreme Court of Georgia. June 12, 1902.)

EXECUTION—PROPERTY SUBJECT—PLEDGE.

1. Property in pledge may be seized and sold under execution against the pawner, and, on notice by the pawnee to the levying officer, the court, in the distribution of the fund arising from the sale of the property, will recognize the lien of the pawnee according to its dignity, and will so direct the payment of such proceeds as will protect the legal rights of the pawnee.

2. Where such a levy was made, and the property was claimed by the pledgee, and the case thus arising was submitted to the presiding judge for decision without the intervention of a jury, he sufficiently discharged his duty by adjudging generally that the property was subject, although the agreement for submission embraced a stipulation that the court was to

fix "the legal and equitable rights of all parties without prejudice to the rights of either party in the premises."

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by S. F. Wheedon against W. H. Simmons. On levy of execution, the People's National Bank of Americus interposed a claim. Judgment for plaintiff in execution, and claimant brings error. Affirmed.

W. P. Wallis, for plaintiff in error. Hooper & Dykes and Lane & Maynard, for defendant in error.

LITTLE, J. The question under consideration in the present case, as made by the levy and claim, is whether the property levied on is subject to the execution. On the trial of this issue the parties agreed upon a statement of facts which was to control the determination of the issue, which statement is as follows: "Mrs. S. F. Wheedon obtained judgment in Sumter superior court against W. H. Simmons on the 29th of November, 1898, for the principal sum of \$1,000; interest to judgment, \$77; cost, \$11. *fi. fa.* issued on the 29th of November, 1898, and was duly levied on the 7th of December, 1898, by the sheriff of Sumter county, on eighty shares of the capital stock of the People's National Bank of Americus, each share expressed to be of the par value of \$100 per share, and being sixty shares of certificate number 131, and twenty shares of certificate number 134, levied on as the property of W. H. Simmons, to satisfy said *fi. fa.* (and all notice given as required by law in such cases), and was advertised for sale on the 29th of March, 1900. Said stock was claimed, as provided by law, by the People's National Bank of Americus, Georgia, and which is now pending, which claim arises on the following as the title of the said bank: Some time during the year 1897 the said stocks were owned by one Mrs. E. A. Windsor, when W. H. Simmons purchased the interest of E. A. Windsor in said bank, and purchased the said shares of stock, and had the same transferred and assigned to him, and placed on the books of the said People's National Bank in the name of said W. H. Simmons, and so stood on said books at the time of the said levy under said *fi. fa.*, and up to the present time. But the said W. H. Simmons did not pay cash for the said shares of stock or for said purchase, but gave his notes to the said E. A. Windsor for the sum of several thousand dollars, among which notes were two obligations, to wit: Each note dated the 11th of January, 1897, signed W. H. Simmons, and payable to the order of E. A. Windsor, and due on the 1st of January, 1898,—one for the sum of \$800, and the other for the sum of \$1,910; each of said notes bearing 6% interest after maturity, and 10% attorney's fees; said notes being sealed instruments,

and embodying the following clauses: The note for \$800, the following clause: 'Twenty shares of stock of the People's National Bank of Americus, Ga., held as collateral to this note; and, in default of payment, stock subject to sale, without notice, to satisfy principal and interest.' The note for \$1,910 has the following clause: 'Sixty shares of stock of the People's National Bank of Americus, Ga., held as collateral to this note; and, in default of payment, to sell the stock to satisfy said principal and interest.' The sixty shares herein referred to being certificate number 131, and the 20 shares referred to in the \$800.00 note was of certificate number 134,—same as levied upon. Said certificates of stock were delivered with said notes to E. A. Windsor, with the following indorsement on the back thereof: 'For value received, the undersigned hereby assigns and transfers unto ——— shares of the capital stock of the People's National Bank of Americus, Georgia, and do hereby constitute and appoint ——— true and lawful attorney, irrevocably, for and in ——— name and behalf to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank. In witness whereof, ——— have hereunto set ——— hand and seal this, the 12th of January, 1897. [Signed] W. H. Simmons.' In the face of said certificate is written: 'Shares \$100.00 each. This is to certify that W. H. Simmons is entitled to shares (certificate No. 131, sixty shares, and certificate number 134, 20 shares), of one hundred dollars each, of the capital stock of the People's National Bank of Americus, Ga., transferable only on the books of said company, in person or by attorney, on the surrender of this certificate. Witness our hands, and seals of the corporation. [Signed by the president and cashier of the bank.]' The People's National Bank was at that time and since a corporation under the national banking system, with authority in its charter to make all necessary by-laws, rules, and regulations for the transaction of its business, and as incident to the operation of said bank. It was one of the rules, regulations, and by-laws of the said People's National Bank that the bank should have a lien on the stock of its shareholders for any indebtedness that might be contracted by any of its stockholders with said bank, as principal, surety, or otherwise. On the 1st of January, 1898, when the notes hereinbefore set out, together with the other indebtedness due by the said W. H. Simmons to the said Mrs. E. A. Windsor, matured, the said W. H. Simmons induced the People's National Bank to take up some of the outstanding obligations due to the said E. A. Windsor, which was at that time represented by the aforesaid two notes; and the said E. A. Windsor did on the 1st of January, 1898, transfer, deliver, and assign to the People's National Bank the aforesaid two notes, the following being the indorsement on

said notes: 'Without recourse, pay to the People's National Bank. January 1st, 1898. [Signed] E. A. Windsor.' People's National Bank has no other security than the said stock for indebtedness due by W. H. Simmons to said bank. There is due on the notes the principal sum of \$800, and on the other note the principal sum of \$1,910, besides interest to date. Said W. H. Simmons was on the 1st of November, 1898, indebted to the People's National Bank of Americus, Ga., as shown by the books of said

—Bank, and as charged to the said
 Simmons \$10,323 35
 Credit by amount paid by him up to
 that time 5,289 08

Balance due \$ 5,034 27

—Besides interest on the same, which amount has never been paid to the bank. The People's National Bank has since the above date gone into liquidation, and paid in the way of the redemption of its stock not exceeding 50% of the face of the said stock, besides paying off its depositors, all of which was satisfactory to the stockholders; and, at the same ratio of settlement, there is largely more due to the said People's National Bank than the 50% of the face value of said stock. The said People's National Bank of Americus, Ga., holds the two said certificates of stock as collateral to the said indebtedness of the said W. H. Simmons due to the said bank under the aforesaid transfer, by-laws, rules, and regulations of the said People's National Bank of Americus, Ga. That while said stock was at the People's National Bank as security for said sum of money, it was still bound to the said Mrs. E. A. Windsor for a balance of the purchase money other than that represented by the said two notes hereinbefore set out, and subsequent to the judgment of the plaintiff; and the said W. H. Simmons induced one C. R. Whitley of Americus, Ga., to stand said Simmons' security for the sum of \$10,000 with one Rouse & Co., to secure the money of the said Rouse & Co. with which to pay Mrs. Windsor. Said Whitley did stand the security of the said Simmons, with the understanding that the said Mrs. Windsor would deliver to the said Whitley said certificates of stock held by her as hereinbefore set out. Said stock was delivered to the said Whitley, and the money so obtained was paid to the said Mrs. Windsor; and Whitley afterwards held said stock as a pledge to indemnify him against loss on account of said suretyship, and continued to hold the said stock until the 7th of December, 1899. Said \$10,000 has been paid by the said W. H. Simmons; said C. R. Whitley returning said stock to the People's National Bank; the People's National Bank at no time waiving any of its right, lien, or claim on said stock."

Upon the above agreed statement of facts, counsel submitted the case to the judge un-

der the following agreement: "We, counsel for the plaintiff and claimant, agree that the foregoing are the true statement of facts regarding the above stock levied on, and the claim of the People's National Bank of Americus, Ga., and that the court may pass upon the said case in term time,—pass upon both the law and the facts without a jury,—fixing the legal and equitable rights of all parties, without prejudice to the rights of either party in the premises." After consideration, the trial judge entered the following judgment in the case: "The above-stated case was submitted to the court upon an agreed state of facts, to be determined by the court without the intervention of jury; and, after consideration by the court, it is adjudged that the property levied upon and claimed is subject to the *fi. fa.*, and it is further ordered that the *fi. fa.* proceed. It is further ordered that the sheriff hold up the proceeds of the property levied upon, when sold, to be distributed in accordance with law in such cases." To this judgment claimant excepted, and complains that the same was error.

Under the provisions of section 2962 of the Civil Code, property in pledge or pawn may be seized and sold under execution against the pawner. It is further provided in that section that, on notice of the pawnee to the levying officer, the court, in distributing the proceeds, will recognize his lien according to its dignity, and give such direction to the funds as will protect his legal rights. There can be no question that the property levied on by the execution was, under the agreed statement of facts, in pawn or pledge at the time the execution was levied. Indeed, the only right, as we understand from the statement of facts, which is insisted on by the claimant, is that it held the certificates of stock in pledge for the payment of the indebtedness of the defendant in *fi. fa.*, and that its lien was superior to that of the judgment creditor. The issue, then, is one of priority of lien between the plaintiff in execution and the claimant. This being true, the provision of the section of the Code just referred to has direct application; for, as the property was in pawn or pledge at the instance of the defendant in *fi. fa.*, it was the right of the plaintiff in execution to have it seized and sold, and the order of the court was but the enforcement of this right. It is claimed, however, on the part of the plaintiff in error, who was claimant in the court below, that the judge, under the agreement, was to fix the legal and equitable rights of the parties; but the Code provides that the court, in distributing the proceeds, will recognize the lien of the pawnee according to its dignity, and will give such direction to the fund as shall protect its legal rights. It is apparent from the provisions of this section of the Code that it was contemplated that this recognition of the lien should be

made in the distribution of the proceeds of the sale; and it was evidently contemplated that, when property in pledge is levied on under execution, it shall be sold, and the proceeds of that sale shall be distributed by the court among the lienholders according to the priority of their respective liens. Therefore, notwithstanding that portion of the agreement which contemplated that the judge should fix the legal and equitable rights of all parties, the judgment rendered in the case was entirely legal, and the proper one to be rendered, and the question as to the priorities of the liens can be made and determined when the fund arising from the sale is subject to distribution.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 751)

McDANIEL et al. v. ALLISON et al.

(Supreme Court of Georgia. June 10, 1902.)

BILL OF EXCEPTIONS—APPEAL—REVIEW—NEW TRIAL—HARMLESS ERROR.

1. An exception to a ruling made during the progress of a trial will not be considered by the supreme court if presented for the first time by a bill of exceptions, and it does not affirmatively appear therefrom or from the record that the bill of exceptions was tendered within 30 days from the adjournment of the term of the court at which the case was tried. *Mortgage Co. v. Walker*, 42 S. E. 59. The question whether or not the judge who presided at the trial of the present case erred in directing a verdict for the plaintiffs is not properly before this court; no complaint thereof having been made in the motion for a new trial, and this court having no jurisdiction to consider the assignment of error, with respect to this matter, made in the bill of exceptions.

2. Refusing to admit testimony as to a declaration made by an agent of one of the parties to a case, the same being offered for the purpose of showing the intention with which he had done a particular act, is certainly not cause for a new trial when it affirmatively appears from the record that the witness by whom it was sought to prove such declaration was permitted to testify to other facts showing, not only that such intention existed, but was actually carried into effect. See *White v. Iron Works Co.*, 38 S. E. 944, 113 Ga. 577, and *Doggett v. Bank*, 39 S. E. 506, 113 Ga. 950.

3. There was ample evidence to sustain the verdict, and the court below did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Waycross; J. S. Williams, Judge.

Action by Allison, Shearer & Co. against J. J. & J. A. McDaniel. Judgment for plaintiffs. Defendants bring error. Affirmed.

J. T. Myers and Spence & Branham, for plaintiffs in error. J. Walter Bennett and Hendricks & Harrison, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 765)

TOWN OF DEXTER v. GAY.

(Supreme Court of Georgia. June 11, 1902.)

ACTION AGAINST TOWN—CORPORATE NAME.

1. A municipal corporation can be sued only in the corporate name set forth in the charter.

2. When the general assembly by an act incorporates "a town under the name of the town of Dexter," and declares that the municipal government of such town shall be vested in a mayor and five aldermen, who shall be styled "the mayor and aldermen of Dexter, and by that name are hereby made a body corporate," and as such may sue and be sued, such town can be sued only in the corporate name last referred to, and a suit brought against the "town of Dexter" should be dismissed on demurrer.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Action by J. F. H. Gay against the town of Dexter. Judgment for plaintiff. Defendant brings error. Reversed.

T. J. Evans and Akerman & Akerman, for plaintiff in error. T. L. Griner, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 794)

SUTTON v. VALDOSTA GUANO CO.

(Supreme Court of Georgia. June 12, 1902.)

BILL OF EXCEPTIONS—RETURN FOR CORRECTION—DELAY.

While a party to whose attorney a bill of exceptions has, under section 5545 of the Civil Code, been returned for correction, is entitled to a reasonable time within which to meet and remove the judge's objection thereto, the latter has no authority to extend for an unreasonable period the right of such party to tender a correct bill of exceptions. This is a matter which is regulated by statute, and as to which the judge has no discretionary powers. Accordingly, if a bill of exceptions be so returned to counsel, and a true and correct bill of exceptions be not tendered until after the lapse of seven months, the delay not being occasioned by providential cause, the judge is without power to then certify, and the writ of error must be dismissed. See *Parkman v. Dent*, 84 S. E. 559, 109 Ga. 289, and cases cited.

(Syllabus by the Court.)

Error from city court of Douglas; F. W. Dart, Judge.

Action between J. L. Sutton and the Valdosta Guano Company. From a judgment, Sutton brings error. Dismissed.

R. A. Hendricks, for plaintiff in error. Quincey & McDonald, for defendant in error.

PER CURIAM. Writ of error dismissed.

LEWIS, J., absent on account of sickness.

(115 Ga. 794)

JONES v. SPENCE et al.

(Supreme Court of Georgia. June 12, 1902.)

APPEAL—GRANT OF NEW TRIAL.

This being the first grant of a new trial, and the evidence not having demanded the ver-

dict, the discretion of the trial judge will not be controlled.

(Syllabus by the Court.)

Error from city court of Waycross; J. S. Williams, Judge.

Action between Nancy Jones and S. A. Spence and others. From an order granting a new trial, Jones brings error. Affirmed.

Jno. I. Myers and W. S. Branham, for plaintiff in error. Leon A. Wilson, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 769)

PERRYMAN v. EQUITABLE MORTG. CO.

(Supreme Court of Georgia. June 11, 1902.)

APPEAL—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. There was no error in any of the rulings complained of, and the evidence authorized the verdict.

2. Even if the newly discovered evidence was in other respects sufficient, it could have been, and doubtless was, disregarded by the trial judge, for the reason that there was no affidavit as to the character or credibility of the witnesses. *Grant v. State*, 25 S. E. 399, 97 Ga. 791 (3), and cases cited.

(Syllabus by the Court.)

Error from superior court, Stewart county; Z. A. Littlejohn, Judge.

Action by the Equitable Mortgage Company against M. L. Perryman. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Worrill and E. J. Wynn, for plaintiff in error. J. B. Hudson and E. A. Hawkins, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 765)

FAIN et al. v. SHY et al.

(Supreme Court of Georgia. June 11, 1902.)

CERTIORARI—DISMISSAL—ANSWER.

There being no proper answer to the writ of certiorari, and no motion looking to the obtaining of such an answer, there was no error in dismissing the petition for the writ.

(Syllabus by the Court.)

Error from superior court, Greene county; Jno. C. Hart, Judge.

Action between Fain and Stamps and others and Shy & Co. From a judgment Fain and Stamps bring certiorari, and from an order dismissing the petition they bring error. Affirmed.

Jos. P. Brown, for plaintiffs in error. Geo. A. Merritt, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 663)

RIGGS v. STEELE.

(Supreme Court of Georgia. June 7, 1902.)

APPEAL—REVIEW.

Neither the final judgment, which was rendered by the judge without the intervention of a jury, nor any of the special findings of fact on which that judgment was based, was contrary to either the evidence or the law. The foregoing disposes of all the assignments of error made in the bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by F. J. Steele against J. I. Riggs. Judgment for plaintiff. Defendant brings error. Affirmed.

Edwards & Ault, for plaintiff in error. Jas. Beall, Head & Head, and Beall & Edwards, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 773)

WATERMAN v. GLISSON.

(Supreme Court of Georgia. June 11, 1902.)

ACTION AGAINST FIRM—INDIVIDUAL PLEA OF PARTNER—AMENDMENT—JURY TRIAL—JOINDER OF COUNTS—JURISDICTION.

1. Where suit for breach of a warranty was brought against a partnership alleged to be composed of three persons, and one of them filed a plea, in his individual capacity, denying that he as an individual ever made the warranty sued on, but not denying that he was a member of the partnership, or showing facts which would relieve the partnership of liability, such plea was properly stricken on motion.

2. It was not error to reject an unsworn amendment to such plea, denying the existence of the partnership and the pleader's membership therein. Civ. Code, § 2637.

3. Under the act creating the city court of Bainbridge, it is not necessary to take the verdict of a jury except where a jury is demanded, even though the suit be for unliquidated damages.

4. A count in a declaration, alleging in substance that the defendant had acted in bad faith, and had been stubbornly litigious, and had caused the plaintiff unnecessary trouble and expense, may be joined with a count on breach of warranty; and, if the amounts claimed in the two counts aggregate more than \$50, this will, as against a motion in arrest of judgment, give jurisdiction of the suit to a court having jurisdiction only of suits for more than \$50.

(Syllabus by the Court.)

Error from city court of Bainbridge; B. B. Bower, Judge.

Action by L. Glisson against L. Waterman. Judgment for plaintiff. Defendant brings error. Affirmed.

Donalson & Fleming, for plaintiff in error. Bower & Bower, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 795)

SOUTHERN RY. CO. v. OVERSTREET.

(Supreme Court of Georgia. June 12, 1902.)

APPEAL—REVIEW.

The charge of the court was full, clear, and impartial, and covered the requests to charge, in so far as the same were legal and pertinent; no error of law was committed; and the evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from city court of Baxley; T. A. Parker, Judge.

Action by J. E. Overstreet against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

De Lacy & Bishop, for plaintiff in error. W. W. Bennett and E. D. Graham, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 764)

TRAVELERS' INS. CO. v. GRAY.

(Supreme Court of Georgia. June 11, 1902.)

PLEADING—AMENDMENT.

An amendment which sought to ingraft on a petition which described a defendant as "a foreign corporation doing business in said state and county under the laws of Georgia, having an office and agent" in a named county, a further allegation that at the time of the institution of the suit the defendant had an agency and place of business in the named county, was properly allowed. The amendment sought to be made was germane, and the petition contained allegations sufficient to support this amendment. Civ. Code, § 5008. There was no error in allowing the offered amendment.

(Syllabus by the Court.)

Error from superior court, Spalding county; E. J. Reagan, Judge.

Action by Edna Gray against the Travelers' Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dessan, Harris & Harris, for plaintiff in error. A. J. Daniel and M. W. Beck, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 724)

SOUTHERN RY. CO. v. BARFIELD.

(Supreme Court of Georgia. June 10, 1902.)

BILL OF EXCEPTIONS—SERVICE—PLEADING—WAIVER OF DEFECTS—INSTRUCTIONS—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

1. Though an acknowledgment of service entered on a bill of exceptions be not dated, yet, if it otherwise affirmatively appear from official entries thereon that it was actually served within the time prescribed by law, the writ of error will not be dismissed on the ground that the fact of service does not duly appear.

2. When the defendant to a case goes to trial on the petition and answer, and does not by demurrer, or appropriate motion in the nature thereof, challenge the legal sufficiency of the petition, it is not improper to try the case accordingly. (a) Applying this well-settled rule to numerous grounds of the motion for a new trial in the present case, there was no error in the omissions to charge or in the instructions complained of. It appears from the motion itself that one of the propositions, the failure to charge which is complained of, was in fact given to the jury; and the omissions to charge related to matters which, under the pleadings, were not pertinent. The instructions excepted to, whether abstractly correct or not, were adjusted to the pleadings as they stood. *Railroad Co. v. Barnes*, 38 S. E. 756, 113 Ga. 212.

3. There was, under the rule above announced, no error in admitting evidence, save in a single instance, and the evidence improperly allowed was not of sufficient materiality to affect the result.

4. Inasmuch, however, as the plaintiff did not prove his case as laid in his petition, but, on the contrary, even by his own testimony, affirmatively showed that he could, by the exercise of ordinary care, have avoided the injuries for which he sued, and that the same were not really attributable to the alleged negligence of the railroad company, the verdict against the latter was unwarranted, and should be set aside.

(Syllabus by the Court.)

Error from superior court, Fayette county; E. J. Reagan, Judge.

Action by J. J. Barfield against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Arthur Heyman, J. W. Wise, and A. O. Blalock, for plaintiff in error. E. E. Spurlin and R. L. Berner, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 794)

JOHNSON v. GIRTMAN.

(Supreme Court of Georgia. June 12, 1902.)

ADVERSE POSSESSION—COLOR OF TITLE—DEED—CONSTRUCTION.

1. "A quitclaim deed, taken in good faith, is sufficient color upon which to base title by prescription, when accompanied by seven years' possession thereunder." *Castleberry v. Black*, 58 Ga. 386.

2. A deed whereby the grantor, for a valuable consideration, grants, remises, sells, and releases unto the grantee, his heirs and assigns, "all the right, title, interest, claim, or demand [the grantor] has or may have had in and to his interest in and to" a certain described lot of land, is sufficient to amount to a conveyance of whatever interest the grantor had in the entire lot.

3. Where the grantee in such a deed purchases the land in good faith, goes into possession under the deed, and holds the land adversely for more than seven years, his claim ripens into a good prescriptive title.

(Syllabus by the Court.)

Error from superior court, Coffee county; Jos. W. Bennet, Judge.

§ 1. See *Adverse Possession*, vol. 1, Cent. Dig. § 47.

Action between G. L. Johnson, administrator, and W. Girtman, administratrix. From a judgment, Johnson brings error. Affirmed.

J. L. Sweat and Leon A. Wilson, for plaintiff in error. Quincey & McDonald, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 787)

WIGHT et al. v. COMMERCIAL BANK OF ALBANY.

(Supreme Court of Georgia. June 12, 1902.)

NONSUIT—CONTRACT—ACTION FOR BREACH—DIRECTING VERDICT.

1. When, in the trial of a case against two persons, it appears from the evidence that the undertaking sought to be enforced was, as to one of the persons, not entered into by him individually, but as the authorized agent of another, the case, as to such person, should have been nonsuited on his motion.

2. When a recovery is sought against a defendant for the breach of a contract by the terms of which the defendant undertook to collect for the plaintiff certain notes given as collateral to secure the payment of a debt of the bailee, no recovery can be had for a breach of that contract unless it be shown that the bailee had in fact collected a particular sum on such notes, or that by the exercise of reasonable diligence the bailee could have collected such notes, and by his failure to exercise that diligence the amount of the notes, or some part thereof, has been lost to the bailor.

3. The evidence in this case was not sufficient to warrant a verdict against either of the defendants for any particular sum which either of them had collected, or had failed to collect by the want of proper diligence, whereby the same had been lost by the plaintiff. It was therefore error to direct a verdict against the defendants.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Action by the Commercial Bank of Albany against Ed. L. Wight and J. M. Solina. Judgment for plaintiff, and defendants bring error. Reversed.

D. H. Pope & Son, for plaintiffs in error. Jesse W. Walters, for defendant in error.

LITTLE, J. The Commercial Bank of Albany instituted an action against Ed. L. Wight and J. M. Solina. Its petition alleged that in 1896 it delivered to the defendants 30 chattel mortgage notes, falling due September and October 1st of that year, aggregating \$1,423.86, payable to J. M. Solina, agent, a list of which notes was attached to the petition; that these notes, secured by mortgage, were held by it as collateral to secure the payment of a certain promissory note due by Solina to the bank, for \$1,875.83, a copy of which was attached; that Wight and Solina agreed to collect said notes when they became due, and delivered the proceeds to the bank, to be applied to the payment of the note due by Solina to the bank, and, in

the event of their failure to collect them, these notes were to be returned; that all of the notes were secured by mortgages on personal property, and were good and solvent notes; that defendants refused to pay over the proceeds of the notes so held, or to return the same to petitioner; at the time of the agreement the defendant Wight was a director in the bank, and Solina was the agent of a business in Baker county which belonged to the wife of Wight, for whom defendant Wight was general agent, and had a general supervision of that business; and that the indebtedness of Solina to the bank arose from the transaction of that business, and the makers of the notes so held as collateral were customers of that business. The bank claimed to have thus been damaged in the sum of \$1,423.86. The defendants answered, and denied all of the paragraphs of the petition which alleged that they were indebted to the plaintiff. On the trial, Ticknor, who was cashier of the plaintiff, was the only witness in the case, according to the record before us. Substantially, he testified as follows: The plaintiff held as collateral to secure the note given by Solina certain notes of the customers of Solina, as they appeared attached to the petition. This list of notes was made by defendant Wight, and the bank had the notes in its possession. Originally the bank had notes to the amount of \$4,000 as collateral to secure Solina's note. These were turned over to defendant Wight. He returned to the bank such of them as he considered solvent. Wight was to assume the payment of these notes, and with that understanding the bank delivered them to him. He has never paid anything on them. This contract was made with Mrs. Wight, the wife of the defendant Wight, through her husband, as her agent, and he was to assume so much of the debt as these notes represented. Mrs. Wight was not present at any time in a business way. He gave the collateral to defendant Wight for collection, under the agreement that he would have them collected, and turn over the proceeds to the bank. Witness and the defendant Wight went over the entire list of notes, and the latter picked out what he said were solvent, and gave them to the bank to secure the unsecured balance, and paid the balance, and there was left due \$1,423.86 on the collateral. The full amount of the note sued on is due to the bank. At the last April term of the court the defendant Wight told the bank that, if it would have this case continued, he would have the matter all settled up in 30 days, but since then has said nothing about it. Solina admitted to the witness that he had collected a part of the money on the collateral notes, but did not say how much he had collected. Witness did not look to Wight individually for the payment of the money. The notes were turned over to him as the agent of his wife, and the business was transacted with him as such. No contract

was made with him individually. The plaintiff having closed, the defendants moved for a nonsuit as to the defendant Wight, which motion the trial judge overruled, and directed a verdict for the plaintiff against each of the defendants for the full amount sued for; and to these rulings defendants excepted, complaining that the trial judge erred—First, in refusing to nonsuit the plaintiff as to defendant Wight; and, second, in directing a verdict for the plaintiff against the defendants. The judge, in our opinion, erred in both of the rulings complained of.

1. The evidence of the only witness who was sworn in the case was directly to the effect that the contract made between the bank and Wight was really a contract of Mrs. Wight, made through her husband, the defendant Wight, as her general agent. He says: "I turned the notes over to him as agent for his wife, Mrs. M. M. Wight. The understanding was that he was agent for his wife. He was not doing business in his own name. I transacted business with him as agent for his wife. Did not look to him individually for anything. Did not make any contract with him individually. The contract was with Ed. L. Wight, as agent for his wife, M. M. Wight, and J. M. Solina." According to this evidence, whatever liability, if any, may have been incurred to the bank under this contract was incurred by Mrs. Wight, and not by the defendant Wight. Hence there could not legally have been any recovery against Wight individually, and as the suit was against him in that capacity, together with Solina, a nonsuit should have been granted as to defendant Wight.

2, 3. Again, the trial judge erred in directing a verdict for the plaintiff against the defendants, for the reason that the evidence did not show any right of recovery on the part of the plaintiff against either. As to Solina, no recovery could be had against him, under the evidence in the record, for the reason that no specific amount of the collateral notes was shown to have been collected by him, even if, under the agreement with the bank, he was to be liable for their collection. In relation thereto the witness said: "Solina told me he had collected a part of the money on the collateral notes, and turned it over to Ed. L. Wight. He would not tell me how much had been collected. He said I could get that information from Wight. Did not tell me all of it had been collected." Assuming that Solina had been intrusted with the collection of the collateral notes, and that his undertaking was to pay to the bank the amount which he had thus collected, then, to entitle the bank to a judgment against Solina under this contract, it was necessary for it, in the first place, to show that Solina had entered into the contract; further, that he had collected a specific amount on such notes, or that by reasonable diligence he could have collected such notes; and that by his failure to exercise such dili-

gence the plaintiff had been injured in the amount of the notes, or some other amount. Without such proof, the plaintiff was not entitled to a judgment against the defendant Solina; and, none such appearing in the record, it was error to direct a verdict against him.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 753)

BUTLER v. LEWMAN et al.

(Supreme Court of Georgia. June 10, 1902.)

**BILL OF EXCEPTIONS—SEVERAL DEFENDANTS
—NEGLIGENCE—DANGEROUS PREMISES—
INDEPENDENT CONTRACTOR.**

1. It is the proper practice for the plaintiff in an action against several defendants to bring to this court for review, by a single bill of exceptions, separate judgments sustaining separate demurrers filed by the defendants below.

2. The owner of a building which has been damaged by fire, who delivers the same to an independent contractor for the purpose of repairing it generally and putting it in thorough order, and who surrenders to the latter full possession and complete control of the premises, is not, merely because of the peculiar arrangement of some of the interior appointments of the building, such as an elevator shaft, stairways, etc., which, under certain conditions, may become sources of hidden danger to one unfamiliar with their location, liable to any person going into the building by invitation of the contractor for damages resulting from physical injuries sustained because of exposure to such danger.

3. In such a case the contractor is, in law, chargeable with knowledge of the existence of such appointments and their peculiar location, and therefore, relatively to the servant of one whom he employs to do a portion of the repairing, under the duty of taking proper steps to guard him against any injury likely to occur by reason of the existence of such danger.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by P. G. Butler against M. T. Lewman and others. Judgment for defendants, and plaintiff brings error. Modified.

Shepard Bryan and Harvey Hill, for plaintiff in error. Rosser & Carter and Candler & Thomson, for defendants in error.

LUMPKIN, P. J. The plaintiff in error, Butler, brought in the city court of Atlanta an action for damages against Daniel O. Dougherty, William A. Speer, Mrs. Katie Speer, Mrs. John Silvey, M. T. Lewman & Co., a partnership, and the persons who were members of that firm. The facts upon which he based his alleged right of recovery were, as gathered from his petition, in substance as follows: The four defendants first named "are the owners, as tenants in common, of the land and building fronting twenty-five (25) feet on the east side of Loyd street, and known as lot No. 2 in the plat of the Markham House property," in the city of Atlanta. "On June 1, 1901, and before and after said date, the defendants M. T. Lewman & Co.

were engaged, as contractors, in rebuilding said building, which had been partially destroyed by fire, and they were occupying and in possession of said premises. They were under contract to rebuild with said other defendants hereinbefore referred to as owners." On that date the plaintiff, "who is an ironworker, was doing galvanized iron-work on said building. He was employed by the Moncrief-Carter Company, who had contracted with said Lewman & Co. to do certain galvanized iron and tin work on said building. About 11:30 o'clock a. m. on said June 1, 1901, petitioner was at work in said building, putting galvanized iron under the front windows on the third floor, and overhauling it; the fire having damaged that part of the building. While petitioner was at work it became necessary for him to have a saw, in order to saw to the right length a piece of wood which was needed to firmly fix the galvanized iron in place. There was no saw on petitioner's scaffolding, and it was therefore necessary for petitioner to go down to the lower floor in order to get a saw. There was no ladder leading from the scaffold where petitioner was at work to said floor, and the only means to get down was by the stairway. This was the only method provided by the defendants, the contractors, for persons to use in reaching and in descending from the upper stories of the building. Said stairway and the elevator shaft in said building were all contained within one wall, which jutted out in the form of a square from the partition wall on the north side of said building. In the side of said square wall on said third floor, where petitioner was at work, are three doors, all exactly alike in size and appearance. One of said doors opens into the ascending steps, and one of said doors to the descending steps, and the other one of said doors into the elevator shaft. All of said doors were unlocked and unfastened, but closed, and there was no sign or mark of any kind by which petitioner or any other person could tell which door opened into the elevator shaft or to the steps. Said doors are about an equal distance apart. Said shaft was not in use from elevator, and had not been for some time." The "only light that reaches said part of the building where said doors are located is from remote windows at each end of said building, the distance being about twenty-five or thirty yards. The light is very faint, because the said building is very deep and narrow; being less than twenty-five feet in width, and about one hundred and fifty (150) feet in length." On the date above mentioned "the interior of said building about said doors was dark and gloomy, and it was necessary for petitioner to grope his way about in his search for the door and the stairway. It was too dark to see how to get about." He "started to descend from said third floor by means of said stairway, [and] went toward the door leading to said

stairway; but on account of the darkness in the interior of the building, and on account of the darkness within the wall inclosing said stairways and elevator shaft, and because all of said doors stood so close together, petitioner entered the door leading to the elevator shaft, and fell down said shaft, three stories, and into the basement of said building," sustaining serious and permanent injuries. He "had no knowledge of said elevator shaft, and the darkness was so great and the arrangement of the doors was such that plaintiff, in the exercise of ordinary care, and intending to enter the door which led to the stairs, entered the door opening on the shaft. There was no light on the landings of the steps, and the door leading to the elevator shaft was not nailed or fastened or marked by any signal or sign, and there was no protection whatever about said place. After opening said door, it was dark inside, just as it was after opening either one of the other two doors leading to the stairways," and, this being so, "the danger which resulted in his injury was hidden. The arrangement of the doors was very confusing. It was very dark at said point, and defendants had placed no lights or signals there of any kind. Said shaft and stairways and the arrangement of said doors were for said reasons dangerously constructed, and allowed to remain so. Said elevator shaft, and the arrangement thereof, was a part of the building owned by defendants, the owners, before said building was partially destroyed by fire; and said arrangement was in existence when the defendants, the contractors, went to work upon said building to rebuild it," but they nevertheless "continued said dangerous condition after taking possession of said property, in violation of the duty to exercise ordinary care, which they owed to all persons lawfully upon said premises and having occasion to use said stairway." After the injury to the plaintiff occurred, the contractors "caused the door entering said shaft to be securely fastened, so that no other person could be deceived by the confusing arrangement, and thereby injured." Petitioner was himself without fault, "and he was injured by the negligence of all the defendants," which "said negligence consisted of the following acts and omissions: (1) Failing "to have said stairway and elevator shaft lighted"; (2) omitting "to have the interior of the building about said elevator shaft properly and sufficiently lighted"; (3) not having "the door leading to said elevator shaft marked by some sufficient sign or securely fastened"; (4) failing "to warn petitioner of the dangerous and confusing arrangement of the said three doors in said wall"; (5) causing "said dangerous, confusing, and deceptive arrangement of doors to be constructed in said building," and allowing "said arrangement to continue"; and (6) not "furnishing plaintiff safe means of ingress and

egress to and from the upper stories of the building," and being "negligent in other respects." For convenience, we shall hereinafter refer to the persons to whom it was alleged the building belonged as the "owners," and to the other defendants as the "contractors." The owners joined in a general demurrer to the plaintiff's petition, and a like demurrer was filed by the contractors. Both of these demurrers were sustained, the court entering a separate judgment as to each. Thereupon Butler sued out a bill of exceptions, in which he assigned error upon the action of the court in thus disposing of his case.

1. Before undertaking to pass upon the merits thereof, it is necessary for us to consider whether this court has jurisdiction to entertain the present writ of error; the defendants having moved to dismiss it on the ground that the plaintiff could not lawfully, by a single bill of exceptions, bring under review here the two separate judgments rendered in the court below. The question of practice thus raised is entirely free from difficulty. There was but one case in the lower court, and upon its final termination therein it was properly brought to this court by a single bill of exceptions; the plaintiff in error not being at liberty, even had he chosen to do so, to bring up his case by piecemeal. Counsel for the defendants in error cited and relied on a number of decisions by this court to the effect that separate and distinct judgments rendered in separate and distinct cases which are tried together in a lower court cannot be legally brought here for review by a single bill of exceptions. See *Walker v. Conn*, 112 Ga. 314, 37 S. E. 403; *Wells v. Banking Co.*, 113 Ga. 857, 39 S. E. 298, and the cases therein referred to. Obviously, however, these decisions have no bearing whatever on the question with which we are now called upon to deal.

2. There was clearly no error in sustaining the demurrer filed by the owners. It appears from the petition that they contracted with Lewman & Co. to reconstruct the building in question, surrendering to that firm all control over the same, and that at the time of the plaintiff's injury its members or representatives "were occupying and in possession of said premises." In other words, the owners, as it was their legal right to do, relieved themselves of all responsibility in the matter by making an absolute surrender, for the time being, of their possession of the building, and placing it under the complete control of independent contractors. This branch of the case is controlled by the provisions of sections 2818 and 2819 of the Civil Code. See, also, *Brunswick Grocery Co. v. Brunswick & W. R. Co.*, 106 Ga. 270, 32 S. E. 92, 71 Am. St. Rep. 249; *Ridgeway v. Downing Co.*, 109 Ga. 591, 34 S. E. 1023, and cases cited. In reaching the conclusion above announced, we have not overlooked the allegations in the plaintiff's petition with respect

to the location of the stairways and elevator shaft, and the confusing arrangement of the doors leading thereto. The owners certainly owed no duty to the plaintiff or to any one else, when planning the interior arrangements of their building, to choose a location for their elevator shaft different from that selected by them; and, granting that its proximity to the stairways and the confusing arrangement of the doors just referred to constituted a source of danger to one unfamiliar with the premises, the only legal duty which rested upon the owners was to take proper precautions to guard against this danger such persons as entered the building at their invitation, express or implied. After surrendering possession of the premises to independent contractors, the owners could not reasonably be expected to any longer exercise such precautions, and therefore were not bound to take any steps looking to the protection of persons entering the building at the instance of the contractors. Accordingly, it cannot fairly be said that the plaintiff occupied the position of one who was by implication, at least, invited by the owners to enter and galvanize their building; for it is clear that, having for the time being relinquished all control over it, they had no right, so long as the contractors remained in the lawful possession thereof, to extend to any one an invitation to go upon the premises for any purpose, save, perhaps, in the event of some extraordinary emergency which would justify the owners in temporarily assuming control over the same even against the will of their contractors.

3. We have no hesitation in saying that the demurrer filed by the contractors should not have been sustained. It is not a legitimate inference from the allegations of the plaintiff's petition that the Moncrief-Carter Company occupied, with respect to the work it was employed to do, the position of an independent contractor. It is true, the plaintiff alleges that this company "had contracted with said Lewman & Co. to do certain galvanized iron and tin work on said building"; but, construing this allegation in the light of the other facts set forth, it simply means that the Moncrief-Carter Company was employed by the contractors to do certain work, they still retaining possession of and control over the building. This being so, they were bound to take reasonable measures to protect the employes of the Moncrief-Carter Company from injuries likely to arise from hidden defects in construction, or places of unusual danger about the building. We quite agree with counsel for the contractors that the relation of master and servant did not exist between them and Butler, and that therefore they owed to him none of the duties growing out of such a relation. It is equally true, however, that the plaintiff was on the premises by the invitation of the contractors, and had a right to expect that they would exercise proper precautions in guarding him

against hidden dangers of the existence, of which he could not, by the use of ordinary care, inform himself, and with knowledge whereof they were, in law, chargeable. He alleges that, in undertaking to go from an upper to the lower floor of the building for the purpose of procuring a necessary tool, he attempted to use the stairway, which was the only means of descent furnished him. Assuming that he was carrying on the work it was his duty to his master to perform, and that the arrangement of the stairways, elevator shaft, and doors described in his petition constituted a trap exposing him to a hidden danger, from which the exercise of due diligence on his part could not protect him, he undoubtedly was entitled to a recovery. Whether he was, in point of fact, attempting to go upon a necessary errand, and was exercising ordinary care, and whether the contractors were, in any or all of the particulars alleged, guilty of negligence which brought about the injuries complained of, were questions for the determination of a jury, under proper instructions from the court.

Judgment affirmed in part, and in part reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 684)

EVANS v. ROUNSAVILLE et al.

(Supreme Court of Georgia. June 9, 1902.)

BANKRUPTCY—EFFECT OF DISCHARGE—LIEN—ENFORCEMENT—EXEMPTIONS.

1. While a discharge in bankruptcy releases the bankrupt from a debt which is provable under the bankrupt act of 1898, and which is not within the excepted classes, and takes away from the creditor the right to proceed against his debtor in personam to recover that debt, yet a valid lien created on the property of the bankrupt more than four months before the filing of his petition in bankruptcy is not affected by his discharge. After discharge, a creditor holding such a lien, who has not proved his debt in bankruptcy, may proceed to enforce it against the property of the bankrupt in the state court.

2. An exemption assigned and set apart by the bankrupt court under the homestead laws of this state is no more subject to levy and sale than if it had been set aside by the ordinary of a county having proper jurisdiction. No reason appears in the record why the exemption set apart was not good as against the lien of the plaintiff in execution in the present case.

3. The trial judge erred in refusing to sanction the petition for certiorari, not because the lien of the creditor was released, but because the facts do not show that the lien can be enforced against the property to which it attached because of the exemption.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Rounsaville & Bro. against E. R. Evans. Judgment for plaintiffs was affirmed on certiorari, and defendant brings error. Reversed.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 326, 336, 312.

M. B. Eubanks, for plaintiff in error. C. E. Carpenter, for defendants in error.

LITTLE, J. There was tried in a justice's court in Floyd county the case of Rounsaville & Bro. against Evans. The trial resulted in a verdict for the plaintiffs, and the defendant filed a petition to the superior court seeking a writ of certiorari. This petition made the following allegations: On August 8, 1901, in the justice's court designated, the stated case was tried, the issue arising on the foreclosure of a mortgage on personal property, and an illegality thereto. The mortgage was dated January 17, 1899, and was given to secure three notes of \$75 each, described in the petition. It was foreclosed on March 4, 1901, and was levied in the same month on a horse and mule which are also described. To the levy of the execution on foreclosure the defendant filed an illegality, in which he alleged that on the 4th of March, 1901, he filed in the United States district court for the Northern district of Georgia his voluntary petition in bankruptcy, and on said date was duly adjudged a bankrupt; that, after having duly conformed to all the requirements of the bankrupt act, he was, on May 4, 1901, granted a discharge in bankruptcy; that said discharge operated to discharge him from all debts which existed against him prior to March 4, 1901, which were provable in bankruptcy; that plaintiffs' debt existed prior to that time; that they were notified of the pendency of the bankruptcy petition, and had full opportunity to be heard; that he had been discharged from the debt which the mortgage was given to secure, and for that reason the mortgage *fi. fa.* was proceeding illegally. On the trial it was admitted that plaintiffs in *fi. fa.* were duly notified of the pendency of the bankruptcy proceedings, that plaintiffs' debt existed prior to the bankruptcy proceedings, and that the property levied on was scheduled and set apart as an exemption to him by the trustee in bankruptcy. A certified copy of defendant's discharge in bankruptcy in the usual and proper form was introduced in evidence. On the presentation of this petition the judge of the superior court passed the following order: "This petition for certiorari read and considered. Giving to the bankrupt act approved July 1, 1898, the construction put upon it by the supreme court of this state in the case of Carter v. Bank, reported in 109 Ga., at page 573, 35 S. E., at page 61, I am of the opinion that the justice court rightly decided the questions presented by the case. I therefore decline to sanction the petition." To this order and judgment the petitioner excepted.

1. Inasmuch as we reverse the judgment in this case, and the trial judge predicated that judgment on the ruling made in Carter v. Bank, 109 Ga. 573, 35 S. E. 61, we refer to that case at the outset of this opinion for the purpose of ascertaining what principle

of law bearing on the facts of the case now presented was determined. We find that the only ruling with reference to the bankruptcy laws which was there made was that: "A plea interposed to a proceeding to foreclose a mortgage on land in a superior court of this state, that, pending the proceedings to foreclose, the mortgagor was adjudicated a bankrupt, and praying that such proceedings be stayed for the period of twelve months, or until the question of the discharge in bankruptcy of the mortgagor is determined, is not good, and the court committed no error in sustaining a demurrer to the same." The principle so ruled we still hold to be good law, but not at all applicable to the material issues raised in the present case. It appears that Evans executed a mortgage on certain personal property in favor of Rounsaville & Bro. to secure certain notes on January 17, 1899, and that Evans was adjudicated a bankrupt in March, 1901, and was given his discharge in May of the same year. So far as appears from the present record, the debt of Rounsaville & Bro. was provable in bankruptcy, and debts which, by their nature, are provable in bankruptcy, with certain stated exceptions, noted in section 17a of the bankrupt act of 1898, are released by a discharge in bankruptcy; that is to say, a discharge in bankruptcy releases the bankrupt from a provable debt not within the excepted classes, and takes away the creditor's right to proceed against him in personam. But while this is true in a case where the creditor did not appear in the court of bankruptcy, such a discharge does not affect a lien on the property of the bankrupt which was acquired more than four months before the filing of the petition in bankruptcy, provided the lien is otherwise valid. *Brandenburg, Bankr. § 22, p. 277; In re Blumberg, 1 Am. Bankr. R. 633, 94 Fed. 476.* In the case last cited it was expressly ruled by Clarke, J., in the United States district court for the Eastern district of Tennessee, that, while a discharge in bankruptcy releases the bankrupt from a provable debt which is not in the excepted classes, and takes away the creditor's right to proceed against him thereafter in personam, it does not affect the lien of a valid attachment levied on the bankrupt's goods more than four months before the filing of the petition in bankruptcy. The lien in the case decided by Judge Clarke was created by attachment, while in the present case it was created by a mortgage executed in January, 1899, and at the time it was levied it had been a valid and subsisting lien for more than two years. A fair construction of the bankrupt act of 1898 leads to the conclusion that the discharge in bankruptcy which Evans obtained released the debt secured by the mortgage so far as to prevent its enforcement by this creditor in a personal action against Evans, but that discharge in no way affected the lien which Rounsaville & Bro. held on the property described in the

mortgage. Therefore, as to the ground that the mortgage *fi. fa.* was proceeding illegally, the judge committed no error in refusing to sanction the certiorari. The petition for certiorari alleged that the verdict in the justice's court was contrary to law, and without evidence to support it. It appeared that the property levied on had been set apart in the bankruptcy court as exempt. So, then, while the lien of the plaintiff in *fi. fa.* was not affected by the discharge in bankruptcy given to Evans, the property to which the lien attached had been set apart to him as an exemption authorized by the laws of Georgia; and assuming, as we do, that Evans was in proper position to claim and have set apart an exemption,—because we presume that it would otherwise not have been so set apart,—we know of no reason why the exemption was not good against the lien. Nothing appears in the record tending to show that the right of exemption was waived in favor of the creditor. Had this fact appeared, an altogether different question would have been presented. If Evans had a valid exemption, not subject to the lien of Rounsaville, the petition for certiorari should have been sanctioned, not because his discharge affected the mortgage lien, but because Rounsaville could not enforce his lien against the exemption which had been granted him in the bankruptcy court. It was ruled in the case of *Ross v. Worsham*, 63 Ga. 624, that: "When, in the bankrupt court, an exemption is granted by the judge or register, such exemption is no more subject to levy and sale than if it had been set apart by the ordinary having jurisdiction thereof." See *Collier v. Simpson*, 74 Ga. 697; *Broach v. Powell*, 79 Ga. 79, 3 S. E. 763; *Barrett v. Durham*, 80 Ga. 838, 5 S. E. 102; *Dozier v. Wilson*, 84 Ga. 303, 10 S. E. 743; *Brady v. Brady*, 71 Ga. 71. For aught that appears, as we have said, the lien, while not affected by the bankruptcy proceeding, could not be enforced against the homestead property. There was nothing in the petition for certiorari showing that it could be; hence the petition should have been sanctioned, and the writ issued, and on the facts set out in the record the judgment of the justice of the peace should have been reversed.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 722)

SMITH v. ZACHRY.

(Supreme Court of Georgia. June 10, 1902.)

BANKRUPTCY—LIEN—DISCHARGE.

The points made and insisted on in this case are fully discussed and decided adversely to the contentions of the plaintiff in error in the case of *Evans v. Rounsaville*, 42 S. E. 100.

(Syllabus by the Court.)

Error from city court of La Grange; F. M. Longley, Judge.

Action by J. T. Zachry against J. H. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

E. T. Moon, for plaintiff in error. B. H. Hill and H. A. Hall, for defendant in error.

LITTLE, J. On the trial of certain issues arising on the interposition of an affidavit of illegality by Smith to the levy of two executions in favor of Zachry on certain land as the property of Smith, an agreed statement of facts to the following effect was submitted by the parties: In October, 1898, Zachry obtained two judgments against Smith in the county court of Troup county, on which executions were issued and levied on 80 acres of land as the property of Smith on November 12, 1898. The defendant filed a voluntary petition in bankruptcy on November 4, 1899. The plaintiff did not appear in the bankrupt court, nor attempt to prove his claim against the defendant. Smith was properly discharged as a bankrupt on October 13, 1900. The affidavit which was interposed by Smith was based on two grounds: "(1) Because the executions are barred, having been killed and paid by deponent's discharge in bankruptcy on October 13, 1900; (2) because said described land levied on was set apart to deponent" by the trustee in bankruptcy "as a homestead," and that this action of the trustee was approved by the court. Subsequently Smith, by leave of the court, struck the second ground contained in his affidavit of illegality, and on the hearing the court overruled the affidavit of illegality on the remaining ground, and ordered the *fi. fa.* to proceed. To this judgment of the court Smith excepted, and assigned the same as error.

We affirm the judgment of the court below. The only issue to be passed upon by us is whether the judgments obtained by Zachry more than a year before Smith was adjudicated a bankrupt lost their lien on the property levied on. For reasons fully set out in the opinion this day delivered in the case of *Evans v. Rounsaville*, the ruling of the trial judge was right, and his judgment is affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 780)

REED v. EQUITABLE TRUST CO.

(Supreme Court of Georgia. June 11, 1902.)

BANKRUPTCY—EFFECT ON PENDING FORECLOSURE—DEMURRER—FAILURE TO ATTACH EXHIBITS—OBJECTIONS TO JURISDICTION.

1. The filing of a petition in bankruptcy by the defendant in a proceeding instituted in a state court to establish and foreclose a special lien on realty which was created more than four months before the filing of such petition will not affect the right of the plaintiff to proceed with the foreclosure, unless he proves his demand against the defendant in the bankrupt court.

2. Failure to attach proper exhibits to a peti-

tion should be met by an appropriate and timely demurrer.

3. The question of a court's jurisdiction to entertain an action cannot be properly raised by presenting objections to an amendment to the plaintiff's petition, the allowance of which would make no change in the status of the case with respect to the matter of jurisdiction. (Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Equitable Trust Company against Mary A. Reed. Judgment for plaintiff, and defendant brings error. Affirmed.

T. J. Ripley, for plaintiff in error. Green & McKinney, for defendant in error.

LUMPKIN, P. J. The Equitable Trust Company brought in the city court of Atlanta an action against Mrs. Mary A. Reed, of Fulton county, to recover the amount due on a bond the payment of which was secured by a deed to land situated in the county of Columbia. The plaintiff prayed in its petition not only for a general judgment against Mrs. Reed, but also that its special lien upon the land just mentioned be set up and established. The defendant relied on an answer in which the fact was recited that she had filed a voluntary petition in bankruptcy, and in which she prayed that the plaintiff's action be stayed until her discharge in bankruptcy and for 12 months thereafter. This prayer was expressly based upon the ground that the plaintiff was seeking to obtain against her a general judgment. After the filing of the defendant's answer, the trust company offered an amendment striking its prayer for a general judgment, and the judge thereupon passed an order calling upon Mrs. Reed to show cause why this amendment should not be allowed. In resisting this attempt on the part of the plaintiff to amend its petition, she insisted: (1) That although it, if amended as proposed, would seek only a foreclosure of the plaintiff's lien, there should nevertheless be a stay of the proceedings; (2) that "no papers, deeds, are attached to said suit authorizing a special judgment against defendant;" and (3) that the plaintiff was not entitled to a special judgment foreclosing its lien, because the city court of Atlanta has no jurisdiction to foreclose a lien on land lying in the county of Columbia. The amendment was allowed, and a judgment in accord with the prayer thereof was rendered in favor of the plaintiff. The lien thus foreclosed had been in existence a much longer time than four months before the filing of the defendant's petition in bankruptcy, and there was no contention that the plaintiff had proved its demand against the defendant in the bankrupt court. The latter made no such defense, but is here excepting only to the allowance of the above-mentioned amendment to the plaintiff's petition, and to the judgment which necessarily followed.

1. The first of the objections to this amend-

ment was not well taken. A complete answer to the point thus raised is to be found in the decision rendered by this court in *Carter v. Bank*, 109 Ga. 573, 35 S. E. 61, and *Johnson v. Grocery Co.*, 112 Ga. 449, 37 S. E. 706. See, also, *Evans v. Rounsaville*, 115 Ga. 634, 42 S. E. 100.

2. The second ground of objection is also without merit. If the defendant had desired to call upon the plaintiff to attach to its petition proper exhibits, she should have done so by special demurrer to the petition itself.

3. Nor is the remaining objection to the allowance of the amendment good. The plaintiff was not seeking by amendment to set up any additional fact, or to pray for any relief not sought in its original petition. The proposed amendment amounted to neither more nor less than a voluntary abandonment of the plaintiff's prayer for a general judgment and an election on its part to proceed only for an establishment of its special lien. The question whether or not the city court of Atlanta has jurisdiction to enforce this lien ought to have been raised by a timely demurrer, or by a motion to dismiss the plaintiff's action after the allowance of its amendment whereby it disclaimed any right to a general judgment, or by a motion to arrest the final judgment rendered in the case.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(64 S. C. 254)

METZ v. ABNEY et al.

(Supreme Court of South Carolina. June 19, 1902.)

ACTION AGAINST ATTORNEYS—DEMAND.

1. Where a client assigns certain choses in action to his attorneys, they became, as to such matters, trustees of their client, and the demand on the attorneys before suit to recover the same was unnecessary.

Appeal from common pleas circuit court of Richland county.

Action by Levi Metz against B. L. Abney, Jno. P. Thomas, and J. S. Verner. From order of nonsuit, plaintiff appeals. Reversed.

Wm. H. Lyles, for appellant. P. H. Nelson, Melton & Belser, Andrew Crawford, R. W. Shand, and J. Q. Marshall, for appellees.

POPE, J. At the conclusion of plaintiff's testimony offered at the trial of the above-named action before his honor Judge Watts and a jury, a motion for nonsuit was made on the following grounds: "(1) Because it had not been shown that these defendants were indebted to plaintiff, or had received for him moneys which they should account to him for; (2) because no demand by plaintiff on these defendants previous to action brought had been proven." The circuit judge

¶ 1. See *Attorney and Client*, vol. 5, Cent. Dig. § 275.

passed an order granting the nonsuit. From this judgment on the order of nonsuit the plaintiff now appeals.

We think the circuit judge was in error. It is quite true that a demand upon attorneys by their clients for moneys alleged to have been collected by them for such clients before suit is recognized as a salutary rule. We think there was some testimony here which ought to have gone to the jury, even when this rule is upheld. Certainly, the letters of the defendants, written before suit was begun, denied that they owed the plaintiff anything (in their answer they practically did likewise). These letters were introduced by the plaintiff. But, apart from these matters, it occurs to us that under the agreement of November, 1894, the defendants, as to certain choses in action assigned to them by the plaintiff, became trustees for the plaintiff, which, in our judgment, relaxed the severity of the rule as to demand before suit. We have refrained from any comment upon the facts of this case for the very good reason, as it appears to us, that a new trial must be ordered, and we would be unwilling to express any opinion thereon lest it might affect the new trial.

It is the judgment of this court that the judgment of the circuit court be, and is hereby, reversed, and that the action be referred to the circuit court for a new trial.

(64 S. C. 246)

BELL v. FLOYD.

(Supreme Court of South Carolina. June 19, 1902.)

SLANDER—PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

1. Where, in an action for slander, defendant moved to amend on the ground that there was no allegation that the words were spoken or published by the defendant, or that they were spoken of the plaintiff, an amendment to the complaint making it more definite in those respects did not state a new cause of action, objectionable because made after the bar of the statute of limitations.

Appeal from common pleas circuit court of Spartanburg county.

Action by T. J. Bell against A. G. Floyd. From an order sustaining demurrer to the complaint, but allowing plaintiff to amend, defendant appeals. Affirmed.

Defendant appeals on following exception: "From that portion of the order allowing the complaint to be amended, the defendant gave due notice of appeal, and does hereby appeal to this court on the following ground, as made before the circuit court, to wit: The demurrer having determined that the complaint stated no cause of action for slander in favor of the plaintiff against the defendant, and the time in which he could bring such action having expired, his honor Judge Klugh erred in allowing him to amend such

a complaint by alleging a cause of action which had never been stated."

Nicholls & Jones, for appellant. H. E. De Pass, for appellee.

POPE, J. When this action was called for trial, the defendant interposed an oral demurrer to the complaint, alleging that it failed to state a cause of action. The circuit judge sustained the demurrer on two grounds, but allowed the plaintiff to amend his complaint. From this allowance of amendment the defendant appealed, and the plaintiff gave notice that, if the court could not sustain the order for amendment, in that event he would ask this court to sustain the complaint on the ground that a motion by defendant to require plaintiff to make his complaint more definite and certain, and not that of a demurrer, was the proper remedy. The complaint was as follows, omitting caption: "The plaintiff, complaining of the defendant, alleges that on the 25th day of February, 1899, at Spartanburg, the defendant, A. G. Floyd, in the presence and hearing of J. B. Werts, Charlie Dearman, J. M. Rudasall, and a number of other persons, did falsely and maliciously slander the plaintiff, T. J. Bell, 'that your father was a tolerably good man, but he raised a set of rascals, rogues, and thieves, and they will steal,' whereby this plaintiff was injured in his character and reputation to his damage three thousand dollars. Wherefore plaintiff demands judgment against the defendant, A. G. Floyd, for three thousand dollars and costs." The action was begun on 25th of February, 1899. Its trial was postponed by reason of a stroke of paralysis of defendant in August, 1900. It came on in March, 1901. The demurrer interposed by defendant on the ground that the complaint did not state facts sufficient to constitute a cause of action was as follows: "(1) That there was no allegation that the plaintiff uttered or spoke the words set out in the complaint. (2) That there was no allegation that they were spoken of the defendant." The "case" contains the following: "The presiding judge sustained the demurrer on both points; the plaintiff opposing said motion, and noting an exception that the proper remedy was by motion to make the complaint more definite and certain, and not by demurrer. The plaintiff then moved to be allowed to amend his complaint. The defendant opposed his motion on the ground that the demurrer having been sustained on the ground that no cause of action for slander having been stated in the complaint, and the two years having expired in which such action for slander could be brought, the court could not permit an amendment to such, which in effect allowed plaintiff to bring suit for said words more than two years after they were uttered, if they were so uttered. The circuit judge overruled the objection and passed the following order: 'The above cause having come before the

¶ 1. See Limitation of Actions, vol. 22, Cent. Dig. § 644.

court for trial, the defendant interposed an oral demurrer to the complaint on the ground (1) that there is no allegation that the words were spoken or published by the defendant, and (2) that they are not alleged to have been spoken of the plaintiff. It appearing to the court that both grounds are good, it is hereby ordered that the demurrer be, and is hereby, sustained; that the complaint be amended so as to show: (1) that the words were spoken and published by the defendant, and (2) that they were spoken of the plaintiff. And it is further ordered that the complaint so amended be served on the defendant or his counsel within twenty days, and that the defendant have twenty days after the date of such service within which to answer the amended complaint, if he shall be so advised."

We have reached the conclusion that the order of the circuit judge should be affirmed, thus rendering it unnecessary to pass upon the point raised by the appellant. We would remark that the matter of amendment of pleadings is very wisely confided to the discretion of the circuit judge. In the case at bar a little more definiteness—a little more certainty in the allegations of fact in the complaint—is all that is needed to give a well-rounded cause of action, so far as the pleadings are concerned. The circuit judge has provided in his order for these amendments to the complaint. It is not a case where a new cause of action is set forth after the statute of limitations is a bar.

It is the judgment of the court that the judgment of the circuit be affirmed, and that, after the remittitur from this court reaches the circuit court, then the plaintiff shall amend his complaint, and that 20 days after such amended complaint is served on defendant or his counsel the defendant shall answer the complaint, if he shall be so advised.

(64 S. C. 251)

COPELAND v. COPELAND.

(Supreme Court of South Carolina. June 19, 1902.)

ACTION ON NOTE—EVIDENCE—CONVERSATION—NEW TRIAL.

1. In an action on a note, defendant alleged that his signature was a mistake, and was intended to be put on another note, signed on the same date. *Held*, that the other note was competent evidence on behalf of the defendant.

2. A conversation by the parties to the note, having direct reference to it, is admissible in evidence.

3. The supreme court will not interfere on appeal with the refusal of a trial court to grant a new trial for insufficiency of the evidence.

Appeal from common pleas circuit court of Laurens county; Klugh, Judge.

Action by J. W. Copeland against David T. Copeland. From judgment for defendant, plaintiff appeals. Affirmed.

N. B. Dial, for appellant. W. B. Richey, for appellee.

POPE, J. The object of plaintiff's action was to collect from defendant a note for \$839.50, dated 17th February, 1885. This action was commenced on the 13th December, 1900. The note was credited on the back thereof with a credit in these words: "\$150. Paid on the within note December 18th, 1894, one hundred and fifty dollars. D. T. Copeland. Witnessed: H. D. Henry." The defendant denied the whole complaint. He further alleged that, if he ever signed the note, his signature was obtained by fraud on the part of the plaintiff, by representing to the defendant that said note was some other paper, which representation was false, and defendant received no consideration therefor. He further alleged that, if his signature was obtained to said note, the same was procured by fraud in representing to the defendant that said note was one of two notes for \$832.46, bearing date February 17, 1885. He further alleged that, if his signature was procured to the note sued on, it was a mistake. He further alleged that, if he signed the receipt for \$150 on back of note sued on, it was by mistake; he intended to have such credit applied to one of two notes, each for \$832.46, given on the 17th February, 1885, and which said note represented and covered every cent of defendant's indebtedness to the firm of J. W. Copeland & Co. on that date, who were the assignors of the plaintiff. Defendant pleads the statute of limitations, etc. The issues came on for trial before Judge Klugh and a jury. Verdict was for the defendant. Motion for new trial on minutes of the court was refused. The plaintiff appealed, after entry of judgment, on the following grounds, to wit: "(1) Because the circuit judge erred in not sustaining plaintiff's objection to the introduction of other notes and papers than the ones sued on, on the grounds that they were irrelevant. (2) Because he erred in not sustaining plaintiff's objection to the testimony as to the Vance note on the grounds the same was irrelevant. (3) Because he erred in charging defendant's third request, to wit, 'If defendant intended the credit to go on another note, then it should not go thereon,' etc. (4) Because he erred in not setting the verdict aside and granting a new trial on the grounds there was no evidence to support the verdict, and that the same was manifestly against the law of the case and the evidence, inasmuch as defendant admitted the execution of the note and the payment on the same, and offered no evidence nor assigned no reason to defeat the payment of the same." We will pass upon these grounds of appeal in their order:

1. We cannot sustain this ground. It is very general. Still, an examination of the "case for appeal" shows that defendant, in his answer, sets up the execution by him of two promissory notes, each for \$832.46, on the 17th of February, 1885, which was the very day the note sued on was alleged to

have been signed. His ground of defense, in part, was that all his signatures to papers on that day was confined to these two notes, each for \$832.48. These notes were competent evidence as to issues raised by the pleadings. This ground of appeal is dismissed.

2. When the plaintiff was on the stand, he was interrogated as to certain declarations made by him to and in the presence of Capt. Hale. The Vance note was referred to in that conversation, and, while the Vance note was referred to on the examination of the witnesses as to plaintiff's declarations, the note itself was not introduced in evidence. This conversation had direct reference to the note sued on. There was no error here.

3. This ground of appeal is very indefinite. The words "et cetera" scarcely find a place in an exception, when properly framed. The circuit judge did not charge defendant's third request as it was represented. The circuit judge, in passing on this request before the jury, was exceedingly careful to say: "I charge you that, subject to the instructions I have already given you in reference to the matter of false representation or fraud and mistake." In a careful charge on these matters the circuit judge had at length fully explained them to the jury.

4. The circuit judge had heard all the testimony. If the testimony satisfied him that the issues of fact were fully and squarely put before the jury, he did right not to interfere, unless he was dissatisfied with its sufficiency. This court never interferes on appeal with the exercise of this delicate duty by the circuit judge. This ground of appeal cannot be sustained.

It is the judgment of this court that the judgment of the circuit court be, and it is, affirmed.

GARY, A. J., and JONES, J., concur in result.

(64 S. C. 296)

HELLAMS et al. v. PRIOR.

(Supreme Court of South Carolina. June 21, 1902.)

LACHES—WHAT CONSTITUTES—EXCUSE.

1. Where the delay of plaintiff to enforce an obligation was due mainly to the defendant's repeated and urgent appeals for time, and to his inability to meet his obligation, plaintiff will not be prejudiced in equity because he has yielded to defendant's request for delay, and has not pressed him while in embarrassed circumstances.

Appeal from common pleas circuit court of Laurens county; Benet, Judge.

Foreclosure by Hellams & Gray against H. G. Prior. John W. Carlisle, as executor of Simpson Bobo, intervened by petition, and was made a party defendant, and in his answer sets up an equitable mortgage against

the lands in question, his testator being the assignee of E. M. Cooper, who sold the land originally to Prior, and who had given him bond for title. At instance of Carlisle, executor, the heirs at law of Cooper were also made parties defendant. Decree for plaintiff, and defendant Prior appeals. Affirmed.

The following is the circuit decree: "On January 1, 1878, E. M. Cooper sold the defendant Prior the lands described in the complaint, which was part of a tract of 400 acres conveyed to him by J. B. Gray by deed dated December 10, 1869. He gave Prior his bond for titles on payment of the purchase money, for which he took Prior's notes. Under this contract, Prior went into the possession of the land, and has since remained in possession. On March 17, 1875, Cooper assigned Prior's notes to S. Bobo, and indorsed upon Gray's deed to him the following: 'For value received, I assign to S. Bobo, or his assigns, 256 acres of the within tract of land, the balance having been conveyed to E. Patterson. I have given my bond to S. T. Prior and H. G. Prior for titles to the remainder when they pay the balance of \$1,447.85, and ten per cent. interest thereon; and if the same is paid by the 25th of December, then they are to have titles to the land; otherwise, the land is the property of S. Bobo or his assigns. Witness my hand and seal, March 17th, 1875. [Signed] E. M. Cooper. [L. S.] Attest: Mark Cooper.' On December 12th, 1883, Prior gave Bobo his obligation, of which the following is a copy: '\$770. By the 4th of November next, I promise to pay Simpson Bobo, or order, \$770, with interest at ten per cent. from 4th of November last, balance for the land whereon I live, containing 170 acres, more or less. Now, if I fail to pay the above amount when due, I am to pay rent for the next year, 1884, one-third of all that is made on the premises, and give possession on demand. Value received. December 12th, 1883. [Signed] H. G. Prior. [L. S.]' Between the date of Cooper's assignment and Prior's obligation above, there were frequent negotiations between Prior and Bobo relative to the land, but it will not be necessary to notice them in detail. On January 16, 1884, Prior gave the note and mortgage set out in the complaint. The heirs of Cooper admit in their answer that their ancestor intended by the indorsement on his deed from Gray to convey to said Bobo the title to said land and notes, and that he did thereby subrogate him to all his rights and equities therein, and they disclaim any interest in the premises. There is no issue between the plaintiffs and the defendant Carlisle. Plaintiffs' attorney concedes in his argument that, claiming under Prior, their rights depend upon his.

"Prior's defense to the claim of plaintiffs is that it has been paid. The burden of proof is upon him to establish this defense. The testimony on this issue was taken be-

fore me in open court. It was very indefinite and unsatisfactory, and in some particulars self-contradictory, while in others it was inconsistent with the undisputed facts and circumstances. It does not satisfy me that the plaintiffs' debt has been paid. Against the claim of the defendant Carlisle, the defendant prior pleads want of consideration, payment, presumption of payment from lapse of time, adverse possession, the statute of limitations, and laches of Bobo and of his executor. On this branch of the case counsel for both parties agreed, at the hearing, to admit as evidence in this case all the relevant and competent testimony, oral and documentary, set out in the printed brief, upon which the appeal was heard by the supreme court in the ejectment proceedings begun in 1896, by the defendant Carlisle, against the defendant Prior. Laches was the defense chiefly relied upon in the argument. In 18 Am. & Eng. Enc. Law (2d Ed.) at page 97, laches is defined as follows: 'Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity.' On page 101, the same authority says: 'It has been held that, so long as the relative positions of the parties are not altered to the defendant's prejudice, delay is of very little consequence.' From the foregoing, it will be seen that something more than mere lapse of time is implied in the term 'laches.' Ordinarily, there must be 'other circumstances causing prejudice to an adverse party,' which would make it inequitable to grant the relief prayed for. The evidence in this case does not disclose any such circumstances. On the contrary, it shows that the delay complained of was due mainly to the defendant Prior's repeated and urgent appeals for more time in which to pay for his place, and to his inability to meet his obligations. Time is frequently of great advantage to a debtor, and an indulgent creditor will not be prejudiced in equity because he has yielded to his debtor's request for delay, and has not pressed him while in embarrassed circumstances. In 18 Am. & Eng. Enc. Law (2d Ed.) p. 111, it is said: 'Where positive evidence exists which proves that the defendant has all along recognized the plaintiff's rights, delay on the part of the plaintiff in bringing the suit will be excused. When the plaintiff's delay has taken place in pursuance of an agreement with the defendant that the latter will not take advantage of it, or under such circumstances as to show an acquiescence therein by the defendant, no laches can be imputed to the plaintiff for his failure sooner to commence the suit. A party cannot take advantage of the delay he has himself caused or to which he has contributed.' In this case, Prior both sought and acquiesced in the delay. In his argument with Bobo and

in his letters to him, Prior always acknowledged himself debtor to Bobo for the land, and in several of them he agreed to be his tenant. By his obligation of December 12th, 1883, the defendant waived all laches prior to that time, if there had been any. That obligation was not due until 4th of November, 1884, and, by its terms, if he failed to pay the amount when due, he had the right to remain on the land the year following (1885), as tenant to Bobo. According to his own testimony, he made a very short crop in 1884,—not enough to pay the lien on it for supplies, for which purpose it was all turned over to the plaintiffs. After the death of Bobo, in December, 1885, the defendant Carlisle wrote Prior several letters pressing him for a settlement. In his answers, two of which are in evidence, Prior excuses his failure to pay on account of short crops, and in his letter of March 14th, 1887, he says: 'I did not make enough to pay my last year's furnishing bill. Crops were a complete failure. Hoping you will bear with us, and I will do all in my power to make a full payment this fall.' Surely the debtor should not be heard to complain of his creditors' delay in response to such an appeal, made under such circumstances. After failing in repeated efforts by correspondence to get Prior to a settlement, the defendant Carlisle, about 1890 or 1891, went to his home in Laurens county to see him and have some definite understanding with him about the matter. He claimed that he was entitled to some credits, but that his papers were at his house, he being at the time in the farm, some distance from the house. Mr. Carlisle agreed to give him credit for all payments made since the date of the note, and he was to take his papers and receipts to Spartanburg, and make a settlement, but failed to do so. Finally, the defendant Carlisle, on November 15th, 1895, gave Prior notice to quit, under the supposition that he was a tenant by the terms of the contract of December 12th, 1883. Upon his refusal to obey this notice, the ejectment proceedings before referred to were begun on March 23d, 1896. The magistrate issued a writ of ejectment, which was affirmed by the circuit court on appeal, but on appeal to the supreme court the whole proceeding was dismissed for want of jurisdiction. 48 S. C. 183, 28 S. E. 244. By this litigation the matter was kept in the courts until the spring of 1897. In August of that year, this action was begun, and the defendant Carlisle intervened for the purpose of asserting his rights. The delay, which might otherwise constitute laches, may be explained or excused by showing that it was caused by an effort to settle without resort to law or by litigation, in which the matter at issue was involved. 18 Am. & Eng. Enc. Law (2d Ed.) pp. 110-112. The foregoing and other facts and circumstances, which we need not detail, sufficiently and satisfactorily explain and excuse the

delay, and the defense of laches must be overruled.

"The defenses of want of consideration and payment are not sustained by the evidence, and the others hereinbefore mentioned cannot avail the defendant. *Blackwell v. Ryan*, 21 S. O. 112."

W. H. Martin, for appellant. F. P. McGowan, for appellees Hellams & Gray. Hydrick & Wilson, for other appellees.

GARY, A. J. The facts of this case are set forth in the decree of his honor, the circuit judge, which will be reported. The reasons assigned by the circuit judge and the authorities cited by him are satisfactory to this court in disposing of the questions presented by the pleadings.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(64 S. C. 249)

STATE v. GARRETT.

(Supreme Court of South Carolina. June 19, 1902.)

JURY—DRAWING—CONSTITUTIONAL LAW—SPECIAL ACT.

The acts under which the grand and petit jurors for the February term of 1901 of the sessions court for Laurens county were drawn were unconstitutional, as in violation of article 3, § 34, subd. 8, providing that the general assembly shall not enact local or special laws for the summoning of grand or petit jurors.

Appeal from general sessions circuit court of Laurens county.

Manning F. Garrett was convicted of entering a house with intent to commit a crime, and appeals. Reversed.

Babb & Knight, for appellant. Solicitor T. S. Sease and Ferguson & Featherstone, for the State.

POPE, J. Indictment against defendant for larceny and entering house without breaking, with intent to commit a crime, at the February term, 1901, of the court of general sessions for Laurens county, S. C., was found by grand jury. Defendant moved to quash indictment on the ground that the grand jury which found "true bill" was not a legal grand jury, as the law authorizing the same was unconstitutional and void, so far as Laurens county is concerned, because at variance with the provisions of subdivision 8 of section 34 of article 3, of the constitution of this state. Motion was denied. Trial resulted in verdict of guilty, and sentence was pronounced. The defendant, before sentence, moved in arrest of judgment on the same ground submitted to quash grand jury. Motion was refused.

The defendant appeals from judgment on the grounds of error of circuit judge in refusing to quash indictment, and also in arrest of judgment. The appeal must be sustained. The case is ruled by *State v. Queen*, 62 S.

C. 247, 40 S. E. 553, and other cases deciding such jury laws unconstitutional.

It is the judgment of this court that the judgment of the circuit court be reversed, and a new trial ordered.

(64 S. C. 301)

DUNCAN et al. v. RICHARDSON.

(Supreme Court of South Carolina. June 21, 1902.)

ACTION ON NOTE—DEFENSES.

Where the maker of a note is allowed by the assignee thereof, at the time of the assignment, a certain amount, which he claimed against it, he is estopped, after the assignment, from setting up failure of consideration and a counterclaim.

Appeal from common pleas circuit court of Richland county; Watts, Judge.

Action by Duncan & Tompkins against D. M. Richardson. Judgment for plaintiffs, and defendant appeals. Affirmed.

The following is the complaint:

"The plaintiffs, complaining of the defendant, allege:

"First. That John T. Duncan and Frank G. Tompkins now are, and were at the times hereinafter mentioned, copartners doing business under the name of Duncan & Tompkins.

"Second. That heretofore the defendant executed and delivered to R. E. Burris a promissory note, a copy of which is as follows: '\$475. Columbia, S. C., February 8th, 1900. On November 1st after date, I promise to pay to the order of R. E. Burris four hundred and seventy-five dollars. Value received. Payable at Farmers' and Mechanics' Bank, Columbia, S. C. If not paid at maturity, to bear interest thereafter at the rate of eight per cent. per annum. D. M. Richardson. [Seal.] Witness: Wm. T. Aycock.' Back of note: 'R. E. Burris. Without recourse. John T. Duncan. May 9th. Cr. by rent account, \$30.00.' 10 cents revenue stamps attached and canceled.

"Third. That thereafter, and before its maturity, on or about the 9th day of April, A. D. 1900, the said R. E. Burris, the payee of said note, sold, indorsed, and delivered the said note to the plaintiffs herein for valuable consideration.

"Fourth. That said note at maturity was duly presented to defendant maker for payment, and payment refused.

"Fifth. That the plaintiffs herein agreed previously to the maturity to allow the defendant a credit of \$30 for equities claimed by him against said note, and that no other payment or credit has ever been made thereon.

"Sixth. That said note was given for the purchase of one-half interest in the copartnership stock, business, and assets of J. H. Berry and R. E. Burris, doing business under the firm name of Berry & Burris, in Columbia, S. C., and that said stock, business,

and assets, by reason of said sales, are now owned in copartnership by the defendant, D. M. Richardson, and the said J. H. Berry, under the firm name of Berry & Richardson, in Columbia, S. C.

"Wherefore plaintiffs pray judgment against the defendant: (1) For \$445, with interest at eight per cent from November 1, A. D. 1900, and for the costs of this action. (2) That the court certify on the process to be issued for the satisfaction of this judgment that the same is issued for the purchase money only of a one-half interest in the copartnership stock, business, and assets of the said firm of Berry & Richardson, in Columbia, S. C."

The defendant served the following answer:

"The defendant above named, answering the complaint herein, says:

"For a first defense:

"(1) That he admits the truth of the allegations contained in paragraphs 1, 2, 5, and 6 of the complaint.

"(2) That he has not sufficient information to form a belief as to the allegations contained in paragraph 3 of the complaint.

"(3) That as to paragraph 4 of the complaint, defendant admits that the note therein referred to was presented to him for payment, and refusal of the same, but denies that the said note has matured or become due and payable.

"(4) That at the time when the note mentioned in the complaint was executed, it was understood and agreed by and between the parties thereto that there should be no liability on the same in case the maker thereof, the defendant herein, found himself unable to realize sufficient money out of the business and its assets, mentioned in the complaint, with which to meet the said note when it fell due: such agreement being part of the contract regarding such note.

"(5) That the defendant has been unable to realize out of the said business and its assets sufficient money with which to meet said note at its expressed maturity, although he has carefully conducted said business from the time of his purchase, as alleged in the complaint to the present, and has expressed readiness and has offered to render to the plaintiffs an accounting of all the business since the same has been in his hands, in order to establish that, under the understanding and agreement aforesaid the liability on the said note has not yet accrued, but said offer was and is by them refused.

"For a second defense, and by way of counterclaim:

"(1) That he admits the truth of the allegations contained in paragraphs 1, 2, 5, and 6 of the complaint.

"(2) That he has not sufficient information to form a belief as to the allegations contained in paragraph 3 of the complaint.

"(3) That as to paragraph 4 of the complaint, defendant admits that the note therein

referred to was presented to him for payment, and refusal of the same, but denies that the said note has matured or become due and payable.

"(4) That the sum agreed to be paid by the note mentioned in the complaint was the amount agreed to be paid by the defendant to R. E. Burriss for the interest owned at the time of the execution of the said note by the said R. E. Burriss in the business and assets of the firm of the said Berry & Burriss, and that the said note was based on the agreement to buy said interest; and was conditioned on the accuracy and truthfulness of the statement of the condition of the said business rendered to the defendant by the said Berry & Burriss.

"(5) That the statement referred to has been since found to be in many respects erroneous and faulty, and totally untrustworthy, as a statement of the condition of the business.

"(6) That the defendant, in purchasing the said interest of R. E. Burriss, assumed all debts of the firm of Berry & Burriss, as represented by the alleged statement above referred to, and that in consequence thereof, and of the errors and mistakes in said statement contained, he has paid out of his own funds numerous and large debts of the firm, outstanding when said statement was presented to him, of which he was not informed by said statement, nor in any other way at the time said note was executed, to an aggregate amount much greater than the sum promised to be paid by the note aforesaid.

"(7) That the defendant has expressed a desire and offered to account to the plaintiffs, in order to establish that he has paid out of his own funds sums largely in excess of the amount agreed to be paid by said note, but that the plaintiffs have refused and do refuse to go into the accounting and statement thus offered.

"Wherefore defendant demands judgment that an accounting be had of the matters alleged in this answer, and that the complaint herein be dismissed, for the costs of this action, and for such other and further relief as may be just and expedient."

At the trial plaintiff demurred as follows:

"The plaintiff herein demurs to the answer of defendant, in that it appears on the face thereof that it does not, in either the first or second defense, state facts sufficient to constitute a defense or counterclaim. In that:

"(1) As to the first defense: The special defense set up in paragraphs 3, 4, and 5 contradicts and varies the terms of the written instrument sued on in the complaint, and admitted in the said defense.

"(2) The alleged agreement as set out in said defense was not to be performed within a year,—nor is it alleged that there was any memorandum of the same signed by either party thereto,—and, as such, was in violation of the statutes of frauds.

"(3) As to the second defense by way of counterclaim: The counterclaim, as here set out, must either be taken as a tort against the defendant by the payee of the instrument sued on and Berry, doing business as co-partner, in which case it fails to state that there was fraud, or that the said Berry and Burriss, or that either of them, knew of the alleged faultiness in the alleged statement, or it must be taken as a plea that there was a want of consideration for the execution and delivery of said instrument sued on, in which case the counterclaim fails, as the want of consideration cannot be raised against an instrument under seal.

"(4) The counterclaim alleged herein is against a partnership, Berry & Burriss, and cannot be set up against one of the individuals, or those holding under him.

"The Court: I do not see that Mr. Aycock denies anything. He admits 1, 2, 5, and 6. That leaves 3 and 4. As to the third, he says he has not sufficient information to form a belief as to the allegation contained in paragraph 3, and he stopped. He ought to have gone on and denied the thing, as he had a right to do. As to the fourth, defendant admits the note was presented for payment and refused, but denies said note has matured. I do not see that he denies anything. I think this demurrer will have to be sustained. I do not think it sufficiently alleges want of consideration, and does not allege fraud,—more particularly, because of the fifth allegation in this complaint, which is admitted: "That the plaintiffs herein agreed previously to the maturity to allow the defendant a credit of \$30 for equities claimed by him against said note, and that no other payment or credit has ever been made thereon." Now the plaintiff alleges that, and the defendant admits it. In accordance with the supreme court in the case of *Chemical Co. v. Youngblood*, 58 S. C. 56, 36 S. E. 437, this defendant now will be estopped from claiming anything. That will come in as a note account stated and accepted by him, and when you put in a claim of \$30 in equity arising out of this, and they allege accepted, he is now estopped from questioning the consideration of that note, whether or not it was fraudulent, or anything of that sort. Your answer does not set up a failure of consideration sufficiently, and does not sufficiently allege fraud. Then by your admission in fifth paragraph of the complaint, and your man claiming a credit of \$30, he is now estopped from questioning anything that took place up to that time. The sole issue for the jury to determine is whether or not— There is no controversy now except as to the denial of paragraph 3 and whatever is in paragraph 4. Mr. Aycock: I move to allow me to amend my answer by striking out the admission of the fifth paragraph, and insert in lieu thereof that the plaintiffs having allowed the defendant a credit of \$30 as an equity claimed by him against said

note, and not in satisfaction of his claim against the same. The Court: You mean they offered him \$30, and he refused to accept it. If you want to amend by saying they offered him \$30 by way of compromise, and he refused to accept it, I will allow your amendment to that effect. Mr. Aycock: We do not mean that was the only equity he claimed. I understood that was merely one equity, and the only one upon which they had agreed. The Court: I do not think I will allow it. It strikes me your man got all he purchased. He purchased this man's interest in a stock of goods, and gave a note, and that note matured and was to be paid at a certain time; and he has not alleged fraud sufficiently, and no failure of consideration. I do not think you have shown any defense. I will sustain the demurrer on these grounds, and submit the other issue to the jury."

W. T. Aycock, for appellant. Frank G. Tompkins, for appellees.

HUDSON, A. A. J. On the 8th day of February, 1900, D. M. Richardson purchased of R. E. Burriss his interest in the business of Berry & Burriss, copartners in trade in the city of Columbia, S. C., under the firm name of Berry & Burriss, which said interest consisted of one-half of the assets, stock, and business of said concern. In payment of the said purchase, Richardson gave to Burriss a note, under seal, as follows: "\$475. Columbia, S. C., February 8, 1900. On November 1st after date, I promise to pay to the order of R. E. Burriss four hundred and seventy-five dollars, value received. Payable at Farmers' and Merchants' Bank, Columbia, S. C. If not paid at maturity, to bear interest thereafter at the rate of eight per cent. per annum. D. M. Richardson. [Seal.] Witness: W. T. Aycock." On back of note: "R. E. Burriss without recourse. J. T. Duncan. May 9th, credit by rent account, \$30." Ten cents revenue stamps attached and canceled. On the 9th day of April, 1900, for valuable consideration, R. E. Burriss sold, indorsed, and delivered this note to the plaintiffs, who, after its maturity, commenced this action against the maker, D. M. Richardson. Among the allegations of the complaint is the following: "Fifth. That the plaintiff herein agreed, previously to the maturity, to allow the defendant a credit of \$30 for equities claimed by him against said note, and that no other payment or credit has ever been made thereon." This allegation of the complaint is admitted by the defendant, as are also paragraphs 1, 2, 5, and 6, leaving only the third and fourth paragraphs denied. The defendant sets up against the note two defenses, which are, in substance, as follows, viz.: First, that, at the time the note was given, it was agreed that the same should not be paid, and should be null and void, unless the defendant's share of the profits of the firm

of Berry & Richardson should be sufficient for that purpose, and that he has from said business realized nothing; second, and, as a counterclaim, that the defendant, in buying the interest of E. B. Burriss in the partnership of Berry & Burriss, acted upon a statement of the affairs of said firm which afterwards proved to be erroneous, and that he has had to pay debts of said firm to an amount greater than the amount of said note, so that the consideration has entirely failed. The plaintiffs demurred to the answer of the defendant, which demurrer was sustained by the circuit judge, who submitted the case to the jury upon testimony bearing only upon the third and fourth allegations of the complaint, which alone were not admitted in the answer, and which raise but two questions, to wit, was the note sold and delivered for value before maturity by Burriss to the plaintiffs, and has it been paid? The jury found for the plaintiffs, and the appeal comes up on exceptions by appellant as follows: "(1) For that his honor erred in sustaining the demurrer and holding: 'More particularly because of the fifth allegation in the complaint, which is admitted: "That the plaintiffs herein agreed previously to the maturity to allow the defendant a credit of \$30 for equities claimed by him against said note, and that no other payment or credit has been made thereon." Now, the plaintiffs allege that, and the defendant admits it. Your answer does not set up a failure of consideration sufficiently, and does not allege fraud, then, by your admission of the fifth paragraph of the complaint, and your man claiming a credit of \$30, he is now estopped from questioning anything that took place up to that time. There is no controversy now except as to paragraph 3 and whatever is in paragraph 4.' In other words, holding that the admission in the answer of the fifth paragraph in the complaint constituted the allegation of an account stated. (2) For that his honor erred in refusing to allow the defendant to amend his answer by striking out the admission therein of the fifth paragraph of the complaint and inserting, "The plaintiffs allowed the defendant a credit of \$30 as an equity claimed by him against said note, and not in satisfaction of his claim against the same." (3) For that his honor erred in refusing to allow the defendant, when on the witness stand, to answer the question propounded by his attorney: 'It is alleged in the complaint that the plaintiff herein agreed previous to maturity to allow the defendant a credit of \$30 for equities claimed by him against said note, and that no other payment or credit has ever been made thereon. Was that the only credit which you claimed on that note?' (Objection made and sustained.) (4) For that his honor erred in refusing to allow the defendant, when on the witness stand, to answer the question propounded to him by his attorney: 'In paragraph 3 of the answer it is admitted that the note therein

referred to was presented to you for payment, and you refused the same, and that you denied said note had matured or become due and payable. Under your understanding with the payee of this note, had it become due and payable at that time?' (Objection made and sustained.)"

We do not deem it necessary to consider and pass upon these exceptions in detail, nor to follow the learned counsel for the appellant in his argument as to what is an account stated, as we do not think the question of what is or what is not an account stated is involved in the case. The circuit judge, in sustaining the plaintiffs' demurrer, did so because he regarded the admission by the defendant of the fifth paragraph of the plaintiffs' complaint as fatal to the other defenses attempted to be set up,—not because it showed that an account had been stated between the plaintiffs and the defendant, but because the admission of such an agreement as is therein alleged estopped the defendant from setting up the equities or defenses to said note interposed in his answer. He then had the opportunity, and it was his duty, to make known to the plaintiffs the real consideration of the note, and the conditions as to maturity and payment, if such existed. But instead of doing so, he, on the day of the transfer, claimed, as against the note, a credit of \$30, and nothing more, in the way of an equity; and this was allowed by the plaintiffs and indorsed on the note. This was a distinct admission that the note had been given, that it had been duly transferred to the plaintiffs, and that it was, in their hands, a valid claim, to the amount of the note, less the \$30. The circuit judge so held, and in this we think he was correct.

It is therefore the judgment of this court that the judgment of the circuit court be affirmed, and that the appeal be dismissed.

For a full understanding of the issues involved and decided, the complaint, the answer, and the rulings of the circuit judge should by the reporter be set forth in his report of this case.

(64 S. C. 256)

REVELS v. REVELS et al.

(Supreme Court of South Carolina. June 19, 1902.)

DEED—UNDUE INFLUENCE—MENTAL INCAPACITY—CONSIDERATION—SUPPORT FOR LIFE.

1. Evidence examined, and held insufficient to show that a deed from a mother to her son was obtained by fraud, undue influence, or misrepresentation.

2. Evidence held to show that the grantor in a deed was of sufficient mental capacity to understand the transaction.

3. Where a mother executed a deed to her son of her real estate on his agreement to support her at her home, but such consideration was not inserted in the deed, the son will be required to execute a deed to the mother whereby he binds himself to give her a sup-

port for her natural life, so long as she resides with him.

Appeal from common pleas circuit court of Chester county.

Action by Susannah Revels against Jefferson D. Revels and J. L. Abell. Judgment for plaintiff, and defendant Revels appeals. Reversed.

The following is the report of the special referee, J. H. Marion:

"This is an action for the cancellation of certain deeds of conveyance executed by the plaintiff herein to the defendant Jefferson D. Revels. The action seeks the setting aside of said deeds upon the general grounds of plaintiff's incompetency, undue influence, and fraud, either actual or constructive, growing out of the circumstances connected with the transactions in question. The plaintiff, Susannah Revels, and the defendant Jefferson D. Revels are mother and son. As a preface to the story of domestic infelicities, forming, in good measure, the subject-matter as well as the *raison d'être* of this suit, the family history of the Revels from the year 1874 will be briefly sketched: In that year one George Revels, a man of humble social station, but of thrifty bent and fair mental capacity, was living with his wife, Susannah, and several small children, upon a homestead which embraced the land involved in this action. Twelve children had been born into the Revels home, several of whom at this time had grown up, and had gone out into the world for themselves. For one in his condition of life, George Revels had accumulated a competency. He had a farm of some 300 acres, near what is now the village of Lowryville, in said county and state, and was, it is fair to assume, making a comfortable living for himself and his family. But the standard of living in the Revels home was not high,—not higher, certainly, than the most ordinary physical needs and wants made it. No attention, seemingly, was paid to education or to the culture of mental or spiritual things. Some of the children learned to read and write, some did not, and all that appeared as witnesses in this action gave unmistakable evidences of having 'sat long in darkness.' Some time in this year of 1874, George Revels died, leaving his widow, Susannah, the plaintiff herein, and five minor children, living in the old home. Among the children were Jefferson Davis, the defendant herein, and Mary S. (now Mrs. George Roof) and Georgiana (now Mrs. Melton). The mother then was about fifty years of age, Jefferson Davis was a mere plowboy, and his two sisters above mentioned were younger. George Revels' estate consisted of some 300 acres of land and some personalty. A suit for partition was brought. In the distribution the widow received as her share the old home seat, with 98½ acres of land, being the identical tract of land involved in this action. The minor children received, by

their guardian, in the neighborhood of \$100 each. From this year of 1874, then, the plaintiff continued to live on at the old place, with her several daughters and her one son, Jefferson, the defendant. The marriage of two of the older girls soon reduced the members of the household to the old lady, Georgiana, Mary, and Jeff. As thus constituted, the household continued for several years; Jeff running the farm, and the women attending to the domestic affairs. In 1884 Mary, the youngest girl, married one George Roof. Six years later, Jeff, then a little over thirty years of age, married, and brought his wife home to live with his mother and his sister Georgiana. Jeff's matrimonial venture seems to have met with the disapproval of his mother, and more particularly of his sister, to both of whom the new wife was, to a considerable extent, *persona non grata*. Domestic relations becoming somewhat strained, Jeff and his wife moved away for a few months, but came back within a year and moved into a house which Jeff built for a home within a few hundred yards of his mother's, on the old place. In 1892 Georgiana, the only child of the plaintiff then living with her, married Mike Melton, and moved away from the old home. Shortly thereafter Jeff and his family moved back into the old home to live with the old lady. The marriage of Georgiana to Mike Melton (a bridegroom of some sixty-odd summers) was a rise in the world, from a financial standpoint, which fact seems to have been promptly recognized by Georgiana's mother, the plaintiff herein, who very shortly after Mike's advent into her family induced him to take up a mortgage on her son Wesley's land, and also a mortgage upon her own land then held by Mrs. Mary Gaston, of Chester. The current of family history now runs smoothly for something over two years, until the fall of 1895. In the late summer or early fall of this year, Mike Melton made known his intention of foreclosing his mortgage upon Wesley's land. The announcement seems to have caused something of a disturbance in the family circle and to have aroused, to a marked degree, the fears and resentment of the old lady. Wesley's land was duly sold under foreclosure proceedings by the thrifty and undaunted Mike. Apparently growing out of said circumstances, very shortly thereafter the old lady, the plaintiff herein, deeded her land, upon which Mike Melton held mortgage, to her son Jeff, who arranged to take up mortgage in Melton's hands, and place the mortgage debt, the payment of which he assumed, with the defendant Abell. The conveyance from the old lady, the plaintiff, to her son Jeff, by the deed aforesaid, is the principal transaction the validity of which is questioned in this action. Nearly two years after the execution of the first deed, in August, 1897, a second deed from the plaintiff to her son Jeff, conveying the same land, was executed. In

this second deed the consideration is not the same as in the first deed. The old lady appears to have lived on at the old place with Jeff continually until early in January, 1900, when she came to Chester to visit her daughter Mary Roof. While there, in the winter and spring of 1900, she had a severe spell of sickness. Going back to Jeff's in May, 1900, she came back to Mary Roof's in the fall of 1900, where she was in January, 1901, when this suit was brought. Such is an outline of the Revels' domestic history from 1874 to the 1st of January, 1901.

"The broad issue of law and fact before us is as to the validity of the deed of Susannah Revels to Jefferson D. Revels, of date the 23d of December, 1895, purporting to convey the premises described in the complaint. Was this instrument the outgrowth of, or attended by, such facts and circumstances as will warrant a court of equity in declaring it null and void?

"(1) In determining that question, the first issue of fact raised by the pleadings and by the testimony is as to the mental capacity of the plaintiff, Susannah Revels, on the said 23d day of December, 1895. There can be no difference of opinion as to the plaintiff's mental condition at the time she appeared as a witness at the hearing before me on the 15th of May, 1901. She presented the appearance of a very old and exceedingly feeble woman. She would grow impatient, refuse to answer questions, and attempt to leave the witness chair. Her examination had to be suspended once or twice on account of her excitement and irritation. Altogether, she presented a piteous spectacle of complaining, querulous, inconsequent, driveling senility. Her testimony, with its contradictions and inanities, is in itself a sufficiently pointed commentary upon her mental condition at the time of the hearing before me. Without going to the extent of pronouncing her entirely non compos or insane, I have no hesitation of saying that at the hearing before me she was in a condition of mental weakness very closely approaching mental incapacity and impotence. But I do not think the facts as to her mental state in the summer of 1901 are sufficient to raise the presumption that she was in the same condition nearly six years before, on December 23, 1895. Nor do I think the testimony to that effect convincing. The testimony of the venerable Dr. A. F. Anderson,—a splendid type of the old-school country physician, whose long life and labors in the service of humanity, and whose simple and noble character, of which any court sitting in Chester county is justified in taking judicial cognizance, remind us of Dr. McClure, of Drumtochty, immortalized by the pen of Ian MacLaren—The testimony of Dr. Anderson is to the effect that he could not see much difference in her present mental condition and that of the past condition of her mind, but that he had seen but little of her within the

past twelve months; that he had not examined her with respect to her mental capacity at any time; that she was feeble physically than in the past; and that the condition of the body had some influence upon the mind. The doctor did not see Mrs. Revels the day she was on the stand. Himself in his eighty-third year, while his mind seems clear and strong, it is probable that he is not as close an observer, or as keen and competent a critic, as when his physical vision was as clear as his mental. The testimony of the Revels family, directed to this point, is disregarded, for the reasons hereinafter assigned. The testimony of A. G. Brice, Esq., who saw the old lady on the day she executed deed, the 23d of December, 1895, is that she impressed him as being physically and mentally weaker—'especially mentally weaker'—on the day of her examination before the referee than on the day deed was executed. I have no doubt that this impression is correct. It is certainly more in accord with reason and the general tenor of the facts. What, then, was the mental condition of Susannah Revels on December 23, 1895? While, as I have indicated above, her mental weakness nearly six years before cannot be inferred from her mental weakness of the present, and while she is doubtless weaker intellectually to-day than she was then, there is no question but that she was a person of feeble mental powers on the 23d of December, 1895. The testimony of all the witnesses, expert and nonexpert, indicates conclusively that she was naturally a woman of limited intellectual capacity. Dr. Anderson, who had known her for fifty years, says that he 'always regarded her as a woman of feeble mental character.' Dr. J. C. Brawley, who knew Mrs. Revels for several years prior to December 23, 1895, says that her 'mental ability' had been 'limited' ever since he knew her. He goes so far as to pronounce her case one of dementia naturalis, but afterwards explains that his diagnosis has reference only to 'her capacity for business affairs.' An attempt was made to show an attack of paralysis in 1891 or 1892, having the effect of further weakening her naturally feeble mental powers, but the proof as to this paralytic stroke is unsatisfactory. Dr. Anderson, who, it is claimed, was called in, has no recollection of it; and Dr. Brawley, the other physician who is said to have treated her, has only a 'slight recollection' of attending her for a stroke of 'facial paralysis,' from the attack of which he says she recovered under his treatment. Dr. Brawley saw Mrs. Revels last in 1894. The testimony of the several members of the Revels family who testify as to the mental incapacity of the plaintiff at the time of the execution of the deed is given very little, if any, weight, for the reason that it is opinion evidence of ignorant, illiterate, and more or less stupid nonexperts, interested in having the deed in question set aside, and founded upon no satisfactory facts

and data. Before leaving this phase of the case, it ought to be noted that Dr. A. F. Anderson says that in his opinion the plaintiff was never 'weak-minded to the extent of being imbecilic or lunatic.' The facts and circumstances as to plaintiff's conduct and conversation prior to and at the time of executing the deed negative the idea of total incompetency. From all the testimony, I find that plaintiff's mental condition on the 23d of December, 1895, was that of a naturally weak-minded person, aggravated somewhat by the infirmities of old age.

"(2) The mental weakness established, our next inquiry is as to what extent the plaintiff was capable of understanding the nature and effects of the transaction in question,—to what extent did she understand it? Dr. Anderson says he does not think she would understand the difference between a deed and a mortgage; that 'she never had any business of that kind to transact, and that he could not say definitely as to her capacity for understanding a business transaction on December 23, 1895'; that he could not say that she would or would not understand the 'difference between a gift of property and borrowing money,' or between a deed and a mortgage; that he has never seen her tested in a business transaction. Dr. Brawley testifies that the plaintiff has always been afflicted with dementia naturalis as to business affairs, but he says he never saw her have any business transactions with any one, except with himself, in regard to settlement of accounts, of which her knowledge was meager. If 'dementia naturalis' is another term for idlcy, as Dr. Cox says, I do not exactly understand how a person can be an idiot as to business affairs, and not an idiot as to other matters. If he is not an idiot as to anything or any class of things, then he could not be termed an idiot at all. The referee, while recognizing his incompetency to decide between learned doctors, who have exercised their immemorial privilege of differing, ventures his maiden opinion as an alienist against Dr. Brawley's theory of a dementia naturalis confined solely to business affairs. But while, in the opinion of Dr. Cox and of the referee, Dr. Brawley may have used his scientific term somewhat inaccurately, his meaning is clear. In his opinion, Mrs. Revels was thoroughly incompetent to transact any kind of 'business.' While the opinions of these reputable physicians are entitled to respect, it seems to me that the fact that neither of them ever examined her for the purpose of diagnosing her mental condition, nor ever saw her tested in business affairs, detracts greatly from the value of their opinions. While it is competent evidence, I do not think the bare opinion of a general practitioner of medicine, who has not made a specialty of mental diseases, as to mental capacity, is entitled to much weight in any case. As against the opinion of the doctors, we have in this case a number of facts per-

tinent to the point in issue. Between 1882 and 1892 the plaintiff gave five different mortgages upon the land involved in this suit. She was appointed by the judge of probate the guardian of her children. Mike Melton, the son-in-law, an illiterate but intelligent witness, testifies that in 1892, the year he married Georgiana Revels, the old lady requested him to take up the mortgage on her land, as 'she was afraid they would foreclose mortgage, and they wouldn't be able to pay it'; that the 'old lady' also requested him to lift mortgage on land of Wesley Revels, which he did. In 1895 Melton foreclosed mortgage on Wesley's land, and bought it in at foreclosure sale. After foreclosure proceedings were commenced against Wesley, the old lady tells Melton she is going to take papers out of his hands, etc. The testimony of A. G. Brice and J. L. Abell as to conduct and conversation of old lady on the day deed was executed shows clearly that she had at least a fair comprehension of what she was doing. After deed was executed, she recognized that she had conveyed land to Jeff, by accusing him of lying about giving three acres to Thomas. Living as the old lady had for many years in comparative poverty upon her little farm, with the storekeeper's frown as the largest cloud upon her horizon, it is entirely reasonable to infer that she had long known the meaning of borrowing and lending money, and of mortgaging and deeding the land. The evidence of Mrs. Melton as to her mother having made a will in her favor while Jeff was living away from the old home, and of her mother having put it away in her trunk, is another commentary upon the old lady's understanding of worldly concerns. While it is true that the plaintiff was, to a certain extent, weak-minded, and very ignorant and illiterate, I cannot say she was incapable of comprehending the nature and effect of the transaction by which she conveyed her land to Jeff. On the contrary, I believe she was capable of understanding her act, and did understand it.

"(3) Was the execution of this deed procured by means of undue influence on the part of Jeff Revels, the defendant? What part did Jeff play in getting the deed executed? It is agreed that the old lady became indignant and resentful when she discovered that her son-in-law Mike Melton was going to foreclose his mortgage on Wesley's land,—the mortgage she herself had induced him to take up three years before. The old lady's action a few years before in getting Melton to lift the family mortgages, with which transaction neither Jeff nor any one else is connected as an adviser or instigator, indicates that she knew what foreclosure and forced sales meant, and that she had a rather deep-rooted dread of foreclosure proceedings. It is natural to conclude that the foreclosure of Wesley's mortgage would excite her fears, perhaps not unreasonably. Under these conditions, I am convinced that

the old lady thoroughly made up her mind, with all of the stubborn determination of a narrow and ignorant mentality, to get the mortgage on her land out of Mike Melton's hands as speedily as possible. As to Jeff's egging his mother on in her ill feeling toward Mike Melton, and as to his claim that his mother first brought up the subject of taking the mortgage at the supper table, etc., I do not think the evidence on either side worthy of any great consideration. It is probable that the supper-table story is a myth. It is probable, further, that this matter of the means and methods of lifting the Melton mortgage was from the first thoroughly and frequently discussed between them. Whatever the facts as to that, I am satisfied that the wish of the plaintiff to get mortgage out of Melton's hands was as much the product of her own instincts, feelings, desires, and free will as it could well be. The method of attaining the desired end finally agreed upon was that the old lady should deed land to Jeff; that he should assume the mortgage debt, which he had already arranged to take out of Melton's hands; and that he should support his mother the balance of her life. Was that part of the transaction by which the land was conveyed to Jeff attended by such facts and circumstances as will warrant a court of equity in setting the deed aside for undue influence? The answer to this question is the crucial point of the case and has given me considerable difficulty. It depends upon the proof as to the following points of fact:

"First. Was the plaintiff really influenced, directly or indirectly, by Jeff, against her own inclination or judgment, to give this deed of conveyance? The testimony fails to disclose any evidence as to any persuasion, importunity, threats, or constraint brought to bear upon the old lady by Jeff. The old lady's mind seemed thoroughly made up as to this point. She destroyed the somewhat mysterious papers she had made in favor of Georgiana a few years before, when Georgiana was the only child living with her. She came to the office of A. G. Brice, in Chester, and while there, or on that day, told J. L. Abell that she wanted Jeff to have the land. After Mrs. Melton had taken her out of the office and had the talk with her on the day the deed was executed,—a fact, by the way, which Mrs. Melton, very unfortunately for herself as a witness, positively denies,—the old lady stated that 'they didn't want her to do it, but she was going to do it anyway,' or something to that effect. Not once does the old woman hesitate; she appears to be thoroughly willing, almost anxious, for the step. There is no evidence that she had any scruples from the beginning. On the contrary, it would seem that any endeavors on Jeff's part, by means of importunity, fraud, deceit, or otherwise, to influence his mother to execute deed, would have been useless, for she appears to have been

a convert to that way of thinking from the first. I do not think the testimony establishes the use of any such means to influence her.

"Second. Are there other facts connected with the transaction from which undue influence will be presumed? (a) The relationship of the parties. The family sketch indicates with sufficient clearness the peculiarly close relationship that had existed for many years between the plaintiff and her son Jeff. Her youngest son, he appears to have held the Benjamin's place in the old lady's heart and life. From the date of his father's death he was the male head of the plaintiff's household,—the man of the family. In that capacity he was responsible for making the little farm support his mother, his sisters, and himself for many years. For one of his intelligence and condition in life, he appears to have performed his part with reasonable faithfulness. Men in Jeff's station of life, as a rule, marry early. Jeff was over thirty when he took unto himself a wife. His services up to the time of his marriage seem to have been given entirely to his mother and sisters. I do not think Jeff could pose as a modern *Aeneas*, or as a satisfactory exemplar of any particular virtue; but, so far as filial piety is concerned, up to the time of the making of this deed he shows up better than any of his sisters or brothers. There is nothing in his life during the said period to indicate that he was at all unworthy, as compared with her other children, of the old woman's affection and confidence. He even seems to have done more than most favorite sons to have deserved his place in the old lady's regard. Such was the tie that existed between these two persons when this conveyance from mother to son was determined upon. Was that determination on the old lady's part the result of the skillful and artful touch of the scheming son upon the strings of maternal affection, or of the subtle but potent influence of the strong mind upon the weak? The facts are that Jeff was as ignorant and illiterate as his mother. He impressed me, by his demeanor as a witness, with having very little sense. From such light as the testimony throws upon the matter, I am constrained to think Jeff's mental capacity was very little superior to his mother's when the deed was made. He certainly was not the man to conceive the scheme of having the old lady execute the conveyance, and carrying it out so successfully, if it had been in any way contrary to the old lady's real desires and intentions. (b) Such being the relationship of the parties, and the footing upon which they stood, was the conveyance in question, as between these parties, under all the circumstances, for an inadequate consideration, or unfair or inequitable in any way? I do not think so. I cannot say that the price of \$400 was in itself grossly inadequate for the 96½ acres of land in question. Taken in connection with Jeff's

long service in his mother's house, his mother's affection for him, and his agreement to take care of her the balance of her life, I do not think the consideration of the deed by any means unconscionably inadequate. I do not think the nature of plaintiff's act justifies the conclusion that she did not exercise her deliberate judgment in conveying the land to Jeff. If it be true that such a relationship as existed between the plaintiff and her son Jeff raises a presumption that the son exercised a controlling influence over the will and conduct of the mother, it is equally true that such a relationship raises the presumption that such an agreement as the turning over of her worldly affairs and property interest to her favorite son was in accord with the freest instincts, promptings, and desires of her untrammelled heart and reason:

*'To shake all cares and business from our age,
Conferring them on younger strengths, while we
Unburthen'd crawl toward death.'*

—is one of the strong propensities of human nature. She had the right—most highly respected by our law—of disposing of her own as she pleased. Her son Tom testifies that he had long before this heard his mother say that she intended Jeff to have everything she had. She told Mr. Abell, the day the deed was executed, she wanted Jeff to have the land. 'Love and affection,' a good consideration in itself, taken in connection with the valuable consideration, and the promise of future care and support, moving from Jeff, is certainly sufficient in this case to rebut any presumption of undue influence. In this connection, I do not think the absence of independent counsel for the old lady is of any consequence. Mr. A. G. Brice, the distinguished counsel who drew the papers for these parties, acted with scrupulous fairness in the premises, carrying in to effect faithfully the agreement which he understood had been arrived at between them before coming to his office. There was no secrecy about the transaction, and nothing to indicate to Mr. Brice that there was anything wrong about it. In view of my findings as to the fairness of the transaction, the matter of absence of independent counsel is not material. She did what she had a right to do, what was natural for her to do—an intention which she confirmed and ratified two years later, when she signed the second deed over the earnest protests of her aged neighbor and counselor, Maj. Lowry, who drew the deed. (c) There is no question that Jeff agreed to support and care for his mother the remainder of her life, and that this agreement was a part of the consideration of and for the deed. Granting that this agreement should have been inserted in the deed of conveyance, was the failure to insert it the result of artifice or cunning on Jeff's part? I do not think that at all certain. Jeff stated to several persons before and after the execution of the deed

that he was to take care of his mother for the rest of her life. He so stated to Mr. Abell the day the papers were drawn. In the second deed,—a paper the execution of which grew out of misunderstanding and muddled wits,—Jeff's agreement to support is in the deed. Neither the mother nor the son mentioned that agreement in advising Mr. Brice as to the preparation of the deed in question. They were both persons who might easily make a mistake of that kind,—persons whose familiarity with the details of conveyancing contracts and whose general information was not such as to make the failure to have the provision inserted in the deed a badge of bad faith in itself. That it was not an omission, contrived with fraudulent intent by Jeff, his after conduct in fully and freely accepting the responsibility for his mother's support and care is strong circumstantial evidence. I believe the omission was the result of mutual mistake. (d) Granting that a promise to support should have been written in the deed, and regarding it as a real part of the consideration, has the defendant Jeff Revels failed to meet and keep his obligation in that respect? Has there been a failure of the consideration in that regard? So far as the testimony shows, there has never been any attempt on Jeff's part to escape his obligation to support and care for his mother. Where the aged parent turns over his estate to the child upon his filial promise of support and care, we are apt to find in too many cases that the child has lost 'the pregnant and potential spurs' to filial duty. It is the fool in 'King Lear,' I think, who speaks of such a parent as one 'that giveth his children the rod and putteth down his own breeches.' While, as I have said, Jeff is by no means a model son, for one of his antecedents, environment, and mental and moral fiber, he seems to have done his duty by his mother surprisingly well. Up until the time she went to Mrs. Roof's in response to the latter's invitation to visit her at Factory Hill, in Chester, in January, 1900, Jeff had, ever since the execution of the deed, supported and cared for his mother as an inmate of his home. The old lady having fallen sick at Mrs. Roof's, and having lain there for several months, seriously ill, Mrs. Roof seems to have repented of her hospitable intentions, and preferred a claim against Jeff for his mother's support for the time she had been with her. Jeff had been to see his mother several times during her illness, but nothing had been said to him about paying his mother's board or taking her away. As soon as he received notice of the claim through Attorney Newbold, Jeff came for his mother and took her to his home. I do not think the allegations as to ill treatment and abuse are sustained. It is significant that the time she was found with vermin on her was a short time after she came back from Mrs. Roof's. There is no doubt that, from the time of her sick-

ness at Mrs. Roof's, she has been a great charge and burden upon those about her. Jeff Revel's wife—a woman who impressed me favorably as a witness in the case—has been a good deal of an invalid herself for several years, and it may be that the old lady might have lacked certain attentions on that account; but there is no satisfactory evidence that Jeff either failed to provide for his mother, or that he neglected and abused her. Certainly the other children have not developed any very attractive traits or devoted deeds, in the way of filial piety or otherwise, so far as the testimony reveals.

"(4) Is the bringing of this action the act and deed of the plaintiff, conceived and executed in the exercise of a free, intelligent, and responsible will? This suit was commenced over five years after the old lady had deeded the land to Jeff. It was commenced while she was at Mrs. Roof's, where she had gone a second time in the fall of 1900. When she appeared as a witness in this case, four and one-half months after suit was started, there is no doubt she was mentally irresponsible, or very nearly so. Dr. McConnell's testimony establishes that she was almost, if not quite, in that condition when he treated her at Mrs. Roof's in the spring of 1900. I am satisfied that she was very nearly, if not quite, mentally incapable when this action was commenced. The setting aside of the deed to Jeff Revel's by means of this action is the equivalent, practically, of her writing a new deed, conveying all her land to all her children in equal proportions; for it is almost certain that no will or other disposition of her property she could now make, or make between this and the swift-coming death hour, could be considered the act of a person of sane mind. The first deed—the conveyance to Jeff—was reasonable, natural, and fair. This second deed, which the old lady would write by means of a decree of this court, giving a pittance carved out of the little plantation to each of her other numerous progeny, none of whom have any special claim upon her bounty, would be unnatural and unfair, as well as the act of a person virtually non compos mentis. Passing over the fact that Jeff Revels has partly performed his contract to support his mother, and has made some payments upon the mortgaged debt assumed by him, the present condition of the plaintiff's mind makes it impossible to place the parties in statu quo, from a legal standpoint, by canceling the deed of December 23, 1895.

"(5) In view of the findings of fact and conclusions of law reached as to the deed of December 23, 1895, it will not be necessary to consider in detail the second deed of August 31, 1897, or the mortgage of the defendant J. L. Abell.

"Upon the above review of the facts, I submit the following findings:

"(1) That on the 23d of December, 1895,

the day deed in question in this case was executed, the plaintiff herein was a woman about 76 years old, ignorant and illiterate, and of naturally weak mental powers, aggravated to some extent by old age.

"(2) That notwithstanding her ignorance and mental feebleness, the plaintiff was capable of understanding the general nature and effects of the deed aforesaid, whereby she conveyed the land described in the complaint to her son the defendant Jefferson D. Revels, and in fact did understand her said act and deed.

"(3) That the execution of said deed of conveyance was not procured by fraud, threats, or undue influence on the part of the defendant Jeff D. Revels.

"(4) That the consideration of the said deed was not grossly inadequate, that the said conveyance was thoroughly in accord with the plaintiff's will and wishes, and that the transaction was not unfair and inequitable in any way.

"(5) That the agreement on the part of Jeff D. Revels to support and care for his mother, the plaintiff, during the remainder of her life, was a part of the consideration of and for said deed of conveyance, and that the failure to insert said agreement in the deed was contrary to the intention of both parties, being due to mutual mistake.

"(6) That the plaintiff's present mental condition, taken in connection with the other circumstances, raises the presumption that the bringing and prosecution of this suit is not an act of the plaintiff's free, intelligent will, and makes it impossible to restore said parties to the status quo ante.

"(7) That the defendant Josh. L. Abell is the owner and holder of a mortgage upon the premises described in the complaint, that the condition of said mortgage has been broken, and that there is now due upon the debt secured by said mortgage the sum of \$——.

"The principles of law governing this case may be briefly stated as follows: The acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in a court of equity, and relief by rescission granted, if it appear that such acts or contracts were in fact induced or procured by imposition or undue influence, or if the nature of the act or contract, or of the conditions or circumstances under which it was executed, show unfairness or advantage taken, or justify the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence. Story, Eq. Jur. § 238; Banker v. Hendricks, 24 S. C. 1; Gaston v. Bennett, 30 S. C. 473, 9 S. E. 515; Wille v. Wille, 57 S. C. 427, 35 S. E. 804; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 280. On the other hand, unless there is great inadequacy of consideration, or some other evidence of fraud, imposition, or overreaching, any degree of imbecility will not suffice to avoid

a deed. *Henderson v. McGregor*, 30 Wis. 78, and fifteen other cases cited in note to *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 280. 'Absolute soundness of mind is not necessary to enable one to make a valid conveyance. It is sufficient if the mind fully comprehend the import of the particular act.' *Rippy v. Gant*, 4 Ired. 443; *Miller v. Craig*, 36 Ill. 109; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97. 'In all cases involving an inquiry of this sort, in order to avoid erroneous conclusions the strictest attention must be paid to the particular circumstances, so as to ascertain, if delusion and infirmity appear, whether they are so connected with the act, the validity of which is in dispute, as to show that as to that act the intelligent assenting mind was wanting.' *Barrows, J., in Hovey v. Hobson*, 55 Me. 282.

"As to reformation, the rule under which conclusion No. 2, as hereinafter stated, is reached, is as follows: 'Where an agreement is made and reduced to writing, but through mistake, inadvertence, or fraud the writing fails to express correctly the contract really made, a court of equity will reform the instrument in conformity with the real intention of the parties.' 20 Am. & Eng. Enc. Law, 713. It is evident that any discussion of any law applicable to this case is unnecessary. The law is plain and comparatively simple. The determination of the issues depends upon a careful, critical analysis and weighing of the facts. In the well-considered and able argument for the plaintiff the effort was made to put this case upon all fours as to the facts with the recent case of *Wille v. Wille*. The analogy falls as to more than one vital point. In the *Wille Case* the deed was executed under a mistake of fact on part of grantor, who believed she was executing a will; the valuable consideration was entirely nominal, and the contract itself improvident and unreasonable. And so, I believe, little is to be gained by a study of cases, a number of which in our own Reports I have examined. Every case must stand upon its own bottom, and that is particularly true in a case of this kind. Appreciating that fact, I have endeavored to indicate in some measure the character and manner of the witnesses, and the impressions produced by them, with perhaps unnecessary candor in some instances, but in the interest of the truth, as I see it. Judge Wardlaw, in *Means v. Means*, 5 Strob. 189, says: Where 'there has been conflict of testimony, many witnesses on one side, all fair upon paper, may have been disbelieved, and slight testimony on the other side, from the character and manner of a witness, or circumstances which attended the trial and fell within the observation of the jury, may have justly acquired force which cannot here be appreciated.'

"Upon the facts above found, the conclusions below stated necessarily follow:

"(1) That the deed of conveyance of date

December 23, 1895, from the plaintiff, *Susannah Revels*, to the defendant *Jeff D. Revels*, is a valid and binding contract, and that the plaintiff herein is not entitled to have said instrument rescinded or canceled.

"(2) That the said deed of December 23, 1895, should be reformed to the extent of having written therein, as a part of the consideration therefor, the promise of the grantee, *Jeff D. Revels*, properly to support and care for his mother, the grantor, *Susannah Revels*, for and during her natural life.

"(3) That the defendant *Josh L. Abell* is entitled, if he so desires, to an order of foreclosure and sale of the premises described in the complaint; the proceeds of such sale to be applied to the payment of his mortgage debt, with the interest thereon, after the payment of a certain portion of the costs, as hereinafter provided.

"(4) That in the event the defendant *Abell* shall not demand the foreclosure of his mortgage in this action, the plaintiff herein shall be liable for one half of the costs of this action, and the defendant for the other half thereof; in the event said mortgage be foreclosed, and premises sold, three-fourths of the costs shall be taxed against the defendant, to be first paid from the proceeds of the sale of the mortgaged premises, and the remaining one-fourth thereof shall be taxed against the plaintiff."

Glenn & McFadden, for appellant. *Caldwell & Gaston*, for appellee.

POPE, J. Ninety-six and a half acres of land is the contention between mother and son, or, rather, all the children except the son have influenced the mother to turn against her son. Surely the love of money is the root of all evil. The story is soon told. The plain story is short. Not long after the war, the plaintiff, who was the mother of seven children, was left a widow. Three of these children,—two girls and a boy—were left to the care of their mother, the plaintiff. This 96½ acres of land was assigned to the widow in the partition of her husband's estate. She could not work in the field, yet she must have managed her household affairs well. Her son *Jefferson D. Revels* clung to his mother. He cultivated her land from the year 1874 so that the generous yield therefrom supported mother and all three children. One by one the girls married, and would leave the family nest. When only one was left, *Jeff* himself married. Bickerings between the daughter and the daughter-in-law caused *Jeff* to take his wife a little distance from his mother, but not to such a distance as to fail to work for her, and, too, only staying away until he could put himself up a modest cottage on his mother's land. As soon as this last daughter married, the mother had her son to come back with his wife into the family residence. The plaintiff, through some misfortune, had to borrow a

few hundred dollars. A kind lady lent the money on a mortgage of her land, and was very indulgent. Finally, after years, a son-in-law of the plaintiff, at her request, took up the mortgage debt. This same son-in-law took up a mortgage that Wesley Revels, a son of the plaintiff, had given on his lands. The debt not being paid, this son-in-law, Mr. Mike Melton, foreclosed his mortgage, and bought the land at the sale. Thus Wesley Revels was turned out into the public highway. This was too much for the mother, the plaintiff. Instantly she was filled with forebodings as to her own fate at the hands of her son-in-law. The defendant did not take any part against his brother-in-law, but the plaintiff could not be quieted. Finally she proposed to her son Jefferson, the defendant, that if he would take up the mortgage held by Mr. Mike Melton, and would also agree to support the plaintiff the balance of her life, she would convey the 96½ acres of land to him. He consented to try to take up the mortgage. The result was that the defendant J. L. Abell agreed to advance the money to pay off the mortgage held by Mr. Mike Melton, provided that the defendant Jefferson D. Revels would, as soon as the plaintiff conveyed the land to him, execute a mortgage on the land to secure the money necessary to satisfy Mr. Melton's mortgage. So the parties went to the town of Chester, S. C., into the law office of Mr. A. G. Brice, where the latter prepared the deed from the plaintiff to the defendant Jefferson D. Revels, who at the same time prepared a deed by way of mortgage of the same land to J. L. Abell for \$380, which was executed as a part of the same transaction by the said Jefferson D. Revels. A daughter of the plaintiff took her mother out of the office while the papers were being prepared, and urged her mother not to sign the papers. The mother's reply was, "I know what I am doing," and she returned and executed the papers. All these things happened in the year 1895. Thereafter the plaintiff returned to her old home, and resided there as a member of her son Jefferson's family. At his table Jefferson always helped his mother's plate first of all the family until some time during the year 1900. On 1st January, 1901, this action was begun to cancel the conveyance in question on the ground that plaintiff was a very old woman, of weak mind, unprotected, and, dominated by the influence of her son Jefferson, without consideration, but through fear of him, by his intimidation of her, by his fraud, etc., had made the same without understanding what she was doing. The consideration named in the deed was \$400, while the mortgage of Mr. Melton was only \$380. The answer of the defendant denied all wrongdoing. The issues of law and fact were referred to J. H. Marion, Esq. His report is clear and strong, and was in favor of the defendant on all the issues of law and fact. Plaintiff excepted to his report, and, upon the hearing before Judge

Ernest Gary, he pronounced a decree in favor of the plaintiff, and ordered the deed canceled. Upon appeal we have given the case full consideration, and, as the result thereof, we find ourselves in favor of the views of Mr. Marion, as special referee. His report must be reported. We will not repeat a discussion of the facts. However, it is apparent to us that the defendant Jefferson D. Revels should execute a deed to Susannah Revels, wherein he must bind himself to support his mother, the plaintiff, for and during her lifetime, as a member of his family, but not to include her expenses while living anywhere else than in his family.

It is the judgment of this court that the judgment of the circuit be reversed, and that the complaint be dismissed upon the execution of a deed by the defendant Jefferson D. Revels to his mother, Mrs. Susannah Revels, whereby he binds himself to give her a support for and during her natural life, and so long as she resides with him.

JONES, J., concurs in the result.

(64 S. C. 277)

FRIEDHEIM v. CRESCENT COTTON
MILL et al.

(Supreme Court of South Carolina. June 19, 1902.)

RECEIVERS—COSTS AND ATTORNEY'S FEES—
CORPORATION—OWNERSHIP OF
BONDS—EVIDENCE.

1. Where mortgaged property and machinery on which the manufacturer held a purchase-money mortgage are sold by the receiver, the attorney's fees of the receiver, taxes, commissions of receiver, and costs of court are properly paid pro rata out of such proceeds.

2. The president of an insolvent cotton mill deposited certain of its bonds with the bank to secure a loan for the mill, and thereafter paid the loan in part by his individual funds. *Held* sufficient to establish his claim that the bonds belonged to him as an individual, though no account of the transaction could be found on the books of the mill.

3. A party paid to the treasurer of a cotton mill moneys for which he was to receive bonds at par secured by a trust deed. The officers of the mill hypothecated all the bonds to a bank, and none were ever delivered in pursuance of the contract. *Held*, that any surplus of the mortgage assets after paying the claim secured by the pledged bonds was applicable to the debt of such lender.

4. Where a receiver, under orders of the court, runs an insolvent cotton mill, the expenses thereof are properly paid from proceeds of the sale of the goods manufactured by the receiver to the exclusion of the general unsecured creditors.

Appeal from common pleas circuit court of York county; Townsend, Judge.

Action by Samuel Friedheim against the Crescent Cotton Mill and others.

The following is the circuit decree:

"On hearing the report of the receiver, A. E. Smith, bearing date of April 17, 1901, and the report of W. Brown Wylie, special referee, upon the claims presented and proved before him, and after hearing the argument

of counsel upon all matters of contest, it is hereby ordered, adjudged, and decreed, that the report of the said A. E. Smith, receiver, be, and the same is hereby, in all respects confirmed, except as the same may be hereinafter modified. And it appearing from the said special referee that there have been proved before him bonds secured by the lien of the mortgage mentioned in the pleadings, amounting to \$50,000, with coupons on \$75,000 of such bonds from April 1, 1900, and with coupons on \$35,000 thereof from October 1, 1900, and also detached coupons due April 1, 1900, amounting to \$300; and it appearing that only the six bonds proved by O. K. Eldridge, with coupons maturing October 1, 1900, are disputed as to ownership; and as to these bonds, after hearing the testimony offered and argument of counsel,—it is hereby adjudged that the said O. K. Eldridge is the legal and 'bona fide' owner and holder of the said bonds. And it further appearing from the report of the said special referee that W. B. Fewell having, on the 7th day of December, 1899, paid over to the Crescent Cotton Mill the sum of \$5,000, with the understanding and agreement that he should receive therefor first mortgage coupon bonds of the said Crescent Cotton Mill, but which bonds were never delivered; and it further appearing that the whole amount of \$50,000 of bonds issued by the said Crescent Cotton Mill are now held by other bona fide holders: It is ordered and adjudged that the said W. B. Fewell is in equity entitled to receive any bonds or surplus of bonds which have been or may be released by the payment of the debts for which the same were pledged, to the aggregate par value of \$5,000, and is entitled to be paid his pro rata on said bonds, if any, along with the other bondholders of the said Crescent Cotton Mill, out of the proceeds of the property sold under said mortgage, after the payment of the expenses as hereinafter provided. And it further appearing from the report of the said A. E. Smith, receiver, that there is now in the bank the sum of \$33,752.77, with interest thereon at four and one-half per cent. from February 11, 1901, applicable to the payment of the said bonds and coupons, after the payment of expenses: It is hereby ordered, adjudged, and decreed, that the said receiver do at once draw out and retain from said sum so deposited an amount equal to three per cent. thereon for his commissions as receiver, and that he pay therefrom to James F. Hart, Esq., plaintiff's attorney, the sum of \$840, being four-fifths of the fee of \$1,050 allowed him under the order of this court dated April 17, 1901; and that he pay therefrom to Jos. W. Barnwell, Esq., the sum of \$100 in full of counsel fees and commissions of the Richmond Trust & Safe Deposit Company, and to W. W. Lewis, Esq., the sum of \$20, being four-fifths of his fee of \$25 allowed him as attorney for the Crescent Cotton Mill, and to W. Brown

Wylie, Esq., the sum of \$80, being four-fifths of his fee of \$100 hereby allowed him as special referee herein; and to F. P. McCain, Esq., the sum of \$16, being four-fifths of his fee of \$20 hereby allowed him as special referee in said cause; and to James F. Hart, Esq., the sum of \$160, being four-fifths of the additional fee of \$200 hereby allowed him as receiver's attorney, in addition to the sum of \$150 already paid to him by the receiver; and that said receiver retain therefrom in his hands to the credit of the fund out of which it was paid the sum of \$1,031.35, being four-fifths of the sum of \$1,289.19 paid out by the receiver, as his report shows, to wit, four-fifths of the following amounts: Insurance, \$98.44; watchman, October, November, December, \$126; James F. Hart, attorney, \$150; auctioneer, \$7; advertising, \$45; taxes, \$862. That the receiver, after making said payments, and after paying from said mortgage fund four-fifths of the costs of the officers of the court, to be taxed by the clerk, do credit to each of the claimants proving said bonds his pro rata, to be based on the report of the referee as of April 1, 1900, but under special agreement with the counsel of the said Charleston Savings Institution he shall pay to the said institution, or said counsel for them, a sum not exceeding \$14,042.06, and under special agreement with the counsel of the Hibernia Bank a sum not exceeding \$52,744; and any difference between the pro rata share of the said institution and bank and said sum agreed to be received by them be applied by him to the claim of W. B. Fewell to an amount not exceeding a pro rata sum paid to the other bondholders on bonds to the amount of \$5,000; and that said receiver do forthwith pay to said claimants or their counsel their whole pro rata or distributive share of said mortgage fund, except as hereinbefore ordered, under special agreement with said Charleston Savings Institution and Hibernia Bank. And it is further ordered that, in case the said mortgage fund be not sufficient to discharge the claims of said bondholders in full, said claims be paid their pro rata of any funds distributable among the general creditors, but the payments so made shall not exceed the amounts proved against said mortgage fund, and in the case of the Charleston Savings Institution and Hibernia Bank not more than the sum agreed to be received by them respectively. And it is further ordered and adjudged, that A. H. White do pay to said receiver the sum of \$257.84, being one-fifth of said sum of \$1,289.19, to be credited back to the fund out of which it was paid, and one-fifth of the costs of the officers of the court, to be taxed by the clerk; and also the sum of \$210, being one-fifth of the fee of \$1,050 ordered to be paid to James F. Hart, plaintiff's attorney, under order of the court dated April 17, 1901; the sum of \$5, being one-fifth of the fee allowed W. W. Lewis, attorney for the Crescent Cotton

Mill; the sum of \$20, being one-fifth of the fee allowed W. Brown Wylie, special referee; the sum of \$4, being one-fifth of the fee allowed F. P. McCain, special referee; the sum of \$40, being one-fifth of the additional fee allowed James F. Hart, as attorney for the receiver; and also the sum of \$273, as receiver's commissions on \$9,100, proceeds of the sale of the machinery sold; and receipt the receiver for the remainder of said fund of \$9,100 as a credit on his lien on said funds reported by the referee, and thereupon his bid for said machinery shall be deemed paid in full. And it is further ordered and adjudged that out of any funds still remaining in his hands, after first retaining therefrom three per cent. for his commissions, and a further sum of five per cent. thereof to be credited back as its part of the costs and expenses of these proceedings to the funds applicable to the payment of the bonds and coupons and to the machinery fund going to A. H. White, four-fifths to the former and one-fifth to the latter fund, said receiver shall pay to the National Bank of Rock Hill, S. C., the amount due on the note for \$1,800, given by him to said bank for money borrowed under order of court in this cause; and that the remainder thereof be distributed pro rata among the general creditors. It is further ordered and adjudged that the said receiver do proceed to collect from I. H. Cohen, trustee, purchaser of the Crescent Cotton Mill, on his bond given said receiver, the sum of \$63, paid by said receiver for a day and night watchman's services for the care of said property from December 31, 1900. It is further ordered and adjudged that the claims of A. H. White and others for \$2,060.91, as reported by the special referee, W. Brown Wylie, Esq., is not a lien upon the proceeds of the sale of any of the property in the hands of said receiver."

From this decree, the Commercial & Farmers' Bank, White, White & Hutchison, Holler, Richmond Trust & Safe Deposit Company, Hibernia Savings Bank, Charleston Savings Institution, Revel, and Fewell appeal. Modified.

Witherspoon & Spencers, for appellants Commercial & Farmers' Bank, White, White & Hutchison, and Holler. Jos. W. Barnwell, for appellants Richmond Trust & Safe Deposit Co., Hibernia Savings Bank, Charleston Savings Institution, and Revel. Wm. J. Cherry and D. E. Finley, for appellant Fewell. Wilson & Wilson, for appellees Eldridge and National Bank of Rock Hill. Jas. F. Hart, for appellee receiver.

POPE, J. The defendant was chartered under the laws of this state on the 11th day of August, 1899. It passed into the hands of a receiver, under an order made in this action, because of insolvency, on the 4th day of September, 1900, aged 1 year and 23 days. In September, 1899, the defendant executed to the Richmond (Va.) Safe Depos-

it & Trust Company a mortgage covering all its real and personal property situated in the city of Rock Hill, S. C., which secured \$50,000 of negotiable coupon bonds to be issued by said Crescent Cotton Mill. Of this \$50,000 of negotiable bonds so issued not a single bond was ever sold on the open market. On the contrary, every one of such bonds was hypothecated to secure loans. For instance, \$18,000 of said bonds were hypothecated to the Charleston Savings Institution, of Charleston, S. C., to secure a loan of \$13,645; \$8,000 to the Hibernia Savings Bank, of Charleston, to secure a loan of \$3,719.07; \$10,000 to the plaintiff to secure a loan of \$7,500; \$5,000 to the National Bank of Charlotte, N. C., to secure a loan of \$5,000; \$8,000 to secure a loan made by a Rock Hill bank; \$5,000 to secure a debt for machinery to the Saco Pettee Machine Company. Nothing but the exhaustion of the supply of the bonds prevented the president and treasurer of the defendant cotton mill from hypothecating \$9,000 of the bonds with one O. K. Eldridge, of New York, to secure a loan to him and turning over \$5,000 to Mr. W. B. Fewell, who paid for them in advance at par. When the affairs of the Crescent Cotton Mill were being examined before Mr. W. Brown Wylie, as special referee, it was ascertained that the books of the mill failed to state its operations as to these bonds, as also the condition of subscriptions to its capital stock. Instead, therefore, of being able to trace the history of the issue of the \$50,000 of bonds from the books of the mill to the holders thereof, this history had to be traced from the holders back to the mill. So much by way of preface. Under the action a receiver of the mill was appointed, and, as before remarked, Mr. W. Brown Wylie was appointed special referee, and directed to advertise for all creditors of the mill to present and prove their respective demands before him. Quite a number of claims which were unsecured came before the special referee, but, as no assets could possibly be available for the payment of their claims, no further attention will be paid to them. The special referee's report upon claims which had or claimed a preference was made, and upon exceptions came on to be heard before Judge Townsend. His decree must be reported. Many appeals have been taken from this decree, and it remains for this court to dispose of the same.

1. The Hibernia Savings Bank claims that the circuit judge inadvertently allowed too little interest on its claim. As we understand the question of this alleged error, it is that the circuit judge only allowed interest on its pro rata share up to 1st April, 1901, whereas his decree was rendered on 20th May, 1901, and the distribution was not made until after 20th May, 1901,—say until 1st June, 1901. This error should be corrected, especially as this bank gave up a se-

curity which would and did largely yield more than enough to pay its full claim. If the claim, with interest to 1st March, 1901, was \$2,719.07, and 1st April, 1901,—one month later,—was \$2,744.60, then, by the same rule, on 1st June, 1901,—two months later,—it should be \$2,795.66. Let this appellant receive \$2,795.66, instead of \$2,744.60.

2. It is contended that the claim of James F. Hart, as attorney for the receiver of the mill, as the balance of his fee (say \$200), should not be charged as against the holders of bonds secured by mortgage, and also as against the fund received from A. H. White, as purchaser of the machinery sold separately by the receiver. It is not denied that the sale was pushed forward by the attorney; that such attorney has represented said receiver in several important suits. Such being the case, we will not interfere with the exercise of the discretion of the circuit judge involved in his allowance of these fees. This court admits that A. H. White has had a series of mishaps, which he has met like the man he has proved himself to be, but still it was his contract to protect the machinery company in its sales of machinery to the mill.

3. It is contended that the other items embraced in the receiver's account should not be allowed, and, if allowed at all, should not require of the holders of the negotiable bonds secured by the mortgage, as well as A. H. White, as purchaser of the machinery, to pay 95 per cent. thereof, while the "general account" is only charged 5 per cent. thereof. Taxes paid by the receiver, amounting to some \$850, were paid from the "general fund." These taxes arose from property embraced in the mortgage and the separate machinery. The fees of the receiver arose from these sales. The loss met by the receiver in running the mill for 23 days was from an honest effort to save the property harmless, as it is well known that intricate mill machinery is better protected from injury when in use than by allowing it to remain idle. Under all the circumstances, these exceptions must be overruled.

4. What is the status of the six bonds held by O. K. Eldridge? The circuit judge decreed that Eldridge was the owner and entitled to set them up as valid claims under the mortgage. This is a serious matter. The facts are not very much complicated, but the deductions to be made from these facts is the serious question. When R. Lee Kerr, as an individual, borrowed \$15,000 from O. K. Eldridge, he pledged as collateral to secure that loan \$5,000 of stock held by him (Kerr) in the Rock Hill Land & Investment Company, and also \$10,000 of stock in the Commercial & Farmers' Bank, of Rock Hill, S. C. The agreement between R. Lee Kerr and O. K. Eldridge is in writing, signed by both parties. In such agreement no reference is made to the Crescent Mill,—as to its proposed issue of \$50,000 negotiable bonds

by said mill. No effort is made by Eldridge to obtain any of these bonds as collateral to his loan already made to Kerr until after it was discovered that the Commercial & Farmers' Bank of Rock Hill, S. C., was insolvent, but that in the spring of the year 1900 the said Eldridge came to Rock Hill on two occasions, the last of which was in April, 1900, at which last visit he sought from R. Lee Kerr some of the bonds of the Crescent Cotton Mill Company. He knew Kerr was president and treasurer of said mill, and on the 30th April, 1900, the said R. Lee Kerr turned over to the attorneys of the said Eldridge six negotiable bonds of said Crescent Mill Company, secured by a mortgage of its property, under the following circumstances, viz.: On the 31st day of January, A. D. 1900, the Crescent Cotton Mill Company made its note payable to the Commercial & Farmers' Bank of Rock Hill, S. C., for the sum of \$11,044, due and payable in 90 days after its date, and that to secure said note the said maker assigned as collateral security for said note the certificate of deposit of \$5,000 with said bank, and also six bonds of \$1,000 each of the Crescent Cotton Mill Company, such bonds being numbered 45, 46, 47, 48, 49, and 50. That when said Commercial & Farmers' Bank became insolvent and went into the hands of a receiver on the 3d February, 1900, and D. Hutchison was appointed such receiver, he found the note of the Crescent Cotton Mill Company for \$11,044, together with the collaterals, to wit, the \$5,000 certificate of deposit and the six bonds of the Crescent Cotton Mill Company, pinned to said note. That R. Lee Kerr was in the vault of the bank in April, 1900. That in May, 1900, the said D. Hutchison, as said receiver, failed to find said six bonds in the bank, and asked R. Lee Kerr if he knew what had become of them, to which inquiry R. Lee Kerr replied that he did not know, but that he thought they were mislaid. That circumstances pointed to their possession by O. K. Eldridge. When applied to, Mr. Eldridge promptly admitted that he held the bonds, having received them on the 30th April, 1900. R. Lee Kerr subsequently admitted that he had taken the six bonds in question from the vault of the Commercial & Farmers' Bank under what he called a claim of right. He claimed to own the bonds, and that he had merely loaned them to the Crescent Cotton Mill Company to use as a pledge to the debt for the \$11,044 debt, and, as the debt was paid, he had taken them and turned them over to Mr. O. K. Eldridge as an additional security to his loan of \$15,000. The receiver demanded the bonds of Eldridge. On examination there was no entry found upon the books of the Crescent Cotton Mill showing that R. Lee Kerr was the legal holder as an individual of said six bonds for \$1,000 each, nor, for that matter, any other holder of bonds. We have heretofore stated that in the written

agreement between Eldridge and Kerr as to the \$15,000 there was no reference to bonds to or issued by the Crescent Cotton Mill Company, but in a letter written on the 5th September, 1899, by R. Lee Kerr to Eldridge in regard to this loan, under a postscript and the letters "K. C." occur these words: "The bonds will be executed on the 15th inst., at which time they will be promptly forwarded." As to what bonds were referred to in this second postscript, to be issued on the 15th September, 1899, we are left to conjecture. The safe inference would be that reference was intended to be made to the \$50,000 negotiable bonds of the Crescent Cotton Mill Company, as they were issued about that date. And R. Lee Kerr testifies that he had promised verbally to O. K. Eldridge that he would issue to him \$15,000 of these bonds as an additional security to the loan of \$15,000. Subsequently, in a trial had between the Commercial & Farmers' Bank and its receiver on the one side and the Crescent Cotton Mill Company and its receiver on the other side, it was judicially determined that the Crescent Cotton Mill Company had paid its debt of \$11,044 to the Commercial & Farmers' Bank, except the sum of \$47. This was the result by reason of the deposit check of \$5,000 and the payment for the bank by the mill of two notes for \$3,000 each, in the city of Charleston. It thus appears that the bank had no claim upon the six bonds of the mill, each bond for the sum of \$1,000, except to secure the sum of \$47. Practically, therefore, these six bonds were the property of either the Crescent Cotton Mill or of R. Lee Kerr. Both of these two parties claim the bonds. They were certainly used by R. Lee Kerr, although he obtained possession of them by underhand means, so far as the bank and mill were concerned. There can be no doubt that R. Lee Kerr exercised, until May, 1900, a very general control of the means of the Crescent Mill, and that his own means were used for the benefit of the mill. As an illustration of this, the \$5,000 deposit check used as collateral to the note of the mill to the bank for \$11,044, was the property of R. Lee Kerr, and this very collateral was subsequently held as part payment of such note. Then the mill was said to owe him, besides, over \$1,000. It is greatly to be regretted that there was no system used in stating these accounts. We must take the record as we find it. Such was the circuit judge's condition when he passed upon these matters. We will have to modify the judgment of the circuit judge by requiring Mr. Eldridge to pay to the mill the sum of \$47, which is to be paid by said mill to the receiver of the Commercial & Farmers' Bank. With this slight modification, we affirm the circuit judgment in this particular.

6. We will now consider the exception relating to the claim of W. B. Fewell. The testimony leaves no doubt that \$5,000 of

Mr. Fewell's money was paid into the hands of R. Lee Kerr, as treasurer of the Crescent Cotton Mill Company, upon an agreement that he was to receive \$5,000 of the negotiable bonds of the said mill. He never received said bonds. He cannot now receive said bonds. The circuit judge ordered that Mr. Fewell should receive as an equity what was left after paying pro rata to the Hibernia Bank of its claim of the \$5,000 of bonds held by said bank. We affirm the circuit judgment in this matter, except as modified by the holding of this court, whereby the claim of the Hibernia Bank was increased by us.

6. We cannot disturb the circuit judgment as to the lien on goods in process, nor as to the repayment of the money borrowed to run the mill for 28 days. From the testimony it appears that Mr. White and Mr. Hutchison were doing their best to save the property and keep it "a going concern." It was their misfortune to be stockholders and officers in this factory. The receiver was appointed with their consent. The order of the court directing the receiver to keep the mill running was made with their acquiescence. The National Bank of Rock Hill should receive its money. The holders of the bonds of the mill, and also the assignee of the claims of the machinery company, have already been made to stand back, so as to allow certain expenses to be paid from funds coming to such holders of preferred claims. We cannot add anything more to their burdens. These exceptions are overruled.

7. If we have failed to enumerate any other exceptions, they must be considered as overruled.

It is the judgment of this court that the judgment of the circuit court, except in the two slight particulars stated in this opinion, is affirmed, and in those two particulars it is modified.

(130 N. C. 385)

JACKSON v. NORTH CAROLINA CORPORATION COMMISSION.

(Supreme Court of North Carolina. June 19, 1902.)

TAXATION—RAILROAD FRANCHISES—TIME OF ASSESSMENT—CORPORATION COMMISSION—MANDAMUS—MATTERS OF DISCRETION.

1. Under Machinery Act (Pub. Laws 1901, c. 7) §§ 43, 50, providing that the returns of real and personal property of railroad companies for assessment and taxation by the corporation commission shall be made at such dates as realty is required to be appraised for taxation, and fixing the method of assessing the physical property and the franchise valuation of railroad companies, the duties required of such commission are not discretionary, and their performance may be compelled by mandamus.

2. Machinery Act 1899, c. 15, § 43, provides that railroad companies shall make their return of real and personal property for assessment and taxation on June 1st of each year. Acts 1901, c. 7, § 48, directs that the returns formerly required by such section 43 shall be made at such dates as realty is required to be

appraised for taxation. Section 12 requires that realty shall be assessed every four years; the next assessment to be made in June, 1903. Section 42 provides that, on meeting of the corporation commission for assessing railroads, they shall value and assess the property of each company in the manner prescribed. Section 50 requires the determination of the value of the franchises by deducting the value of the physical property from certain other values. *Held*, that as Acts 1901 repealed Laws 1899, c. 15, § 43, and required quadrennial assessments to begin on June 1, 1903, and did not continue the assessment of 1899 or 1900, or fix any other to be the basis of taxation on railroad property until the assessment of 1903, the corporation commission were not required to assess for taxation in 1901 the franchises of railroad companies separately from the assessment of their tangible property.

3. The assessment made by the corporation commission of the realty of railroad companies in 1900 cannot be taken as a valuation of the tangible property in determining the value of the franchise under Pub. Laws 1901, c. 7, § 50, as that assessment was made on the real and personal property, and included in its value the value of the franchise, and was a different assessment from the one ordered to be made in such section.

4. An assessment for 1901 of the franchises could not be made by such corporation commission on the information contained in Pub. Laws 1901, c. 7, § 49, requiring railroad companies to return in June annually a schedule to the commission, since such an assessment would be at a time different from that fixed by section 48 for the assessment of the tangible property of railroads.

Douglas and Clark, JJ., dissenting.

Appeal from superior court, Wake county; Robinson, Judge.

Action by W. J. Jackson against the North Carolina corporation commission to compel the latter to assess for taxation the railroad franchises in the state. There was a judgment in favor of defendant, and plaintiff appeals. *Affirmed*.

H. S. Ward, for appellant. The Attorney General and Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. The question for decision in this case is this: Was it the duty of the defendants to assess for taxation in the year 1901 the franchises of the railroad companies in this state separately from the assessment of their tangible property? The failure of the defendants to make such separate assessments (admitted in their answer) is the matter complained of by the plaintiff, and, as a support for the correctness of the view expressed above as to what the question for decision is, allegation 3 of the complaint is inserted: "That the defendants, as members of the said North Carolina corporation commission, have failed and refused to assess for taxation and determine the value of the intangible property of the railroad companies in this state, to wit, the franchises separately from the assessment of the tangible property, as they are directed to do by sections 43 and 50 of chapter 7, Pub. Laws 1901, and have failed and refused to attempt to make such valuation and assessment, and have failed and refused to determine or to attempt to

determine the market value of the capital stock, certificates of indebtedness, bonds, and other securities of said companies in their assessment of the properties of said companies."

The defendants in their answer do not admit that the pertinent sections of the machinery act of 1901 require them to make assessments and franchises of railroad companies separately in any year before or after 1903, and in the brief of their counsel it is argued at length that the writ of mandamus should not be granted, because the alleged duties, the performance of which was sought to be enforced against the defendants, were discretionary in their character, and required the exercise of judgment on their part. There is no room for such an argument here. No discretion is given the defendant by the general assembly, in sections 43, 48, and 50 of the machinery act of 1901, as to the manner and method of assessing the physical property and the franchise valuation of railroad companies. The rules by which they are to be guided in making these assessments are clearly prescribed, their judgment and discretion being allowed only in one instance, viz., when they are to consider of the actual cost to replace the property with a just allowance for depreciation on rolling stock, and also of other conditions to be considered, as in the case of private property, when they come to value the physical or tangible properties of the companies. All else is mandatory. The machinery act of 1899 gave to the defendants discretion in the matter of assessing the taxes on the property of the railroad by authorizing them, in making their assessment, to consider the value of the franchise, without formulating any rules by which that valuation and assessment should be discovered. But the legislature in 1901 put an end to that discretion, and laid down special and particular rules by which the real property shall be valued and the franchise shall be estimated, and required separate assessments. There can be no doubt about the power of the state to have levied a franchise tax on corporations. Const. art. 5, § 3. And there can be no doubt that the franchise tax may be assessed separately from the tangible property assessment.

As we have seen, the state has done those things in the machinery act of 1901, and the question arises, when did or do these assessments go into effect? That is the only uncertainty about the matter in dispute, and the answer to the question, of course, depends upon whether section 50 of the machinery act was in force in June, 1901, or whether its operation was postponed by clear implication, deduced from the language of section 48 of that act. Without doubt, the assessment or valuation for taxation upon the tangible property and that upon the franchise are to be made at the same time; the language of the statute, as to the time, being: "The said commissioners shall first determine the value of the tangible property, • • •

and they shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public, the value of the physical property being deducted as evidenced by the market value of all capital stock, * * * and the aggregate value of the physical or tangible property and the franchise as thus determined shall be the true value of the property for the purpose of an ad valorem taxation, and shall be apportioned," etc. By our laws, for generations, there have been stated periods and times at which, under oath, owners of property were required to list, as it is commonly called, or return a schedule of their property, real and personal, for assessment for taxation by officers appointed for that purpose. All real estate except that belonging to railroad companies up to 1899 was assessed quadrennially (railroad property, real and personal, having been listed annually), and all personal property was listed and assessed in June annually. By section 12 of chapter 7 (Machinery Act) of the Acts of 1901, the next assessment of real estate is to take place in June, 1903; and, by section 48 of the same chapter, the real estate, rolling stock, and such personal property of railroad companies necessary for the construction, repairs, or successful operation of such railroad lines, are to be listed or returned for taxation and assessment at the same time that other real estate is to be returned for assessment and taxation. Section 50 of the machinery act furnishes the manner and method of determining the value of the tangible property of railroad companies, and also of the franchise. The aggregate value of both, determined according to the prescribed method and manner, constitutes the true value of the entire property for the purpose of an ad valorem taxation. Now, can an ad valorem taxation basis be fixed upon the entire property of a railroad company, under section 50, except at the time fixed by law for the return of the real and personal property of the company for taxation, and its assessment by the defendant commissioners? The answer seems to be found in the opening sentence of section 42 of the same act: "Upon the meeting of the corporation commission for the purpose of assessing railroads and other property, they shall thereupon value and assess the property of each association, company, copartnership and corporation in the manner herein set forth after examining such statements [statements made under section 40 of the same act], and after ascertaining the value of such properties thereupon, and upon such other information as they may have or obtain." As we have seen, the real and personal estate of railroad companies is to be returned, under oath, for assessment and taxation, to the commission, at such dates as real estate is required to be returned and assessed for taxation, and there is to be

no further assessment of real estate until June, 1903. Then, if any assessment of the tangible property of the railroad companies should be made by the commission, except at the time when by law that property is to be returned and assessed for taxation, would such assessment be legal? It would seem not. If, then, there can be no valid assessment of the tangible property of railroad corporations until 1903, how can a franchise tax be arrived at under section 50? They stand or fall together. Without a knowledge of what the assessment of the tangible property amounts to, you could not discover what the franchise tax would be; for the franchise tax is "the market value of all the capital stock, certificates of indebtedness, bonds and other securities, due consideration being given to the gross earnings as compared with the operating expenses," less the physical or tangible property.

The contention of the plaintiff that under section 49 of the same act the assessment made by the defendants of the real estate of railroad companies in 1900 remains the assessment until June, 1903, and should be taken by the defendants as a valuation of the tangible property, in determining the value of the franchise under section 50, cannot be maintained, for the simple reason that that assessment was made on the real and personal property, and included in its value the value of the franchise, and was therefore a different assessment from the one ordered to be made on the tangible or physical property in section 50, by the rule of determining its value by a consideration of the actual cost to replace the property with a just allowance for depreciation on rolling stock, etc. Nor can an assessment be made by the commission upon the information contained in section 49 and that which that section authorizes the commission to secure, for the reason that such an assessment would be at a time different from the time fixed for the assessment of the property (of the tangible property) of railroads under section 48 of the same act.

If it should be objected to this opinion that, to be consistent, it embraces impliedly the view that there is no statute which fixes the assessment of the real and personal property of the railroad companies in this state, upon which taxes can be levied and collected, until the assessment provided for in June, 1903, by the act of 1901 (chapter 7, § 12), it would have to be admitted that that is a fact. The act of 1899 (chapter 15, § 43) required railroad companies to report, under oath, for assessment and taxation, their real and personal property annually, on the 1st day of June of each year; and in 1900 the railroad companies made such returns of their property, thereby complying with the law then in force in that respect. The act of 1901 repealed section 43 of chapter 15 of the Laws of 1899, and required quadrennial assessments thereafter, to begin on June 1, 1903, and did not continue the assessment of 1900 or that of

1899, or fix any other to be the basis of taxation on railroad property until the assessment of 1903. This view does not conflict with the rule that the revenue laws of the state are to be considered as a series of laws, and to be construed together as a whole, when necessary to find out the meaning of doubtful provisions in the one last enacted. Section 12, c. 7, of the Acts of 1901, provides for quadrennial assessments of railroad property, to begin June 1, 1903, while section 43 of chapter 15 of the Acts of 1899 provides for annual assessments, to be made on the 1st day of June of each year. These two sections are palpably contradictory of each other, and so inconsistent that the last enacted repeals that of 1899. But that is none of our responsibility. It may have been a part of that compromise and settlement with the railroad companies of the state, mentioned in the message of the governor, and which message was filed by the defendants with their answer; but the general assembly, in the act of 1901, as we have seen, did not incorporate it in that act. We have no evidence, as we have said before, that the assessment of 1899 or 1900, or any other, was adopted as the assessment that should prevail until 1903.

We have not invoked the aid of the governor's message in coming to a conclusion in this case. The acts of assembly which we have been considering were free from doubt, except as to the time when the franchise tax should be assessed separately from the tax on property, and it certainly would be a dangerous expedient for this court to adopt as a rule of interpretation of a statute the consideration of a communication to the legislature on the subject-matter of the statute. It may not be that legislative bodies always carry out, or ought to carry out, the suggestions and recommendations addressed to them in messages by the chief executives of states.

We see no error in the action of the judge in dismissing the case. No error.

FURCHES, C. J. (concurring). Plaintiff alleges that he is a citizen of the state, a taxpayer, and is sheriff of his county, and, as such sheriff, is interested in his commissions; that defendants are members of the North Carolina corporation commission, whose duty it is to assess the property of the railroads of the state for taxation; that defendants have failed, neglected, and refused to assess said railroads according to "sections 43 and 50, c. 7, Pub. Laws 1901"; that he is reliably informed and believes, and avers, that said defendants are in possession of reliable information to the effect that the value of the property of said railroads in this state is as much as \$150,000,000; that it is found by defendants that the tangible or physical property of said companies is about \$42,000,000, and that the value of the franchises is approximately \$106,000,000, which it is the duty of the defendants to assess for taxation, in addition to their assessment of the

tangible or physical property of said railroads. And plaintiff therefore asks for a writ of mandamus compelling defendants to assess said franchises. The defendants answered, and admitted that they are the members of the corporation commission, and that it is their duty to assess the property of said railroads for taxation, which they allege they have done according to law as they understand it. And defendants say they have assessed the entire property of said railroads, including the franchises, but say they did not assess the franchises separately from the other property of said companies, as they were advised and believed that it was not their duty to so assess said franchises; and they deny the fourth paragraph of the complaint, in which it is alleged that the franchises of said railroads are approximately of the value of \$106,000,000.

While I think the plaintiff's right to bring and maintain this action is too broadly stated in the opinion, I do not expect to put my opinion on that, as that would be putting it upon technical grounds, which I do not wish to do. But I do not think the Illinois case principally relied upon in the opinion of the court for that purpose sustains the right of plaintiff to bring and maintain this action. That action was brought by the attorney general in the name of the state of Illinois, while the plaintiff in this case proceeds alone, upon his own rights, and without the aid of the state. Would it be the plaintiff's right, if he conceived the idea that my property was not assessed, for the purposes of taxation, high enough, to bring mandamus against the commissioners of Iredell, to compel them to reassess and increase its value? If he can do this, every taxpayer in the state may do so, and litigation would be interminable. If this is the law, it seems to me that it would be well to regulate it. But why discuss a matter that I shall not rely upon in my opinion? I shall endeavor to put my opinion upon the merits of the question presented by the record,—as to whether the franchises of the railroads of the state shall be assessed separately for taxation for 1901 and 1902, or not until 1903. This is the question, as I understand it, and not whether they can be so taxed. Nor do I understand the question to be as to whether the railroads "shall pay any tax upon their intangible property before the year 1903." And while this is stated to be the question in the opening sentence of the opinion of the court, it is stated further on in the opinion that "it should be borne in mind that the sections under consideration do not impose any additional tax upon railroads, as section 45 of the machinery act of 1899 expressly directs that the value of franchises shall be included in the assessment of railroad property." So I do not think the question under consideration is correctly or fairly stated in the opinion of the court. The court, further on in the opinion, speaks of the great importance of this question to railroads, on the

one side, and to the state, on the other, and says: "We would have preferred that the parties whose real interests are at stake should have been directly represented in this action. They would have been heard, had they seen fit to become parties hereto." It is true, this is an action of mandamus for the purpose of compelling the corporation commission to increase the taxes on railroads. This, I admit, they have the power to do, but the railroads have no such power. They cannot levy or assess taxes, and it seems to me they would have been improper parties to this action. And it also seems to me that it is sufficiently understood that the interests of the railroads are involved in this action. It will be seen that the act of 1899 taxed everything that is taxed by the act of 1901, including franchises. So it is not a question of omission to tax, and whether the legislature had the right to do this; that is, omit to tax the franchise. It has not done so, and the question is, was it the duty of the commissioners in 1901 to assess the franchise separately from the property of the railroad companies?

The constitution of the state does not require the franchise to be taxed. Article 5, § 3, of the constitution, is as follows: "Laws shall be passed taxing, by uniform rule, all monies, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money. The general assembly may also tax trades, professions, franchises and incomes provided that no income shall be taxed when the property from which the income is derived is taxed." It therefore appears that there is no constitutional provision requiring the legislature to tax franchises. This is admitted in the opinion of the court. We have seen they were taxed by the act of 1899, but, if they had not been, this would have given the plaintiff no right of action. It is admitted that the legislature of 1901 did not increase the subjects of taxation; that franchises were taxed by the act of 1899; and the only thing contended for by the plaintiff is that the franchises are to be assessed separately from the property of the railroads, which he alleges has not been done, and this allegation is admitted by the defendants. It is true, the plaintiff contends that, if this had been done, it would have shown these franchises to be "worth, approximately, one hundred and eight millions of dollars"; that is, a property, including the franchises, now assessed at \$42,000,000, would have been increased to more than three times its present assessed value. The plaintiff offered no evidence to support this contention, and, to my mind, the contention is erroneous, and I cannot accept it as true without any evidence to support it. My own mind rejects this contention, and, besides, I cannot accept it without finding that the railroad commissioners were either too stupid to discharge their duty, or too corrupt to be

worthy to hold their position, as the plaintiff alleges that the commissioners had reliable information of facts that would have led to this result. I do not believe that the commissioners are either stupid or dishonest.

The act of 1901 was not a new act,—not original legislation. It was only amendatory of the act of 1899, and the act of 1901 effected substantially but two changes in the act of 1899; and these are the manner of assessing the property for taxation, and the time when this new method of assessment shall go into effect. As to the manner of assessing the property under the act of 1901, there is no controversy. The only controversy is as to when this new mode of assessment goes into effect. Upon examination it will be seen that section 48 of the Acts of 1901 is section 43 of the Acts of 1899, and that section 50 of the Acts of 1901 is section 45 of the Acts of 1899, with only one change which is necessary to be stated and considered in order to determine this controversy, as I think. Section 43 of the Acts of 1899 is as follows: "The president, secretary, superintendent or other principal accounting officer within this state, of every telegraph and railroad company, whether incorporated by any law of this state or not, shall return to the said commissioners for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation, on the first day of June of each year, within this state,"—then naming the same property and subjects of taxation that are named in section 48 of the act of 1901. Section 48 of the Acts of 1901 is as follows: "The president, secretary, superintendent or other principal accounting officers within this state of every railroad, telegraph, telephone, street railway companies, whether incorporated by the laws of this state or not, shall, at such dates as real estate is required to be assessed for taxation, return to said commissioners for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporations within this state,"—then describing the articles subject to taxation; being substantially the same as in section 43, Acts 1899; changing "June of each year," in the act of 1899, to such time as real estate shall be required to be listed for taxation in the act of 1901. By every rule of interpretation known to the law, these two acts—that of 1899 and that of 1901—must be considered together. The language and meaning of the act of 1899 must first be determined, and then the language used in the act of 1901; and, if the act of 1901 differs from the act of 1899, in what respect; and then determine what is the meaning of the act of 1901. There has been a change in the language of the two acts, which, in my opinion, materially affects and changes their meaning. It would have been folly in the

legislature of 1901 to have changed the language in section 43 of the Acts of 1899, unless it had intended to change the meaning of section 43 of the act of 1899, when the legislature of 1901 re-enacted section 43 in every other substantial part. Section 43, Acts 1899, provides that said property shall be returned "to said commissioners for assessment and taxation * * * on the first day of June of each year." This is plain, unmistakable language that the assessment and taxation should be every year. Section 48, Acts 1901, re-enacting section 43 of the act of 1899 in other respects, uses this language in lieu of the "first day of June of each year": "shall at such dates as real estate is required to be assessed for taxation, return to said commissioners for assessment and taxation, verified by the oath or affirmation of the officer making the returns, all the following property," etc. Reading and construing these sections together, it is manifest—indeed, to my mind, "it is perfectly clear"—that these franchises were not intended to be, and are not to be, assessed for taxation until 1903. If it was intended they should be assessed each year, why was this language already in section 43 of the Acts of 1899 changed in the act of 1901 so as to read, "shall be assessed for taxation at such dates as real estate is required to be assessed for taxation"? It will be noted that the language used in section 43, Acts 1899, and in section 48, Acts 1901, is not only that the officers therein named shall make returns of the property therein named, but it shall be made by them "for the purpose of assessment and taxation." This language is not used in either of the other sections quoted and relied on in the opinion of the court. In those it is provided that the officers shall make returns. Section 49 of the act of 1901 is the same in substance, if not in very words, as section 44 of the act of 1899, including the reference to section 1959 of the Code. Section 50 only provides for the manner of assessment, and has no reference to the time when the assessment shall be made. As to this, the time of assessment depends upon section 48, Acts 1901, construed in the light of section 43, Acts 1899. If the language of section 43, Acts 1901, is to prevail, and the assessment is to take place when real estate is required to be assessed for taxation, this assessment will be in 1903, as that will be the time, under former legislation, when such assessments will take place. But the Acts of 1901, c. 7, § 12, expressly provides that such assessments shall take place in 1903.

It seems to me that by every rule of construction, without any aid outside of the statute, it should be held that there should be no new assessment of these franchises, for the purpose of taxation, until 1903. But if the act itself does not plainly show that no new assessment of these franchises is to be made until 1903, it would seem that the

act, taken in connection with the governor's message, puts it beyond all doubt. The legislature of 1901 was elected at the same time Gov. Aycock was elected, and was composed of more than two-thirds of his political friends. This being so, on the 1st of February he transmitted to the legislature the special message set out in defendant's answer, and quoted in the opinion of the court. This message commences as follows: "I transmit herewith the second annual report of the North Carolina corporation commission. You will observe from said report that the cases known as the 'Railroad Taxation Cases,' pending in the circuit court of the United States for the Eastern district of North Carolina, have been compromised and settled. Under the provisions of law, the corporation commission in 1899 assessed the property of the Atlantic Coast Line at \$12,885,775, the Southern Railway at \$14,713,850, and the Seaboard Air Line at \$7,980,245; making a total assessment of \$35,579,870, which was a total increase on the three systems over the assessment of 1898 of \$9,022,678. The assessment of three systems named in 1900 was \$36,373,382." The message further states that the railroads were unwilling to pay this increased assessment of \$9,022,678, and were resisting its payment in the federal courts. But finally they agreed to pay it, provided the assessment should not be increased until 1903; and, inasmuch as it was costing the state as much as \$20,000 a year to carry on this litigation with these railroads, the proposed compromise was accepted by him (the governor) under the advice of his counsel. He then says that he considers this settlement just, and recommends its ratification by the legislature, and says, "If such a law shall be passed, the railroads will not be again assessed until 1903." It is contended in the opinion of the court that this message is ambiguous and uncertain as to what it recommends. But whether there is ambiguous language contained in it or not, there is not, and cannot be, any ambiguity in the closing sentence in the recommendations (though not in the message), which says if such a law is passed "the railroads will not again be assessed for taxation until 1903." This message was sent to the legislature the 1st of February, and the act under consideration was passed and ratified on the 15th of March following, changing the language from "each year" to such time as "real estate shall be required to be assessed for taxation." The opinion of the court does not admit that the message militates against the construction contended for by the plaintiff and adopted by the court, but for some reason the court undertakes to show that its consideration as a means of interpretation is incompetent and improper. But I propose to show by high authority that its consideration is not only competent, but proper.

It is the spirit and purpose of the act that

gives it life, and is to be observed and control in its construction, if this can be ascertained, where there is doubt as to the meaning of the language used, unless such intention conflicts with provisions and requirements of the constitution. In such cases, to carry out the supposed or ascertained intent, this intent will have to yield to the higher law, if in conflict with the constitution, as in *Wilson v. Jordan*, 124 N. C. 685, 33 S. E. 189; *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113. But nothing of that kind appears in this case to interfere with the court's ascertaining the meaning of the act; and nothing could be more pertinent for that purpose than the message of Gov. Aycock to the legislature of 1901, for reasons I have given, and the legislation passed in pursuance thereof, as we must suppose this act was. It is said by Endlich on the Interpretation of Statutes (section 27): "Lord Coke's Rule. The literal construction then has, in general, but a *prima facie* preference. To arrive at the real meaning, it is always necessary to take a broad, general view of the act, so as to get an exact conception of its aim, scope, and object. It is necessary, according to Lord Coke, to consider: First, what was the law before the act was passed; second, what was the mischief or defect for which the law had not provided; and, fourth, the reason of the remedy. According to another authority the true meaning is to be found not merely from the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts, and from extraneous circumstances, or by an examination of and comparison of the doubtful words with the context of the law, considering the reason and spirit and the inducing cause of its enactment. The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the legislature had in view, and what were the causes and occasion of the passage of the act, and the purpose intended to be accomplished by it, in the light of the circumstances at the time, and the necessity of its enactment." And to the same effect are sections 29 and 30. The same doctrine is laid down in *Black on Interpretation of Laws* (chapter 7, §§ 85, 87), and in fact in all the works on this subject that I have been able to examine. But I will not consume the time of the court by making further quotations. I take it that these authorities have fully sustained me in referring to the message of Gov. Aycock, which gives the reason and the object for changing the statute of 1899, which provided for an assessment for taxation every year, to a provision for an assessment for the purposes of taxation, when it is required that real estate

shall be assessed for the purposes of taxation.

It is admitted in the opinion of the court that the governor and legislature had the right to compromise with railroads, but it is contended that there was no compromise. The governor says there was a compromise, and I must believe he knew whether there was a compromise or not, and I do not believe he would have said there was if there had not been. I do not understand the court to say, or even to intimate, that the governor would say what was not so if he knew it, but that he does not know a compromise when he sees it; that he only claims that there was something over \$9,000,000 a year involved in the controversy, which the roads yielded upon condition that their property, the assessment of which had increased \$9,000,000 since 1898, should not be assessed for taxation again until 1903. The court seems to think this was no compromise, because the plaintiff has alleged that the franchises alone are worth approximately \$108,000,000, without offering one particle of evidence to support this disputed allegation, and which seems to me to be large enough to fall of its own weight. But if the governor and the legislature had the right to enter into this compromise,—and this is admitted in the opinion of the court,—and there was no fraud in it, I do say that I think good faith requires that it should be kept. I do not understand it to be our duty to revise this action of the governor and legislature, and whether they made a good compromise or not is not for this court to say. It may not have been a good compromise, but, if there was no fraud in the transaction, I do not consider that this court has any right to revise their action.

In the opinion of the court the question is asked, "Will it be contended that a franchise is real estate?" I might ask if it is contended that for the purpose of taxation a franchise is personal property? If it is personal property, it is already taxed, as the constitution requires the legislature to pass laws taxing all property, personal and real, by a uniform rule, and the legislature has done this. But it is manifest that a franchise is not considered property for the purposes of taxation in the constitution. If it had been so considered, it would not have been classed among trades and professions, which the legislature might or might not tax, at its option. It is thus seen that, if the legislature does tax a franchise, it taxes it as it would a profession or trade, and not as property. It is taxed as a lawyer and doctor are taxed for practicing their professions. There cannot be anything, in my opinion, in the argument advanced in the opinion of the court,—that another legislature will assemble before 1903, and the legislature of 1901 knew they could not pass a law that the next legislature could not repeal, and that it cannot be supposed they

would have been guilty of the vain thing of attempting to do so. If they have passed such a law, then it is passed, whether it was a vain thing or not. But I maintain that they have not done a vain thing by attempting to forestall the succeeding legislature. The succeeding legislature does not assemble until 1903, and the new mode of assessment goes into effect that year without any further legislation. It is true, the legislature may repeal this act, and restore the old mode of assessing franchises and property all together, but I do not understand that is what the plaintiff wants.

It is said in the opinion of the court that:

"Great stress is laid upon the fact that section 48 of the act of 1901, which is substantially a re-enactment of section 43 of the act of 1899, changes the latter section by omitting the words 'on the first day of June of each year,' and inserting the words 'at such dates as real estate is required to be assessed for taxation.' From this it is argued that the legislature intended that franchises should be assessed for taxation only once in four years, like real estate, and therefore should not be assessed until 1903. The fallacy of this argument lies in the fact that section 48 of the act of 1901 and section 43 of the act of 1899 are both, by their express terms, limited to the tangible or physical property of the railroads, and do not pretend to relate to the assessment of the franchise."

If I understand the above-quoted paragraph, it is a virtual admission that "tangible or physical property is not to be assessed for taxation until 1903. To my mind it is susceptible of no other construction. It admits that the statute of 1899 has been changed from "the first day of June of each year" to read as follows: "at such date as real estate is required to be assessed for taxation." And it is not denied that section 12 of the act of 1901 fixes that time in 1903. But it is argued that this change only applies to "tangible or physical" property, as the word "franchise" is not mentioned in either section 43 of the act of 1899, nor in section 48 of the act of 1901. This argument, if true, would make the "tangible or physical" property of the railroads—that is, everything they own, except franchises—assessed for taxation in 1903 and every four years thereafter, but that franchises must be assessed for taxation every year. If that proposition can be maintained, I admit that I have neither the power to comprehend language, nor to construe the same. It is not denied that section 50 of the act of 1901, as did section 45 of the act of 1899, provides for making reports to the commissioners. These reports are to enable them to make the reports they are required to make to the governor and the county commissioners, and not for the purpose of assessments for taxation, as it is stated to be in section 43 of the act of 1899 and section 48 of the act of 1901. The property and franchises of the railroads are taxed under the

act of 1899 (section 45), as is admitted in the opinion of the court, and this assessment is continued to 1903; and reports of such taxes have to be made to the governor and the board of county commissioners, that they may levy the county taxes. These are the purposes for which the reports mentioned in section 49 and section 50 are to be made to the corporation commission.

In my opinion, the judgment appealed from should be affirmed. COOK, J., concurs in this dissenting opinion.

This was written as a dissenting opinion to the opinion of DOUGLAS, J., which was written as the opinion of the court. It expresses my views of the case, and is now filed as a concurring opinion to the opinion of MONTGOMERY, J. I concur in the conclusion at which he arrives,—that there was "no error in the action of the judge in dismissing the action." COOK, J., now concurs in this as a concurring opinion.

DOUGLAS, J. (dissenting). This is an action for mandamus, heard upon the verified complaint and answer, to the latter of which is attached the message of Gov. Aycock. These papers are as follows:

"The plaintiff complains of the defendant, and alleges:

"(1) That Franklin McNeill, Samuel L. Rogers, and D. H. Abbott are the duly constituted members of the North Carolina corporation commission, and are, and have been since 1899, exercising the duties of said office.

"(2) That by virtue of section 47, c. 7, of the Public Laws of 1901, the said North Carolina corporation commission is constituted a board of appraisers and assessors for railroad, telegraph, telephone, street railway, canal, and steamboat companies, and other companies exercising the right of eminent domain, and is required by law to assess the property of said companies for taxation.

"(3) That the defendants, as members of the said North Carolina corporation commission, have failed and refused to assess for taxation, and determine the value of, the intangible property of the railroad companies in this state, to wit, the franchises, separately from the assessment of the tangible property, as they are directed to do by sections 43 and 50 of chapter 7 of the Public Laws of 1901, and have failed and refused to attempt to make such valuation and assessment, and have failed and refused to determine, or to attempt to determine, the market value of the capital stock, certificates of indebtedness, bonds, and other securities of said companies in their assessment of the properties of said companies.

"(4) That he is informed and believes, and avers, that said corporation commission is in possession of reliable evidence to the effect that the market value of the capital stock, certificates, bonds, and other securities of the railroad companies in this state is as much as one hundred and fifty millions of

dollars. The value of the tangible or physical property of said companies is found by said commission to be about forty-two millions of dollars, so that the assessment of the said franchises as above set out, and as the law directs, would find the value thereof to be approximately one hundred and eight millions of dollars, which it is the duty of said commission to assess for taxation in this state in addition to their assessment of the said physical property.

"(5) That the plaintiff is a citizen and taxpayer of this state, with his residence in the county of Washington, and is also sheriff of said county, and is therefore interested in this action.

"(6) That he has demanded of the said Franklin McNeill, Saml. L. Rogers, and D. H. Abbott that they proceed to perform the duty set out in section 3; that they still refuse to do so without legal or just excuse.

"Wherefore he prays that a peremptory writ issue from this court to the said commissioners, commanding them to proceed without delay to assess, and make due return thereof, the said franchises, and to so perform their official duties as above set out, and as defined in section 50, c. 7, Pub. Laws 1901, and to perform such other and further duties as may be necessary to that end."

"The defendants, answering the complaint of the plaintiff, say:

"(1) That paragraph 1 of the plaintiff's complaint is true.

"(2) That paragraph 2 of the plaintiff's complaint is true.

"(3) That the facts set forth in paragraph 3 of the plaintiff's complaint are not true, except that the defendants have not determined the value and assessed for taxation the intangible property of railroad companies in this state, to wit, the franchise, separately from the assessment of the tangible property. Defendants deny that it was made their duty so to do by sections 43, 50, c. 7, Pub. Laws 1901, or any other law, as they are advised and believe.

"(4) That paragraph 4 of the plaintiff's complaint is not true.

"(5) That paragraph 6 of the plaintiff's complaint is true, as defendants are informed and believe.

"(6) Answering paragraph 6, defendants admit that they received a letter purporting to be written by plaintiff, by H. S. Ward, attorney, which was dated August 31, 1901, and was received by defendants September 2, 1901, demanding that defendants assess the tangible and intangible property of railroads separately, but defendants deny that they refused to comply with such demand without legal or just excuse. Answering further, defendants allege, as they are advised and believe, that plaintiff has no right to make such demand. The defendants, further answering the complaint of the plaintiff, allege, as they are advised and believe, that they have discharged the duties required of them

by law in the matter of the assessment of railroad property, and that on the 30th day of July, 1901, they certified to the auditor of the state and to the chairman of the boards of county commissioners of the several counties in North Carolina interested therein the assessment upon which state, county, and town taxes should be computed, and that they are informed and believe that the railroad companies have paid their state taxes thereon, and that the county and school taxes have been computed in accordance therewith, and entered upon the tax duplicate of the said counties, and that said tax duplicates are now, or should be, in the hands of the sheriff or tax collectors for collection; that these defendants did not make a separate assessment of the tangible and intangible property of the railroad companies for the year 1901, because, as hereinbefore alleged, they were advised and believed that the laws of North Carolina did not require them to do so. Further answering, the defendants allege that in the year 1899 they assessed the value of the railroad property, including franchises, as required by law, and that in the year 1900 they again assessed the value of the railroad property, including franchises, at the same value as in 1899, and, in accordance with law, they adopted the assessment for 1900 (which is the same as the assessment for 1899) for the year 1901, as they understood and construed the law to direct; that these defendants are advised and believe that the laws in force in the years 1899 and 1900, and for several years prior thereto, required an annual assessment of railroad property, but that the time for the making of said assessments by the provisions of section 48, c. 7, Laws 1901, was postponed to 'such date as real estate is required to be assessed for taxation,' which time is fixed by said chapter 7, § 12, in the year 1903, and every fourth year thereafter; and the said defendants are further informed and believe that the said change in the time for the assessment of railroad property was made for the reason communicated to the general assembly of 1901 by the message of his excellency Governor Aycock, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this answer.

"Wherefore the defendants pray the judgment of the court (1) that the plaintiff's prayer for a writ of mandamus be denied, and that his action be dismissed; (2) for their costs in this behalf incurred, to be taxed by the clerk of this court."

Exhibit A "To the Honorable the General Assembly: I transmit herewith the second annual report of the North Carolina corporation commission. You will observe from said report that the cases known as the 'Railroad Taxation Cases,' pending in the circuit court of the United States for the Eastern district of North Carolina, have been compromised and settled. Under the provisions of law the corporation commission in 1899 assessed the property of the Atlantic Coast Line at \$12-

885,775, the Southern Railway at \$14,713,850, and the Seaboard Air Line at \$7,980,246; making a total assessment of \$35,579,870, which was a total increase on the three systems over the assessment of 1898 of \$9,022,678. The assessment of three systems named in 1900 was \$36,373,382. In a short time after these assessments were made the three systems named secured an injunction from the circuit court of the United States for the Eastern district of North Carolina restraining the collection of taxes on the assessment over and above the assessment of 1898. During the pendency of these suits much evidence was taken on both sides; that on the part of the railroads tending to show a considerable and systematic undervaluation of the other property of the state, and that on the part of the state, while showing undervaluation in many instances, tending to show that the undervaluation was erratic, and not systematic. During the pendency of the investigation, and while evidence was being taken at Wilmington, early in January of this year, I received a telegram from Hon. H. G. Connor, of counsel for the state of North Carolina, asking me to come to Wilmington. Upon my arrival in Wilmington, I found that propositions of settlement were being discussed between those representing the railroads and those representing the state. The railroads insisted upon a reduction of the assessment made in 1899, but were willing to pay on the assessment of 1900, provided their assessable property should not again be assessed until there was another assessment of other property in the state. Upon conference with Chairman McNeill, of the corporation commission, Hon. H. G. Connor and Col. J. W. Hinsdale, representing the state, we came to the conclusion that no abatement in the assessment for either the year 1899 or 1900 could, under any circumstances, be made. We therefore declined to assent to any reduction in the assessment for either year, but were willing that the property of the railroads subject to assessment should only be assessed as often as other property in the state is or shall be assessed. Upon consideration, those representing the railroad companies decided to accept our view of the matter, and withdraw their suits, and pay the taxes assessed against them in accordance with the assessment made by the corporation commission both for the years 1899 and 1900; and they have paid into the state treasury the full amount of taxes due the state, to wit, \$44,561, and are now ready to pay, as soon as the clerk of the corporation commission can make out the necessary statements, \$32,084 into the school fund, and \$101,559 to the counties, cities, and towns, aggregating \$178,244. This settlement appears to me to be just, and I therefore recommend to the general assembly to place the railroads, as to the time of assessment of their property, upon terms of equality with all other assessable property in the state. If such a law shall be passed, the railroads will not be again

assessed until 1903. There are many good men, I am aware, who would have preferred to continue the litigation, and to pass other and more stringent tax laws against the railroads; but to do so involves continued litigation, which so far has cost the state \$18,273.25, with a considerable sum still due for services already rendered, and which cannot be continued at less than the cost of \$20,000 per year to the state. The railroads constitute a considerable and valuable part of the property of North Carolina, and they are of great importance in its industrial development. No fair-minded man desires in any way to hamper their growth and development. On the other hand, no just man can assent to their having an advantage in taxation. They ought to bear the burdens of the state in proportion to their ability to meet them, but it is not a violation of this rule to act upon the assessment made by our corporation commission, who have conscientiously and earnestly striven to do justice in the matter of taxation. In the settlement of a lawsuit, it never happens, so far as my experience and observation go, that either side is perfectly satisfied with the settlement; but it is frequently wiser to settle litigation than to continue it. I am persuaded that this is one instance in which it would be wise, both for the state and the railroads, to come to an agreement. It rests with the general assembly to carry out, or not, the terms upon which the settlement has been made. The question is no longer for me, further than to say that, in my judgment, what has been done is both just and wise. Charles B. Aycock. By the governor: P. M. Pearsall, Private Secretary."

The following are the sections of chapter 7 of the Public Laws of 1901 whose construction is essential to the determination of this action:

"Sec. 48. Railroads. The president, secretary, superintendent, or other principal accounting officers within this state of every railroad, telegraph, telephone, street railway companies, whether incorporated by the laws of this state or not, shall at such dates as real estate is required to be assessed for taxation, return to the said commissioners for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within this state, viz., the number of miles of such railroad lines in each county in this state, and the total number of miles in the state, including the road-bed, right-of-way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property, necessary for the construction, repairs or successful operation of such railroad lines, including also, if desired by the North Carolina corporation commission, Pullman or sleeping cars owned by them or operated over their lines.

"Sec. 49. Railroads. The movable proper-

ty belonging to a railroad company shall be denominated for the purpose of taxation, 'rolling stock.' Every person, company or corporation, owning, constructing or operating a railroad in this state, shall (in the month of June, annually) return a list or schedule to the commissioners, which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars and all other kinds of cars and the value thereof and a statement of schedule as follows: (1) The amount of capital stock authorized and the number of shares into which such capital is divided; (2) the amount of capital stock paid up; (3) the market value, or if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the state; (5) the total assessed value of all the tangible property in the state; (6) and if desired all the information heretofore acquired to be annually reported by section 1959 of the Code. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the commissioners and with reference to amounts and values, on the first day of June of the year for which the return is made.

"Sec. 50. Tangible and Intangible Property Assessed Separately. (a) The said commissioners shall first determine the value of the tangible property of each division or branch of such railroad, of rolling stock, and all other physical and tangible property. This value shall be determined by a due consideration of the actual cost to replace the property, with a just allowance for depreciation on rolling stock, and also of other conditions to be considered as in the case of private property. (b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses; and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or other securities, the value of which is based upon the earning capacity of the property. (c) The aggregate value of the physical or tangible property and the franchise, as thus determined shall be the true value of the property for the purpose of an ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof; and the commissioners shall certify to the chairman of the county commissioners and the mayor of each city and incorporated town, the amount apportioned to his county, city or town, and the

commissioners shall make and forward a like certificate to the auditor of the state. All taxes due the state from any railroad company, except the tax imposed for school purposes, shall be paid by the treasurer of each company directly to the state treasurer within thirty days after the first day of July of each year, and upon failure to pay the state treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed by the state for school purposes and those imposed for county purposes.

"Sec. 51. Railroads. When any railroad has part of its road in this state and part thereof in any other state, the commissioners shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the corporation commission of such company, as provided in the next preceding section, and divide it in the proportion to the length of such main line of road in this state, bears to the whole length of such main line of road, and determine the value in this state accordingly."

The court below denied the motion for a writ of mandamus, and dismissed the action. Plaintiff appealed.

The above is the statement of facts on which the following opinion is based:

The vital question involved in this action is whether the railroad corporations in this state shall pay any tax upon their intangible property before the year 1903. The form of the question is whether, considering the legal relation between sections 48, 49, and 50 of the machinery act of 1901, the assessment of the intangible property contemplated in section 50 can be made before the next assessment of real estate belonging to private individuals. Of course, if the intangible property cannot be assessed, the taxes thereupon imposed by law can neither be collected nor ascertained. We are aware of the great importance of this case to the railroads, on the one hand, and, on the other, to the state and its citizens; and we would have preferred that the parties whose real interests are at stake should have been directly represented in this action. They would have been heard, had they seen fit to become parties hereto. However, we must decide the case as it is brought before us, and, as the questions have been clearly presented, we find no substantial difficulty in their determination. This is suggested to us by the contention of the defendant that this action cannot be maintained by the plaintiff, but could have been brought only by some officer of the state upon whom is imposed the legal duty of enforcing its laws and collecting its revenues. It is contended that the action, if proper, should have been brought by the

governor or the attorney general, or at least by leave of the latter; but the governor has not brought any such action, while we find the attorney general appearing for the defendants. We do not mean to reflect upon these high officers in the slightest degree, and state these facts merely in answer to the contention of the defendants that they alone could act.

It is true, this court has said in *Russell v. Ayer*, 120 N. C. 180, 185, 27 S. E. 133, 37 L. R. A. 246, "There can be no serious question concerning the power of the governor to bring an action of the nature of this one," but it does not say that he alone can bring it. On the contrary, it cites *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. Rep. 801, where the opinion of the court opens with the following statement: "The plaintiff, as a citizen and taxpayer of the state, brings this action against the defendant, as secretary of state, who, by virtue of his office, is the custodian of all acts passed by the legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said acts to the public printer for publication." It is true, in that case the mandamus was refused on constitutional grounds, but the right of the plaintiff to bring the action in his private capacity was not questioned. It does not appear that *Elias Carr*, "as a citizen and taxpayer," had any greater interest in the result of that action than the plaintiff has in that at bar.

At the threshold of this opinion, we desire to eliminate whatever contingent interest the plaintiff may have in his commissions as sheriff, and to place our decision upon the broad ground that every citizen has the right to demand that every other property holder shall pay his lawful taxes. This doctrine is, in our opinion, founded upon reason and authority, and is thoroughly consistent with the highest principles of public policy. In *High, Extr. Leg. Rem.*, the learned author says in section 431: "When the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result; it being sufficient to show that he is a citizen, and as such interested in the execution of the laws." This doctrine is sustained by a decided preponderance of American authority, but among so many cases few can be cited. Among those peculiarly appropriate, as relating directly to taxation, are the following, selected from different states, and running through a long period: In *State v. Hamilton*, 5 Ind. 310, where a mandamus was granted, compelling the county auditor to return railroad property for taxation, the court says on page 319: "The objection has been made that this mandamus could not issue on the relation of *John P. Dunn*, auditor of state. The assess-

ment of the taxes for state purposes is a matter of public concern, in which all the citizens of the state are interested; and hence, according to the case of *Hamilton v. State* (in this court, Nov. term, 1852) 3 Ind. 452, any citizen of the state might have been the relator. At the same time, it was peculiarly appropriate that the prosecution should be upon the relation of the auditor of state, he being the officer more specifically charged with the management of the finances of the state." In *People v. Halsey*, 37 N. Y. 344, 346, the court says: "The writ of mandamus may, in a proper case, and in the absence of an adequate remedy by action, issue on the relation of a private individual, to redress a wrong personal to himself, or on the relation of one who, in common with all other citizens, is interested in having some act done, of a general public nature, devolving as a duty upon a public officer or body, who refuse to perform it. The collection of a tax legally assessed, in which all the inhabitants of any particular division of the state have a common interest, is an instance of this character, and such collection may be enforced by any one of such citizens." And again, on page 348: "Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter in which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people, and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of mandamus must show an individual right to the thing asked, must be taken to apply to cases where an individual interest is alone involved, and not to cases where the interest is common to the whole community." In *Ford v. Mayor*, 84 Ga. 213, 216, 10 S. E. 732, 733, in an action brought by "Ford et al., citizens, freeholders, and taxpayers of the city of Oartersville," the court held that "if the mayor and aldermen have illegally exempted the waterworks company from taxation, and refuse to levy a tax upon the property of said corporation, the citizens can compel them to do so by writ of mandamus." In *Hugg v. City Council*, 39 N. J. Law, 620, where the city solicitor applied for a mandamus to compel the city council of Camden to sell lands for taxes, on the ground that he would be entitled to certain fees for selling such lands, the court doubted whether such contingent interest would entitle him to the writ, but held that he could sue as a taxpayer, saying on page 624: "But it is not necessary that he should show such interest as a public officer, to prosecute this writ. He is not a mere volunteer, interfering in a public or private matter. He has the right, as a citizen and taxpayer in the city of Camden, to be the relator in a mandamus when seeking the enforcement of a duty by the common council of the city,

which is a public right, affecting the whole community, and also his interest as such taxpayer." On page 622 the court also uses the following significant language, in reply to the contention that such sale was within the discretion of the common council: "But these words, 'It shall and may be lawful,' in this statute, are mandatory, not directory and discretionary. The power conferred by them must be exercised. It is the settled construction that where a public or municipal corporation or body is invested with power to do an act which the public interests require to be done, and has the means for its complete performance placed at its disposal, not only the execution, but the proper execution, of the power, may be insisted on as a duty, though the statute conferring it be only permissive in terms." The case of *Railroad Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428, while not relating to taxation, seems directly in point. The last case we shall cite upon this point is the recent Illinois case of *State Board of Equalization v. People*, 191 Ill. 528, 61 N. E. 339, which in the nature of the suit, the manner in which it was brought, and the results sought to be obtained, are almost identical with the one at bar. Quoting the opinion in that case: "This is a petition for a writ of mandamus, filed in the circuit court of Sangamon county by the state's attorney of said county, upon the relation of Catherine Goggin and Robert C. Steele, against the state board of equalization, and the members thereof (naming them), to coerce said board, and the members thereof, forthwith to value and assess, in the manner provided by law, the capital stock, including franchises, of each of the following named corporations." A large number of corporations were included, principally street railway companies, the aggregate value of whose intangible property over and above the assessed value of their tangible property was alleged to be \$235,000. Neither the attorney general nor any other state officer was a party. The relators were school-teachers, suing as taxpayers, and yet the mandamus was granted. It is true in that case the court went further than we have any reason to anticipate being compelled to go. It declared the assessment made by the state board of equalization to be so grossly inadequate as to be fraudulent upon its face. We doubt not that the members of our corporation commission will be glad of an authoritative declaration of the law, and will follow our decision in letter and spirit.

As the plaintiff has the legal capacity to maintain this action, it remains to be considered to what relief he is entitled. There seems to be no question as to the power of the legislature to impose the taxes in form and substance as contemplated in section 50 of the machinery act of 1901. Section 3 of article 5 of the constitution of this state is as follows: "Laws shall be passed taxing, by a uniform rule, all monies, credits, investments in bonds, stocks, joint stock

companies or otherwise; and also, all real and personal property, according to its true value in money. The general assembly may also tax trades, professions, franchises and incomes provided that no income shall be taxed when the property from which the income is derived is taxed." The power to tax franchises, including the intangible property of a corporation, seems to be optional; but it is fully given, and does not seem to be in conflict with the federal constitution. This principle is ably and elaborately discussed in *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. The court therein says on page 602, 92 U. S., 23 L. Ed. 663: "It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible and tangible property of the corporation, it may or may not include all its wealth. There may be other property, of a class not visible or tangible, which ought to respond to taxation, and which the state has a right to subject to taxation." Again the court says on page 605, 92 U. S., 23 L. Ed. 663: "It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are represented by the value of its bonded debt and of the shares of its capital stock." Later cases are to the same effect, generally citing this case. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 339, 6 Sup. Ct. 57, 29 L. Ed. 414; *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Attorney General of Massachusetts v. W. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Railroad Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238; *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Central Pac. R. Co. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903; *Southern Pac. R. Co. v. California*, 162 U. S. 167, 16 Sup. Ct. 794, 40 L. Ed. 929. These cases sustain not only the fairness and legality of the method of assessment prescribed by our statute, and approved in *State Railroad Tax Cases*, supra, but also the further principle that (quoting headnote in *Railroad Co. v. Backus*), "when a railroad runs into or through two or more states, its value for taxation purposes in each is fairly estimated by taxing that part of the value of the entire road which is measured by the proportion of the length of the particular part in that state to that of the whole road."

The capacity of the plaintiff to sue, and the power of the legislature to impose the tax, having been determined, it remains for

us to ascertain the intention of the legislature as expressed in the act. That the legislature intended to assess and collect at some time the taxes referred to in section 50 does not admit of question. To that extent the act is clear and explicit, neither requiring nor permitting interpretation. The only point susceptible of doubt is as to the time when such assessment should be made. This point, we must confess, gave us some trouble. And yet if we give effect to all parts of the act, we can come but to one conclusion. It seems clear to us that the general assembly intended sections 49 and 50 of the act in question to go into immediate operation. If otherwise, why should they have been put into the act at all? We must take judicial notice that, under our constitution and laws, another legislature will be elected and in session before the month of June, 1903. It is common knowledge, appearing from our public statutes and legislative journals, that each legislature passes its own revenue and machinery acts, which are intended to be, and usually are, complete in themselves. It can scarcely be presumed that the legislature of 1901 deliberately did so vain a thing as either to attempt to bind that of 1903 by anticipatory legislation, on the one hand, or, on the other, to pass an act which it did not intend to be operative. Moreover, it is obvious that the assessment required by section 50 is to be based upon the statements prescribed in section 49, and yet those statements are, by the very terms of said section, to be made "in the month of June annually." Why should they be made annually if they are to be acted upon only quadrennially? Why have four separate and distinct sets of annual statements, when only one can be of any possible use? These statements must necessarily vary, as does the value of all personal property, as times are good or bad. The value of railroad property especially is peculiarly susceptible to the changes produced by the contraction and expansion of the general business of the country. Therefore what might be a fair valuation for one year might be grossly excessive or inadequate for the remaining three years. Real property is not subject to such sudden and violent fluctuations, or at least to a far less degree. Hence it is the long-established rule in this state to assess the real property of individuals only once in every four years, while their personal property is assessed annually. The value of intangible property is much more liable to fluctuation than even tangible personal property, and hence the greater propriety of an annual assessment. These reasons, with none apparently to the contrary, force us to the conclusion that the act intended that sections 49 and 50 should apply to the assessment of 1901, and annually thereafter.

Great stress is laid upon the fact that section 48 of the act of 1901, which is substantially a re-enactment of section 43 of

the act of 1899, changes the latter section by omitting the words "on the first day of June of each year," and inserting the words "at such dates as real estate is required to be assessed for taxation." From this it is argued that the legislature intended that the franchise should be assessed for taxation only once in four years, like real estate, and therefore should not be assessed until 1903. The fallacy of this argument lies in the fact that section 48 of the act of 1901 and section 43 of the act of 1899 are both, by their express terms, limited to the tangible or physical property of the railroads, and do not pretend to relate to the assessment of the franchise. Section 48 says: "The president, * * * shall at such dates as real estate is required to be assessed for taxation return to the said commissioners for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within this state, viz. * * *". Then follows a specific description of the different kinds of physical or tangible property without the slightest allusion to the franchises or intangible property. "Inclusio unius est exclusio alterius." If the legislature had intended section 48 to apply to franchises, it could very easily have said so. In fact, it would have been easier to have said "all property, both tangible and intangible, including franchises," than to have said, as it does say, "all the following described property," followed by a long list of specific kinds of tangible property alone. The fact that neither section 48, nor its prototypes, has ever alluded to the assessment of the franchise, which has always been regulated by other sections, seems conclusive. Those sections, both in the act of 1901 and that of 1899, which refer to the franchises, all provide for annual returns.

But one question remains: Does the act, exclusive of section 48, provide sufficient machinery for annual assessments of the intangible property of railroad corporations? We think it does. Section 49 expressly provides that all railroad companies shall report annually to the corporation commission "(5) the total assessed value of all the tangible property in the state." This obviously refers to the present assessment of the tangible property that has already been made. We cannot suppose that the legislature intended to say that the railroad companies should report in the years 1901 and 1902 an assessment that would not be made until 1903. The gift of prophecy is not of legislative origin. Moreover, section 49 also provides that railroad companies shall, if required by the corporation commission, furnish annually in the month of June all the information set out in section 1959 of the Code. This latter section contains 50 different questions, completely covering in detail the total cost of the road and equipment, with its characteristics, transactions, cost of maintenance, operation, and

repair, the amount of capital stock permitted, subscribed, and paid in, and total floating and funded debt, with average rate of interest. We see no reason why these three sections (49 and 50 of the machinery act of 1901, and section 1959 of the Code), taken together, cannot be enforced without reference to section 48 of said act. It is not alleged that there is any repugnance in the sections of said act, but, rather, that their interdependence is so great as to forbid any separation. As they relate to different subjects of taxation, to wit, tangible and intangible property, and are shown to be capable of independent execution, we cannot concur in the objection. It should be borne in mind that the sections under consideration do not impose any additional tax upon railroads, as section 45 of the machinery act of 1899 expressly directs that the value of the franchise shall be included in the assessment of railroad property. A comparison of sections 49, 50, and 51 of the machinery act of 1901 with sections 44, 45, and 46 of the act of 1899, will show that the only changes relate to certain details in the method of assessment. The principal change made by the act of 1901 (aside from section 48) was the insertion of the following provision. "And particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or any other securities, the value of which is based upon the earning capacity of the property." This is simply the rule so repeatedly approved by the supreme court of the United States, as shown above, and was evidently suggested to the legislature by the great disparity between the assessed value of railroad property and its real value as shown by the market value of the stocks and securities based thereon.

It is suggested in behalf of defendants that the legislature, by the provisions of section 48, intended that the franchise or intangible property should not be taxed until 1903. That would be a very long and circuitous way of saying what might have been said in a few plain and explicit words. As the tax had already been imposed by existing law, such an interpretation would be, in legal effect, an exemption from taxation for the years 1901 and 1902. Can we suppose that the legislature intended to create a practical exemption from taxation of valuable property under the guise of a mere change in the method of its assessment? We think not. It is a well-settled rule of interpretation here and elsewhere that there can be no exemption unless the deliberate purpose of the state to create such exemption is declared in words too plain and explicit to require construction. The mere existence of a doubt is its legal determination in behalf of the state. This question is fully discussed in *Railroad Co. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652, which expresses the settled rule of this court. In affirming that case

on writ of error, the supreme court of the United States says (146 U. S. 279, 301, 13 Sup. Ct. 72, 78, 36 L. Ed. 972): "We concur with the state court in the conclusions reached, as sustained by reason and authority." A few quotations from the numerous decisions of that court, running through a long series of years, show how firmly the rule is established: In *Bank v. Billings*, 4 Pet. 514, 561, 7 L. Ed. 939, Chief Justice Marshall, speaking for the court, says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." In *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 393, 18 L. Ed. 461, Chief Justice Taney, speaking for the court, says: "And certainly there is no reason why the property of a corporation should be presumed to be exempted, or should not bear its share of the necessary public burdens, as well as the property of individuals. This court on several occasions has held that the taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." In *Bailey v. Magwire*, 89 U. S. 215, 226, 227, 22 L. Ed. 850, the court says: "It is manifest the legislation which it is claimed relieves any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment. While it were better for the interest of the community that this power should on no occasion be surrendered, this court has always held that the legislature of a state, unrestrained by constitutional limitation, has full control over the subject, and can make a contract with a corporation to exempt its property from taxation, either in perpetuity or for a limited period of time. If, however, on any fair construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be solved in favor of the state. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy. * * * It is never for the interest of the state to surrender the power of taxation, and an intention to do so will not be imputed to it unless the language employed leaves no other alternative." In *Railroad Co. v. Berry*, 112 U. S. 606, 617,

Sup. Ct. 299, 302, 28 L. Ed. 831, the court says: "This salutary rule of Interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed strictissimi juris." In *Railroad Co. v. Guffey*, 120 U. S. 569, 575, 7 Sup. Ct. 693, 696, 30 L. Ed. 732, the court says: "For it is the settled doctrine of this court that an immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken." In *Railroad Co. v. Alsbrook*, 146 U. S. 279, 294, 13 Sup. Ct. 72, 76, 38 L. Ed. 972, Chief Justice Fuller, speaking for the court, says: "The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power."

It is earnestly contended by the able counsel for the defendants that we should construe the statute in the light of the governor's message, presuming that the legislature intended to carry fully into effect the recommendations contained therein. We approach this question with much hesitation, because we gravely doubt the propriety of considering any outside matter when an act, viewed in all its parts, is, on its face, capable of intelligent construction. *Black, Interp. Laws*, § 25; *End. Interp. St.* §§ 2, 4, 8; *Suth. St. Const.* § 237; *Potter's Dwar.* p. 193. In *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529, the court says: "Although the spirit of an instrument, especially of the constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous, in the extreme, to infer from extrinsic circumstances that a case for which the words of the instrument expressly provide shall be exempted from its operations." In *Alexander v. Worthington*, 5 Md. 485, the court has lucidly expressed the rule applicable to the present discussion in the following words: "The language of a statute is its most natural expositor, and, where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations. The construction is to be on the entire statute, and where one part is susceptible indifferently of two constructions, and the language of another part is clear and definite, and is consistent with one of the two constructions of which the former part of the statute is susceptible, and is opposed to the other construction, then we are to adopt that construction which will render all clauses of the statute harmonious, rather than that other construction which will make one part contradictory to another."

However, as the message is made a part of the answer and is embodied in the case on appeal, we will give it that courteous consideration due to the supreme executive power of the state. Much stress is laid by the defendants upon the expression that, "if such a law shall be passed, the railroads will not be again assessed until 1903"; but, to ascertain the true meaning of the message, we must construe it as a whole, and not in its disjointed sentences. This sentence is immediately preceded by the following statement: "This settlement appears to me to be just, and I therefore recommend to the general assembly to place the railroads, as to the time of assessment of their property, upon terms of equality with all other assessable property in the state." This can be done only by assessing the property of a railroad in the same manner as that of the citizen. His real property is assessed quadrennially, while his personal property is assessed annually. Intangible property is surely personal property. We are not aware of any principle under which it could be classified as real estate. If, therefore, we give any effect to the declared purpose of the message to place the railroads and the citizens of the state upon an equality in bearing the just burdens of taxation, we must conclude it to mean that the railroads will not be again assessed until 1903 on their real property. Keeping in view the just equality of taxation, this construction becomes the more important, as any other would result in the practical exemption of railroad franchises from all taxation until 1903.

Again, it is urged that the faith of the state is pledged to the maintenance of the compromise entered into by the governor and the general assembly with the railroad companies. What were the terms of such compromise, if there was any compromise? The act makes no allusion to any compromise, nor is it alleged that any compromise is shown by the records of the federal court. The message thus alludes to the transaction: "The railroads insisted upon a reduction of the assessment made in 1899, but were willing to pay on the assessment of 1900, provided their assessable property should not again be assessed until there was another assessment of other property in the state. * * * We therefore declined to assent to any reduction in the assessment for either year, but were willing that the property of the railroads subject to assessment should only be assessed as often as other property in the state is or shall be assessed. Upon consideration, those representing the railroad companies decided to accept our view of the matter, and withdraw their suits," etc. Giving to these words their fullest legitimate meaning, there is no allusion to any exemption from taxation such as would result from the construction we are asked by the defendants to place upon this act. In fact, such a construction would destroy all idea of a compromise. It appears from the message that the entire amount involved in

the litigation in the federal court was an increased assessment of a little over \$9,000,000, while it is evident from the report of the corporation commission, compared with the reports of current market values, that the value of the intangible property of the three railroad corporations which were parties to said litigation, after deducting the assessed value of their tangible property, was many times the amount involved. The essential nature of a compromise supposes mutual concessions, and cannot be applied to an inconceivable transaction wherein one party is supposed to bind himself to give up a sum largely in excess of that in litigation simply to settle a lawsuit. We do not think that the message of the governor, even if it could affect our interpretation of the statute, can, upon its face, justly require any such construction.

We see no merit in the contention that the defendants are functi officio, either individually or as a commission. The corporation commission appears to be a continuing body, and in fact there has been no change in its personnel since the passage of the act. We see no constitutional objection to the method of assessment, as the corporations affected thereby will have the fullest opportunities to be heard. Indeed, it appears that the assessments will be based upon reports furnished by themselves. How far such reports will be binding upon the commission is not before us, but we doubt not that the commission will give to such companies a full and fair hearing before taking any final action affecting their interests.

The writ of mandamus will issue in accordance with the prayer of the complaint, requiring the defendants to proceed forthwith, under the provisions of chapter 7 of the Public Laws of 1901, as construed in this opinion, to assess the intangible property of all persons or corporations referred to in sections 49 and 50 of said act for the year 1901.

The above opinion, written more than a month ago, under different circumstances and for a different purpose, is now filed as my dissenting opinion, embodying the views I still entertain as to the law. This I say in justice to myself, as my opinion, professedly dissenting from the opinion of the court, does not allude thereto. As I have just received the opinion of the court, it is impossible for me, in the few remaining hours of the session, to rewrite my own opinion, or even to materially change it, without endangering its logical connection. In specifically dissenting from the opinion of the court, I scarcely know where to begin, as I dissent from it in toto, both in its conclusion, and the reasoning by which it is reached. There is one part, containing the dominating principle of the opinion, which I cannot ignore. It is the following: "If it should be objected to this opinion that, to be consistent, it embraces impliedly the view that there is no statute which fixes the assessment of the real and personal property of the railroad companies in this state, upon

which taxes can be levied and collected, until the assessment provided for in June, 1903, by the act of 1901 (chapter 7, § 12), it would have to be admitted that that is a fact." This is simply saying, in substance, that no species of railroad property, real or personal, tangible or intangible, can be assessed for taxes until June, 1903. In this view I could never concur, as it would drive me to one of two inevitable conclusions,—either that the legislature intended to grant to the railroads a total exemption from all taxation for the years 1901 and 1902, or that the act is so utterly insensible as to be incapable of any reasonable interpretation. If this be the opinion of the court, I must again enter my respectful but most earnest dissent. If, however, the able opinion of the Chief Justice, which, I understand, receives the concurrence of Justice COOK, holds, as it seems to me it does hold, that the railroads are liable for the years 1901 and 1902 at least to the amount of their assessment of 1900, then to that extent I concur in the concurring opinion. This would eliminate from the opinion of the court its vital principle, leaving practically only its conclusion concurred in by a majority of its members. Hence it seems needless for me to go into any further discussion beyond what is contained in the body of my opinion, from which the elaborate opinion of the Chief Justice was written in dissent.

CLARK, J., concurs in the dissenting opinion of DOUGLAS, J.

(130 N. C. 344)

SMITH v. ATLANTA & C. R. CO.*

(Supreme Court of North Carolina. June 17, 1902.)

RAILROADS — PERSONAL INJURIES — SERVANT WORKING NEAR TRACK—FAILURE TO WARN — INSTRUCTIONS—LESSOR'S LIABILITY FOR LESSEE'S NEGLIGENCE.

1. Plaintiff, according to his own evidence, was painting a "switch target" located so close to the track that he was in danger of being struck by passing trains. The track was straight for several hundred feet, with nothing to interrupt the view. Defendant's engineer ran a switch engine down the track without ringing the bell or sounding the whistle, and plaintiff continued at his work until he was struck and injured. The court instructed that he was entitled to recover if the jury found that he was in dangerous proximity to the track, and, being engrossed in his work, was inattentive to the approach of the engine, and that such fact being evident to the operatives of the engine, they ran it on down the track without giving proper signals. *Held* error, because allowing the jury to consider the continuing of his work by plaintiff as evidence that he was engrossed in his work, and on that account inadvertent to the approach of the engine.

2. A railroad leasing its road to another company is liable to a servant of the lessee for injuries caused by the lessee's negligence in the operation of the road.

Douglas, J., dissenting.

Appeal from superior court, Mecklenburg county; Hoke, Judge.

*For opinion on petition for rehearing, see 42 S. E. 976.

Action by Fred Smith against the Atlanta & Charlotte Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. F. Bason, for appellant. Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. According to the plaintiff's evidence, he was engaged in painting what is known as the "switch target" on one of the tracks of the defendant in its depot yard at Charlotte, the target being about four feet off from the rail, and that in doing his work he was compelled at times to put himself in danger of passing trains; that the track where he was at work was straight for several hundred feet, and there was no obstruction to the view in either direction along the track; and that while he was engrossed in his work, and inadvertent to one of defendant's shifting engines, the engineer, without signal of bell or whistle, ran him down and injured him. His honor thought, upon the plaintiff's own evidence, that the plaintiff contributed to his own injury, and so instructed the jury; but at the same time said that such contributory negligence would not prevent the plaintiff's recovery if the jury should find that the engineer knew or could have seen that the plaintiff was in danger, and inadvertent to the approach of the engine, and ran the engine down the track and upon the plaintiff without giving notice of the approach by proper signals. The imputed negligence of the defendant is clearly stated by his honor, and, as the charge on that contention of the plaintiff is the vital point in the case, we will give the whole of it: "A breach of duty that was imputed to defendant in this case was that plaintiff was engaged in performing his work; that he was in a position of danger, and so near the track that he was liable to bring about a position of danger; that he was in a position of danger; that he was absorbed in his work in which he was engaged, and that that must have been evidence to the employés of the defendant on that engine; and while he was in a dangerous position, and evidently unaware of the approach of the engine, that this defendant, through its agent, ran that engine on him without giving him any warning or signal of its approach, and that he was knocked down and injured severely by it, and that was the proximate cause of the injury. If the jury find by the greater weight of the evidence that that is true; if you find that plaintiff was there in what you find was a dangerous proximity to that rail, and that, being engrossed in his work, he was inattentive to the approach of that engine as it came down the track; and you further find that the employés of defendant who were on the engine knew that it was evident to them that plaintiff was in that condition, and, being evident to them, they ran the engine on down the track without

giving proper signals in order to let him escape, and injury followed; and if you find that this was the proximate cause of it,—you will answer, 'Was the plaintiff injured by the negligence of the defendant?' 'Yes'; otherwise, 'No.' " The case was tried by his honor with his usual ability and painstaking care, and we find no error in any of his rulings except in this one. We have no precedent in our Reports, nor have we been able to find one anywhere upon a state of facts like those present in this case; and we have been slow, therefore, to declare as erroneous the conclusion reached by his honor. The plaintiff labored under no infirmity. He was sober, intelligent, occupied a position where he could do his work with entire safety if he would only keep watch for the passing trains. There was no obstruction of any sort to prevent him from seeing the engine which struck him, nor to prevent him stepping out of danger instantly. In *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. 313, and in *Meredith v. Same*, 108 N. C. 616, 13 S. E. 137, it was decided that an engineer, who sees a person walking along the track in front of a moving engine, may act upon the assumption that the person will step off the track in time to avoid injury, if such person is unknown to him, and is apparently old enough to understand the necessity for care and watchfulness. It seems to us that such an assumption was lawful on the part of the engineer in the present case. The fault, then, with his honor's charge, as we see it, is that he allowed the jury to consider, under the first issue, the continuing of his work by the plaintiff as evidence that he was engrossed in his work, and on that account was inadvertent to the approach of the train. The engineer, it appears to us, had the right to assume that the plaintiff, in possession of all his faculties, and not hampered by any obstructions that would have prevented his instantaneous avoidance of danger, would have stepped out of danger. It would be a difficult matter, indeed, for any important railroad system to carry on its business if each engineer of a switch engine is to stop his engine whenever he sees an employé continuing his work upon the approach of the engine, or the employé is to stop his work except for the second to step out of the way of the train.

The defendant's contention that it is not liable for such acts as are set out in the complaint—it being alleged in the complaint and admitted in the answer that the defendant is a lessor and the Southern Railway Company the lessee of the defendant railway, and that the injury of the plaintiff occurred while the road was being operated by the lessee—cannot be entertained, and his honor's ruling was correct in refusing to dismiss the action on that ground.

Error.

DOUGLAS, J., dissents.

(130 N. C. 473)

HOOKER et al. v. TOWN OF GREENVILLE.

(Supreme Court of North Carolina. June 17, 1902.)

CONSTITUTIONAL LAW—SCHOOLS—RACE DISCRIMINATION—STATUTE—ENACTMENT.

1. Pub. Laws 1901, c. 497, establishes graded schools in Greenville, N. C. Section 8 provides that, if there shall be so few of either race in a district that the board of trustees shall deem it inadvisable to organize a school for that race, they may give the pro rata proportion of the fund raised for such children to the public schools for that race in the adjoining district. Const. art. 9, § 2, provides that the children of the white and colored races shall be taught in separate public schools, but that neither shall be discriminated against. *Held*, that the act is unconstitutional unless it should be made to appear there are no children of either race in the district to be discriminated against, or unless there are enough children of both races to warrant a school for each.

2. Priv. Laws 1901, c. 121, authorizing the town of Greenville to issue bonds for improvement purposes, and Pub. Laws 1901, c. 497, establishing graded schools in such town, are unconstitutional, having been passed without the recording of the yeas and nays in the house on either the second or third reading.

Appeal from superior court, Pitt county; Winston, Judge.

Injunction by S. T. Hooker and others against the town of Greenville. From an order refusing the writ, plaintiffs appeal. Reversed.

Skinner & Whedbee, for appellants. Fleming & Moore and Simmons & Ward, for appellee.

FURCHES, C. J. The defendant, the town of Greenville, believing it was authorized by chapter 121 of the Private Laws of 1901 to raise, by the issue and sale of \$75,000, par value, of coupon bonds, money for the purposes stated in said act, proceeded to hold an election as provided in said chapter; and after said election, at which it was found and declared that a majority of the qualified voters of said town had voted for the issue of said bonds, the defendant proceeded to advertise and was offering said bonds for sale; and it alleges in its answer that it had agreed upon a sale of the same, and had levied a tax for the purpose of paying the accruing interest thereon; and the defendant, being of the opinion that chapter 497 of the Public Laws of 1901 had established a graded school within the corporate limits of the town of Greenville, had levied a tax of 10 cents on the \$100 worth of property and 30 cents on the taxable polls for the support of said graded school. But the plaintiff, a citizen and taxpayer of the town of Greenville, believing that said act providing for the issue of bonds was void for irregularity in its submission to the voters for their approval, alleged that the act for the purpose of establishing the graded school was void for the reason that it discriminated, in the distribution of the money collected by

taxation, between the white and colored races; and he further contends that they are both invalid for the reason that they were not passed by recording the yeas and nays on the second and third readings, as the constitution requires such laws for raising money and taxing the people and their property should be, and are void on that account. This action is brought to restrain and perpetually enjoin the defendant from issuing and selling said bonds, and from levying any tax for the payment thereof or the interest thereon; and to enjoin the defendant from paying the \$5,000 provided therein to the trustees of the graded school, and from levying and collecting any tax for the support and maintenance of said graded school. Upon a hearing before Winston, J., the injunction was refused, and the plaintiff appealed.

There were many affidavits and orders offered on the hearing as to the alleged irregularities in the manner of the registration, and holding the election, and as to the manner in which the defendant performed its duty, and as to the best place to get a water supply. But we will not enter upon a discussion of these further than to say that, where the defendant has the power to act, the courts will not interfere unless fraud or bad faith is alleged and shown, but will leave these matters to be corrected by the people at the next election, if there is cause of complaint. But the next ground alleged is a matter of which we must take notice, to-wit, that the act establishing the graded school discriminates in its provisions against one race and in favor of the other. If this is so, it is in violation of article 9, § 2, of the constitution, which provides as follows: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of either race." That is, one white child of the school age shall have the same amount of money per capita as a colored child, and no more; and the colored child shall have the same amount per capita as any white child, and no more; that both races shall have equal opportunities for an education, so far as the public money is concerned. If this bill discriminates against either race to the prejudice of the other race, it is unconstitutional (*Riggsbee v. Town of Durham*, 94 N. C. 800; *Putt v. Commissioners*, Id. 709, 55 Am. Rep. 638); and the law will not allow that to be done by indirection that cannot be done directly. The act establishing this graded school (chapter 497, Pub. Laws 1901) has 50 calls, that is, 50 corners and 50 lines, in its boundary, which seem to us to be remarkable, and we were not able to understand what are the boundaries from the calls in the act. Therefore, for the purpose of explaining the calls in the act, we had a map of the town of Greenville, including the school district, furnished us for the purpose of enabling us to understand the

calls in the act. *Blue v. Ritter*, 118 N. C. 580, 24 S. E. 356; *Foster v. Hackett*, 112 N. C. 546, 17 S. E. 426. The boundaries are as follows: "Section 1. That all the territory embraced within the following limits in the town of Greenville, Pitt county, to-wit, beginning on Tar River at the river bridge, foot of Pitt street, thence up said river to the first branch, commonly called Skinner's Ravine, thence with said ravine or branch to the eastern boundary line of the W. and W. Railroad where it crosses said branch, thence with said eastern boundary of right-of-way of said railroad to Tar River, thence up Tar River to the present corporate limits of said town, thence with said corporate limits of said town to the river road, at a point where Fifth street extended would cross said line, thence with said river road for Fifth street to J. L. Sugg's northwest corner on said street, thence his line so as to include his lot to the western line of the right-of-way of the W. and W. Railroad, thence across said railroad to John Flanagan's southwestern corner on said right-of-way, thence his back line and N. H. Bagwell's, Miss Martha O'Hagan's and Dr. C. O. H. Laughinghouse's back line to Pitt street, thence across Pitt street an air-line to S. T. Hooker's back line, thence his line, Miss McKenny Perkins' and J. A. Andrews' back lines to C. D. Rountree's corner on his back line, thence O. D. Rountree's line to Greene street, thence down Greene street to the Methodist parsonage's southern corner on said street, thence with said parsonage line to R. N. King's line, thence his line to Frank Tyson's, thence with B. F. Tyson's back line, including said Tyson lot, to Dickeson avenue, thence with northern side of Dickeson avenue to R. A. Tyson's first corner on said street, thence his back line, including said lot, to Greene street, thence across Greene street to C. D. Rountree's northeast corner, thence his line so as to include his lot and R. A. Tyson's line to Pitt street, thence up said Pitt street to B. C. Shepperd's northeast corner, thence his line to a point one-half distance between Pitt and Clark streets, thence from this point a line parallel with Pitt street an air-line to Zeno Moore's line, thence his line to Clark street, thence with Clark street to Dickeson avenue, thence with Dickeson avenue in a westerly direction to the first ditch crossing said street, thence up said ditch to the W. and W. Railroad trestle over said ditch, thence an air-line from said trestle to the northeast corner of old college lot, thence with old college line in a westerly direction and southerly direction, including said college lot, to old plank road, thence along and across in a southwesterly direction old plank-road to E. A. Moye's northeast corner, thence his line to a point 60 feet north of Broad street, thence a line parallel with Broad street and 60 feet north of said street to the western boundary of the right-of-way of the W. and W. Railroad, thence

along said right-of-way to a point where Eleventh street extended would cross said railroad, thence with the line of Eleventh street to a point where an air-line drawn from the eastern side of Liberty Warehouse would cross said street, thence a line made by extension of eastern side of Liberty Warehouse to Ninth street, thence Ninth street 200 feet in an easterly direction, thence a line parallel with the eastern side of Liberty Warehouse to Twelfth street, thence with Twelfth street to the road leading from Greenville to Greene's Mill Run, thence with said road in a northerly direction to Alfred Forbe's northeast corner of the lot on which he now lives, thence his line to the livery stable lot of G. M. Tucker and Rickey Moore, thence this eastern line to Fifth street, thence with Fifth street in an easterly direction to a point midway between Cotanch and Read streets, thence a line from this point parallel with Cotanch street to Second street, thence with Second street to Evans street, thence with Evans street to a point midway between First and Second streets, thence a line midway between First and Second streets to eastern line of Washington street, thence with Washington street to a point midway between Second and Third streets, thence this line parallel with Third street 165 feet, thence an air-line parallel with Washington street to Second street, thence with Second street to Washington street, thence with Washington street to a point midway between First and Second streets, thence an air-line parallel with Second street to Pitt street, thence with Pitt street to the beginning."

The territory inside the red lines¹ is the school district, and that part of the territory outside the red boundary is excluded from the benefit of this school. There is another provision in the act that seems to be explanatory of the gerrymandering of the territory of the town for the purposes of this school. The eighth section provides "that if there shall be so few of either race in the district that the board of trustees shall deem it inadvisable to organize a school for that race, then they shall have power to arrange for the children of the race which shall be represented to receive their pro rata proportion of the fund so raised by the special tax herein provided for, in some other manner, or they may give such pro rata proportion to the public schools for that race, adjoining the district herein described." The constitution says both races shall fare equally in matters of public schools, though they shall be taught in separate schools. If there "shall be so few of either race the pro rata of that race may be given to an adjoining school district." Without ascribing any reason the draftsman may have had for using the term "either race," we will suppose it was the white race he thought would be so small that it would not be worth

¹ The shaded lines in the plat, thus: 

tutional. But if it should be made to appear on the trial that this map is not correct, and the territory bounding the school district is not as therein represented, or that there are no negroes in said district to be discriminated against, or that there are no white children in said district to be discriminated against, and that neither race was so small but what a school should be organized and taught for the term free schools are to be kept open, then it may not be unconstitutional on account of its discriminations.

This being an application for an injunction, this court has the right to review the findings of fact by the court below, as well as the law. *Jones v. Boyd*, 80 N. C. 258. But upon examining the supplemental statement of case on appeal, certified by the secretary of state, we find that neither of these acts was passed as they were required to be passed by the constitution to authorize the defendant to create any debt by issuing bonds, or to raise money by taxation. They both seem to have been properly passed in the senate,—the yeas and nays having been called and recorded on the second and third readings and on different days; but this was not done in the house, and of course, this being so, if it is so, and it appears to us that the yeas and nays were not recorded in the house on either the second or third reading, and, this appearing to us to be so, both acts are unconstitutional for the purposes for which they were intended, and a perpetual injunction should be issued. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Black v. Board*, 129 N. C. 121, 39 S. E. 818. There was error in refusing the injunction.

Error.

(130 N. C. 451)

JONES v. FRANKLIN COUNTY COM'RS.
(Supreme Court of North Carolina. June 19, 1902.)

COUNTIES—LIABILITY FOR TORT—EMINENT DOMAIN—COMPENSATION FOR PROPERTY TAKEN—REMEDIES OF OWNER—TIME.

1. A complaint against county commissioners, alleging that they negligently, wrongfully, and tortiously cut, blasted, and carried away a strip of land without condemnation proceedings, states a cause of action in tort, and a demurrer thereto was properly sustained; a county not being liable for damages in the absence of statutory provisions giving a right of action against it.

2. Where county commissioners took land for the use of the county, and removed a quantity of building granite, under Acts 1899, c. 581, without having a jury assess the value of the land taken, as therein required, nor pay for the granite taken, and no appeal as provided for was taken from the actions of the commissioners, an action against them for the value of the property would not lie; the statutory remedy superseding the common law.

3. A reasonable time within which to make application for compensation for the taking of property by eminent domain, after the property is taken, would be allowed where it would be impossible for the claimant to make the

application at a regular meeting of the county commissioners, within 30 days after the taking, as required by Acts 1899, c. 581.

Cook and Douglas, JJ., dissenting.

Appeal from superior court, Franklin county; Justice, Judge.

Action by J. F. Jones against the commissioners of Franklin county. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

F. S. Spruill, for appellant. W. H. Yarborough, Jr., for appellees.

MONTGOMERY, J. The plaintiff, for his first cause of action, complains that the defendants, the board of commissioners of Franklin county, through the superintendent of public roads of the county, under the provisions of chapter 581 of the Acts of 1899, against the protest of the plaintiff, and without condemnation proceedings, negligently, wrongfully, and tortiously cut and blasted away a strip of his land 12 or 15 feet in width, by which the plaintiff's pathway around the end of his house was destroyed, to his great injury, and his warehouse endangered, and also that the defendants, through their agent, carried away and removed large quantities of the stone and granite thus blasted, to his further injury. That cause of action is clearly laid in tort, and his honor properly sustained the defendants' demurrer thereto.

This court has repeatedly held that counties are instrumentalities of government, and are given corporate powers to execute their purposes, and are not liable for damages in the absence of statutory provisions giving a right of action against them. *White v. Commissioners*, 90 N. C. 439, 47 Am. Rep. 534; *Manuel v. Commissioners*, 98 N. C. 9, 3 S. E. 829; *Prichard v. Commissioners*, 126 N. C. 908, 36 S. E. 353, 78 Am. St. Rep. 672; *Moody v. State's Prison*, 128 N. C. 12, 38 S. E. 131. In the last-mentioned case it was further decided that, even if such authority was given, it could cover only actions ordinarily incidental to its operations, and would not extend to causes of action in tort. The same doctrine had been announced in *Prichard v. Commissioners*, supra, and in other cases also. In *Gibbons v. U. S.*, 75 U. S. 269, 19 L. Ed. 453, the court said: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers or agents." And in *Story*, Ag. § 319, it is said: "The government does not undertake to guaranty to any person the fidelity of any of its officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassment and difficulties and losses, which would be subversive of the public interests."

For his second cause of action, the plaintiff complains that the defendants, through the same agent, without the plaintiff's consent, and without condemnation proceedings,

¶ 1. See *Counties*, vol. 12, Cent. Dig. §§ 209, 210, 212.

took for the use of the county, and for the convenience of the traveling public, a strip of land 10 or 12 feet in width, off one end, of his land of great value, and, in addition, cut and blasted away and removed a large quantity of building granite off the property, of considerable value. The defendants demurred, also, to that cause of action; the first specification being that the court has no jurisdiction of the subject-matter of the action. As to that part of the plaintiff's demand for the value of the strip of land alleged to have been taken by the defendants for the public use, the defendants were compelled to order a jury to assess the value of the same, under section 12 of the act of 1899. Upon their declining to do this upon demand made upon them for that purpose an appeal lay to the superior court on the part of the plaintiff. In reference to the plaintiff's demand in his second cause of action for the value of the rock or granite blasted and carried away by the defendants, the defendants were not required to order a jury to assess the value. They could have made the assessment and allowance themselves. Upon their refusal to make any allowance for the value of the granite taken, an appeal lay from their ruling to the superior court; the appeal "to be governed by the law regulating appeals from the courts of justices of the peace." The county commissioners, by the act of 1899, were given original jurisdiction of the matter embraced in the plaintiff's complaint, and the superior court could exercise only appellate jurisdiction.

It has been often held by this court that in cases involving the right of eminent domain the common-law remedy is superseded by the statutory remedy, and that aggrieved parties must therefore seek redress under the statutory remedy. *McIntire v. Railroad Co.*, 67 N. C. 278; *Gilliam v. Canaday*, 33 N. C. 106; *Gillet v. Jones*, 18 N. C. 339; *Dargan v. Railroad Co.*, 41 S. E. 979. In *McIntyre v. Railroad Co.* the action was in trespass for the recovery of damages for an injury sustained by the building of defendant's railroad on plaintiff's land. The court affirmed the judgment below,—that the plaintiff could not bring the action as at common law, but should have proceeded under the provisions of the charter of the company, which contained a method and manner of the assessment of damages. The court said in part: "But the decisions [*Gillet v. Jones*, 18 N. C. 339; *Gilliam v. Canaday*, 33 N. C. 106] do not go so much on the words of the act as upon its evident policy. If the owner of land overflowed by a milldam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action for trespass every day, no railroad could be built. In such case the law considers the

property, though taken for an individual or for a private corporation, for the public use. *Railroad Co. v. Davis*, 19 N. C. 451. It is not forbidden by the constitution if compensation be made, and compensation is provided for. The mode of obtaining it may not be so easy or satisfactory to the owner, but it is not illusory. A substantial and just compensation may be obtained. There can be no doubt but that the legislature had the right to take away the common-law remedy. The only question possible is as to their intention." We can see no difference between the points discussed and involved in those cases and the point involved in the present case, in so far as the remedy of the plaintiff is concerned. The county of Franklin appropriated for the public use the property of the plaintiff, under chapter 581 of the Acts of 1899, and the manner of compensation was fixed in precise terms by the act. The common-law remedy was superseded by that of the statute.

It appears in this case that the plaintiff made his demand for compensation before the proper tribunal, and, upon his application having been refused, he should have appealed under the provisions of the act. If it had been that the plaintiff had not, at the time prescribed in the act, presented his claim, because of the impossibility of his having received notice of the taking of the property before the time when demand had to be made under the statute, we would have no hesitancy, while upholding the main features of the statute, in deciding that a reasonable time within which to make the application for compensation, after the property was taken, should have been allowed, because, under the terms of the act, it is apparent that there might be a taking of property by the county authorities for public purposes under the act at a time which would not admit of an interval of 30 days intervening between the taking and the next regular meeting of the board. *Darby v. City of Wilmington*, 76 N. C. 133; *Broadfoot v. City of Fayetteville*, 128 N. C. 529, 39 S. E. 20. The language of the statute (section 11) is as follows: "If the owner of any land, or the agent or the agents of such owner having in charge land from which timber, stone, gravel, sand or clay was taken as aforesaid, shall present an account of the same, through the county road superintendent, at any regular meeting of the county commissioners, within thirty days after the taking and carrying away of such timber, stone," etc., "it shall be the duty of the said commissioners to pay for the same a fair price."

No error.

OOOK, J. (dissenting). I think there was error in sustaining the demurrer as to the second cause of action. The sacred regard which the law has for the rights of private

property is such that it will not permit it to be taken for public use without just compensation, and an adequate remedy for that purpose must be provided. The remedy provided in this act (chapter 581, Laws 1899) is to be found in sections 11 and 13: "If the owner of any land * * * from which timber, stone, gravel, sand or clay were taken * * * shall present an account of the same through the county road superintendent at any regular meeting of the county commissioners within thirty days after the taking and carrying away of such * * * it shall be the duty of said commissioners to pay for the same a fair price; and before deciding upon this, they may cause to be appointed an impartial jury * * * which jury shall report in writing to the board of commissioners their decision for revision or confirmation: provided said land owner * * * shall have the right of appeal * * * [section 13] to the superior court if the land owner shall be dissatisfied with the finding of the jury and decision of the county commissioners, which shall be governed by the law regulating appeals from the courts of justices of the peace, and the same shall be heard *de novo*." The landowner is not only entitled to just compensation for the property taken from him, but he is also entitled to an adequate remedy by which he can establish and recover the value of his property. By this act he is only allowed 30 days after the "taking and carrying away" to present his account, which must be done "at a regular meeting of the county commissioners," and "through the county road superintendent." So his opportunities for asserting his rights may be dependent upon the caprice or favoritism of the superintendent to perform the act within the time limited, or his good fortune to learn of the completion of the taking and carrying away in time to make and present his account, or upon both. Should he be so situated that he could not find the superintendent, or should the superintendent refuse to present the account, or should the time be so short that he could not prepare and present it, or should he be prevented from doing so by sickness or other unavoidable cause, then his property would become confiscated, if this be the only remedy. The "taking" by the superintendent raises an adverse relationship between the landowner and the superintendent, and the landowner might object to acting through an agent not appointed or selected by him, and whose interest in the subject-matter might be hostile. I think the remedy is inadequate for general practice, and that the superior court had jurisdiction to administer the rights of the parties, and that the demurrer should have been overruled. I do not think that this act was intended, expressly or by necessary implication, to repeal the common-law remedy. And while it does not require this remedy to be pursued, yet, should the convenience of

the claimant justify him in resorting to it, he is at liberty to do so. Its machinery is ample, and a determination can be speedily obtained. The act gives the landowner the right to have his claim adjusted under its remedy, if he should desire to select that method. I cannot believe that the legislature intended by this act to repeal the remedy already in force, and subject a private right to the hazard of uncontrollable circumstances. Compensation is not required to be paid in advance, nor is there any great haste required in making the appropriation by the county officer. Then why should the unoffending, lawabiding citizen be required to "run the chances" of getting his own, when no harm could happen to either party by resorting to the usual remedy? I therefore think that the remedy provided in the act is only additional, and not the sole one intended by the legislature.

DOUGLAS, J. I cannot concur in the opinion of the court, either in its theory or its result, because it seems to me that a substantial injury is being done to the plaintiff by a construction of a statute purely technical in its nature, and justified neither by public policy nor common right. I agree with the opinion in so far as it holds that a county is not responsible for a pure tort committed by one of its officers or employees, but we must remember that a tort can never confer a right upon the wrongdoer. If the county ratifies the act, and keeps the property thus wrongfully taken, it becomes responsible to the owner for its value. If it repudiates the act, it must relinquish the property, of which the owner may at once take possession without let or hindrance. When, therefore, the board of commissioners took wrongful possession of the plaintiff's land, they became personally responsible to him for the injury, without acquiring any right thereto either for themselves, the county, or the public. This latter proposition, I understand, is not disputed by the court. While it does not say so in so many words, I presume that the court intended to hold that the board of county commissioners has exclusive original jurisdiction of all claims arising from the taking of private property for the use of the county. Where is such exclusive jurisdiction conferred upon the board? Not by the act of 1899, as stated by the court, which nowhere says so. If the act does not say so, why should we say so, especially when the only result of such interpolation is to deprive the plaintiff of his lawful remedy for an admitted wrong? The act does not profess to make the remedy exclusive, and in fact provides that it shall apply only when the plaintiff sees fit to resort to such a tribunal. In the case at bar the plaintiff did present to the county commissioners his claim for damages within 30 days, as provided by the act, but the board refused to entertain the claim

because it was not presented through the superintendent of roads. This would seem to me to be purely directory, and could not affect the merits of the claim. But perhaps I am mistaken. Perhaps the road superintendent is a court having exclusive original jurisdiction of all such claims, no matter how great they may be in amount. If so, and he should refuse to act, I presume the injured party would be compelled to bring an action for a mandamus, which would probably come to this court on appeal. Suppose the board of commissioners should then refuse to entertain the claim; another action for another mandamus would be necessary, and another long and expensive litigation through all the courts. Perhaps then the board might pass upon his claim, and allow nominal damages, which would force him to appeal. Thus, after perhaps four or five years of litigation, and necessary expenses greater than the value of his claim, the plaintiff would succeed in getting into the superior court, where his claim could be tried upon its merits. He is there now. Why put him out, and make him take this long and roundabout journey, with the simple result of getting back to where he started? It will be said that this is an extreme case; but it would be entirely possible under the opinion of the court, which puts it in the power of the county authorities to wear out any unwelcome claimant, even if they did not succeed in putting him out on some technicality during the progress of the trial. In the present case, when the plaintiff goes back to the county commissioners or the road superintendent—whichever has exclusive original jurisdiction—he will be met with the objection that more than 30 days has elapsed since the injury. Can we suppose that the legislature intended any such hardship and injustice? Then why not give the act the reasonable construction of saying that the remedy therein provided is simply cumulative? We so hold in criminal actions. Why not in civil actions? We are constantly told that, while a man may not be guilty under the statute, he is guilty at common law. Why should we not also say that, while an injured party has not an adequate remedy under the statute, he retains his right to appeal to the courts of general jurisdiction to redress his wrong? In the further discussion of this case, I shall cite but few authorities, as my time is short; but I shall revert to this subject, and incidentally to this opinion, when the principle comes again before us.

My objection to this decision is that its ultimate tendency is to undermine the foundations of private right. It is well settled that private property cannot be taken, even for a public purpose, without compensation. The act under consideration provides that, when an account is presented for material taken, "it shall be the duty of said com-

missioners to pay for the same a fair price." Laws 1890, c. 581, § 11. This the defendants have refused to do. Even if the statutory remedy were intended to be exclusive, it would be totally inadequate, and therefore unconstitutional and void. The only provision for compensation is when the owner of any material so taken, or his agent, "shall present an account of the same through the county road superintendent at any regular meeting of the county commissioners within thirty days after the taking and carrying away of such timber," etc. Id. There is no provision for notifying the owner of the taking of such material. It may be taken during his absence, or from the back part of his plantation, and he may not know it until the 30 days have elapsed. Moreover, he is required to present his claim at a regular meeting of the commissioners. Suppose that only one regular meeting is held during the 30 days, as is usually the case, and the material is taken the day before such meeting; under the statute the owner would have less than 24 hours in which to find out that his property had been taken, to find the superintendent, to get his claim into shape, and to present it to the commissioners. If he failed to do this within the time limited, he would lose all remedy. Again, suppose the commissioners should fail to hold a regular meeting within the 30 days; the owner would have no opportunity whatever of presenting his claim under the statute. Surely this cannot be the law; and yet it will become the law if the statutory remedy is held to be exclusive.

Let us briefly examine the constitution of this state, and see what are some of the rights of the individual. The declaration of rights declares:

"Section 1. That we hold it to be self evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness."

"Sec. 17. No person ought to be * * * in any manner deprived of his life, liberty or property, but by the law of the land."

"Sec. 35. All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

In the case before us, the plaintiff has admittedly suffered an injury to his land, and the superior courts are open, and have general jurisdiction of all such subjects. If we take away such jurisdiction without leaving the plaintiff an adequate remedy, justice is denied to him, and he is deprived of his property contrary to the law of the land. This court has said in *Dargan v. Railroad Co.*, 118 N. C. 596, 598, 18 S. E. 653: "The

right of the state to take private property rests upon the ground that there is public necessity for such appropriation, and can be exercised only where the law provides the means of giving adequate compensation to the owner." In *Connecticut River R. Co. v. Franklin Co. Com'rs*, 127 Mass. 50, 34 Am. Rep. 338, the court says: "It has long been settled by the decisions of this court that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent." In *Brickett v. Aqueduct Co.*, 142 Mass. 394, 396, 8 N. E. 119, the language of the court was that "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision or compensation, is unconstitutional and void." Both these cases are cited with approval by the supreme court of the United States in *Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188, where the court says on page 390, 159 U. S., page 48, 16 Sup. Ct., 40 L. Ed. 188: "When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain,—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute makes provision for reasonable compensation to the owner." In *Gamble v. McCrady*, 75 N. C. 509, it was held (quoting the syllabus) that: "Every one is entitled to notice in any judicial or quasi judicial proceeding, by which his interest may be affected; hence an order by county commissioners appointing appraisers to assess the value of the benefits and damages which would accrue to the owners of land on account of a certain canal sought to be cut through his land, upon the petition of other parties, filed under the provisions of chapter 39 of Battle's Revisal is void, unless said landowner be made a party to the petition. Sections 9, 12, c. 39, Battle's Revisal, are unconstitutional." In *Sawyer v. Hamilton*, 5 N. C. 253, concerning the laying out of a turnpike, the full opinion of this court is as follows: "Let the report of the commissioners be set aside, on the ground that Enoch Sawyer, through whose lands the road is laid off, had not notice." In *Union Pac. Ry. Co. v. Leavenworth, N. & S. Ry. Co.* (O. C.) 29 Fed. 728, 731, Justice Brewer, then a circuit judge, referring to condemnation of a right of way, says: "Though a special, it is a judicial, proceeding; and a vital element of judicial proceedings is notice to a party against whom a right is asserted, before a final determination of that right." In *Re Neeld's Road*, 1 Pa. 353, the court says: "The law abhors all *ex parte*

proceedings without notice. Notice in this case to the owners of property was absolutely necessary. To take a man's property and assess his damages without notice of it is repugnant to every principle of justice, and such a proceeding is utterly void." Mills, Em. Dom. § 88, says: "Where the statutory remedy is not complete, the common-law remedy remains. For an entry on land or the taking or destruction of property of another, the common law gave the injured party the remedies of trespass, trespass on the case, or ejectment. These remedies gave the owner complete compensation for the invasion of his rights of property. The statutory remedy which is provided must be complete in ascertaining the damages and securing their payment, or the common-law remedy may be pursued. The provision of a specific mode of ascertaining damages confers no right which did not exist before. The omission of a specific mode leaves the party his common-law right. If the statute only provides a partial remedy, there is a remedy for the remainder at common law. The payment of damages must be secured, and if, after condemnation, there is a refusal to pay, trespass or ejectment, with mesne profits, may be maintained." For each of these propositions the learned author cites authorities of the highest respectability. See, also, *Rand. Em. Dom. §§ 227-231*; *Lewis, Em. Dom. §§ 364-366, 456*; *7 Enc. Pl. & Prac. 481, 486, 528, 544, 545, 623*, and especially pages 691, 694, 715, 716; *Black, Const. Law, § 130*; *Cooley, Const. Lim. 449, 664, 665, 692*; *Thomp. Corp. §§ 5590, 5621*.

Among all the cases that I have examined, the one that perhaps more clearly represents my views is *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, where it is held (quoting the headnotes) that: "A law imposing an assessment for a local improvement without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law, and is unconstitutional. The legislature may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice. It is not enough that the owner may, by chance, have notice, or that he may, as a matter of favor, have a hearing. The law must require notice, and give a right to a hearing. So, also, it is immaterial that the assessment has been in fact fairly apportioned. The constitutional validity of the act is to be tested, not by what has been, but by what may be done under it." The ability and the learning in this celebrated case prompt me to make a long quotation, which may well take the place of anything I am capable of saying. The court says, beginning on page 189, 74 N. Y., 30 Am. Rep. 289: "What one pays for taxes and assessments is taken for

the public good, and can be justified upon no other theory. Private property cannot be taken for private purposes, even under the legislative power of taxation. Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation. Property may also be taken by the right of eminent domain where the public good requires. In such case what one parts with is just so much more than his share of contribution to the public good, and hence for such property he must receive compensation in money or its equivalent. It must be conceded that property cannot be taken by the right of eminent domain without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard as to the compensation to be awarded him. An act of the legislature arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guaranty to every citizen. Can it be that, when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation, to their entire value, without any opportunity on the part of the owners to be heard? The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render judgment against the person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, and property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these without due process of law has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights. It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to

which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States supreme court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. In his argument in the Dartmouth College Case, 4 Wheat. 519, 4 L. Ed. 629, Webster defined 'due process of law,' as a proceeding 'which proceeds upon inquiry, and renders judgment only after trial.' Mr. Justice Edwards, in *Westervelt v. Gregg*, 12 N. Y. 209, 62 Am. Dec. 160, defines it as follows: "'Due process of law" undoubtedly means in due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.' Judge Cooley, in his work on Constitutional Limitations, at page 355, after saying that due process of law is not confined to ordinary judicial proceedings, but extends to all cases where property is sought to be taken or interfered with, says that 'due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.'" In this long extract I have omitted, for the sake of time and space, the cases which were merely cited and not quoted. As therein shown, it makes no difference whether a man's land is taken under the form of condemnation or assessment, or, as in the case at bar, without the pretense of either. In any event it can be taken only by due process of law, giving to the owner just compensation, with an adequate remedy for obtaining it.

An examination of this act (Laws 1899, c. 581) discloses some singular features. It is by its terms operative in only seven counties, and parts of three other counties. It further provides that it shall not apply to 50 counties therein named, but may be adopted by 39 other counties also named. It also contains the following most remarkable proviso (section 27): "Provided, that in any county or township not coming under the provisions of this act, but otherwise providing funds for road improvement, the commissioners of such county may at any regular meeting at their discretion adopt any of the sections (except section 1 levying a tax) of this act that in their judgment may be specifically adapted to the needs of their county and incorporate

the same in the road law of the said county." I cannot remember ever having come across any such provision in any statute. I do not question the power of the legislature to pass an act which may be ratified or rejected in its entirety by a vote of the people, and perhaps of the county commissioners; but I am not aware of any principle or precedent authorizing the legislature to delegate its law-making power to a board of commissioners, by empowering them to amend an existing statute by "incorporating" therein, at their pleasure, any one or more of 27 different sections of a distinct act, which by its very terms does not apply to their county. I am glad this question has not been directly raised.

Some changes in the opinion of the court made since the above was written may make certain parts of this opinion seem inapplicable, but I have no time to change them, and can add but little to what I have already said. The opinion of the court seems to be based principally upon the case of *McIntyre v. Railroad Co.*, 67 N. C. 278, and quotes therefrom as follows: "But the decisions do not go so much on the words of the act, as upon its evident policy. If the owner of land overflowed by a milldam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action for trespass every day, no railroad could be built." This quotation seems singularly inappropriate to the conclusion of the court. In the case at bar there is no ground whatsoever for supposing that actions will be brought every day, when, from its very nature, this action would end the controversy. Therefore the "evident policy" referred to in *McIntyre's Case* has no application whatever to the one before us. If this case comes neither within the words of the act, nor the policy of our decisions, why should this court write into the statute provisions which are not there? The only effect of such interpolation, required neither by the spirit of the act nor the policy of the law, is to deprive the citizen of his property without compensation. If the laws are ever stretched, it should be for the fuller protection of personal liberty and private property. In the case at bar the plaintiff is not seeking to recover anything the county has taken, but simply to get compensation one time, and in one final action. The question is not whether the county shall have what it needs, but whether it shall pay for what it takes. Hence the dangers of interminable litigation, so strenuously relied upon by the court, have no visible relevancy to the case at bar. In *Johnston v. Rankin*, 70 N. C. 550, 556, in an opinion written by the same learned justice who wrote *McIntyre's Case*, the court says: "The proceedings were irregular and void, because the sheriff did not proceed with the jury to view the lands and assess the damages on the day named in the

notice to plaintiff, but on a subsequent day, of which the plaintiff had no notice. If this objection had not been waived by the plaintiff's appeal from the assessment of damages, it would have been good. The sheriff had no jurisdiction to enter on the lands until the plaintiff was made a party to the proceedings by service of notice. The neglect to proceed on the day named, without notice of the postponement to the plaintiff, operated as a discontinuance as to him, and put him out of court. He might, perhaps, have regarded all after proceedings as trespasses, being under a warrant which was void, as to him, for want of notice, or he might have brought up the proceedings to the superior court by recordari, and had them quashed, and then, at least, have brought his action for the trespass." This case shows that there are some cases, at least, in which an action for the trespass may be brought even when the statute provides a special and summary proceeding. The same is held in the well-considered case of *White v. Railroad Co.*, 113 N. C. 610, 621, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639. Another objection to such a construction of the statute is that it would be in violation of the fourteenth amendment to the constitution of the United States, inasmuch as it does not provide for any notice to the plaintiff, nor any adequate remedy for his compensation. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 879. In *Simon v. Craft*, 182 U. S. 427, 436, 21 Sup. Ct. 836, 839, 45 L. Ed. 1166, the court says: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed by the substance of things, and not by mere form." The last proposition of the opinion is startling to me. It is, in substance, that if it were impossible, under the circumstances of a particular case, for the landowner to receive notice of the appropriation of his property in time to present his demand, this court would extend the time. It cites *Darby v. City of Wilmington*, 76 N. C. 133, and *Broadfoot v. City of Fayetteville*, 128 N. C. 529, 39 S. E. 20; but neither of these cases is any authority for the position. I am well aware of the principle that part of an act may be constitutional, and a part unconstitutional, if they are capable of separation, but in this case no such principle arises. The opinion of the court does not declare any part of the act unconstitutional. This it clearly has the power to do, but to declare an act constitutional, and then to claim the right to suspend its operation, if, in the judgment of the court it should at any time work a hardship, is entirely a different matter. Article 1, § 9, of the constitution, says: "All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." I am also aware of the line of decisions rep-

resented by *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294, 61 Am. St. Rep. 681, to the effect that statutes of limitation cannot be shortened so as to bar existing rights of action without allowing reasonable time thereafter for the bringing of the action. The statute under consideration has no retroactive operation whatever, but operates only in futuro, and solely upon rights of action which it itself creates. A reasonable interpretation of the act, to the effect that the imperfect remedy therein provided is merely cumulative, would avoid all these difficulties, and meet the ends of justice, without violating any established rule of construction.

I deeply regret feeling compelled so often to dissent from the opinion of the court, but I must follow my convictions. We are not merely deciding isolated cases, but are establishing general principles, more far-reaching, perhaps, than we can foresee. I cannot entirely ignore the dangers that are ahead of us, and which, in my opinion, can be met only by the equal enforcement of the law in its letter and spirit, and especially in the fullest protection of individual right. Corporate monopoly and socialism are twin children of despotism. Hating each other, they are of common parentage, and equally demand the sacrifice of private right, on the one hand, on the claim of public convenience, and on the other on the plea of public service. So far as private property may be actually necessary for public use, it may be taken; but no ground of public policy or of natural right will justify or excuse the refusal of just compensation, or, what is equivalent thereto, the refusal of an adequate remedy for obtaining such compensation. One of England's greatest statesmen has said: "The poorest man may, in his cottage, give defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the king of England may not enter. All his forces dare not cross the threshold of the ruined tenement." Of course, he meant that the king could not enter except by the law of the land. Why should our ancestors have abolished the kingly office, if more than kingly powers remain vested in a county road superintendent?

(115 Ga. 714)

LOVELADY v. FRANKLIN-DAVIS NURSERY CO.

(Supreme Court of Georgia. June 10, 1902.)
APPEAL—OVERRULING CERTIORARI—REVERSAL—PROCEEDINGS BELOW.

1. The judgment of a judge of the superior court overruling a certiorari was reversed by the supreme court on the ground that no authority was shown for entering an appeal in the magistrate's court. When the remittitur was filed in the office of the clerk of the superior court the judge passed an order making the judgment of the supreme court the judgment of the superior court, directing the justice of the peace before whom the case was tried to dismiss the case, and providing that

"this order does not deprive the court of its authority in the matter as set out in section 4457 of the Code." *Held*, that such order, properly construed, did not confer upon the appellant any rights, but simply preserved whatever rights the appellant might yet have under the provisions of the section in question. If any rights still existed under the section, they were preserved by the order. If none existed, the qualification of the judgment directing a dismissal of the case was harmless. So construed, no reason appears for reversing the judgment. If, when the case is remanded to the justice's court, the justice accords to the appellant or its agent any rights under such section, it will then be time to bring in question the propriety or correctness of his decision.

(Syllabus by the Court.)

Error from superior court, Cherokee county; Geo. F. Gober, Judge.

Action between A. J. Lovelady and the Franklin-Davis Nursery Company. From a judgment after reversal by the supreme court, Lovelady brings error. Affirmed.

Geo. I. Teasley, for plaintiff in error. Lee Mullins, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 667)

SIVELL v. HOGAN.

(Supreme Court of Georgia. June 7, 1902.)

DEPOSITION—LEADING INTERROGATORIES—BREACH OF CONTRACT—EVIDENCE—COMPETENCY OF WITNESS—DIRECTING VERDICT.

1. An interrogatory is not open to the objection that it is leading when it does not suggest the answer desired. An interrogatory which does suggest the answer desired is leading. The first interrogatory objected to in the present case was not leading, and the second one was.

2. There was no error in admitting the testimony referred to in the third ground of the amended motion for a new trial, the same being pertinent and relevant to the case.

3. The original plaintiff by whom the alleged contract with the defendant was made being dead, the latter was not a competent witness to testify in his own favor as to any contract or conversation between him and the deceased. This ruling applies to the fourth and sixth grounds of the motion for a new trial.

4. Whether or not the document referred to in the fifth ground of the motion for a new trial was for any reason inadmissible in evidence, it was certainly not open to the objection that it was irrelevant.

5. The plaintiff having failed to prove the allegation that the price of the cotton to which the contract with the defendant related was actually tendered, and this allegation being essential, the court erred in directing a verdict in her favor.

6. This case involves no new or important legal question, and does not require further elaboration.

(Syllabus by the Court.)

Error from city court of La Grange; F. M. Longley, Judge.

Action by N. L. Hogan, administratrix, against E. M. Sivell. Judgment for plaintiff. Defendant brings error. Reversed.

¶ 1. See Depositions, vol. 16, Cent. Dig. § 66.

After the plaintiff had introduced his evidence, the defendant made a motion to nonsuit the case, which motion was overruled, and the defendant excepted *pendente lite*. After the defendant had introduced his evidence, the court directed a verdict for the plaintiff for \$100 principal, \$5.50 interest, and cost of suit; to which ruling and direction the defendant excepted, and afterwards filed a motion for a new trial on the following grounds: (1) Because the court overruled the objection of the defendant to the following question of J. F. Cleaveland: "Did you or not ever hear any conversation between T. M. Hogan in his lifetime with the defendant E. M. Sivell with reference to ten bales of cotton Sivell had contracted to deliver to Hogan on November 1, 1900? and, if so, state what the conversation was." This was objected to in writing on the interrogatories when crossed by defendant, and again at time of introduction of this evidence,—that is, the answer thereto,—on the ground that the question was leading and presumed the facts stated in the question to be true without proof. (2) Because the court overruled the objection of defendant to the following question: "Did or not Hogan ask Sivell, in your presence, to deliver said cotton, or why he had not delivered it, and that he was ready to pay for same, and did or not Sivell refuse to deliver it?" Defendant objected in writing at time of crossing interrogatories, and also at time of offering of this question and answer thereto in evidence, that it was leading, which objection the court overruled. (3) Because the defendant objected to the reading of the following answer of said Cleaveland given in answer to the question set out in the first two grounds of this motion: "I was passing T. M. Hogan's store, going to telephone, and saw Hogan and E. M. Sivell in the store, and heard them talking about cotton, and, as N. L. Hogan and others had told me and talked to me in regard to the contract with Mr. Sivell, I stopped in front of the store to hear the conversation. I heard Mr. Hogan tell Mr. Sivell that he had the money to pay him for the cotton, and that he wanted the cotton; that the contract was past due, and that he wanted the cotton; and Sivell told Mr. Hogan that he did not know about that; that the contract was not right." This was objected to then and there on the ground that it was indefinite; did not state what cotton or contract was subject of conversation; that it showed that it took place after the contract was past due; that a demand or tender at that time was irrelevant, because the contract was past due; that it did not show a tender, a demand, or a refusal, and was therefore irrelevant. The court overruled each of these objections, and allowed the answer to be read and admitted in evidence. (4) Because the following material evidence offered by the defendant was illegally withheld from

the jury against his demand: Applicant offered to testify that instrument of writing following, signed by T. M. Hogan, was made and executed by Hogan contemporaneously with the instrument sued on; the writing being as follows: "Know all men by these presents that I have this day purchased of E. M. Sivell — bales cotton, averaging five hundred (500) pounds each, at seven (7) cents per pound, basis middling threes (Inman's classification), said cotton to be delivered in Chipley, Ga., by Nov. 1st, 1900. Witness my hand and seal this —, 1900. [Signed] T. M. Hogan." This was objected to by plaintiff on ground that Hogan was dead and that defendant was an incompetent witness. (5) Because the following material evidence offered by applicant was withheld illegally from the jury, over his demand: Defendant having proved the signature of the instrument set out in the foregoing ground No. 4 to be that of T. M. Hogan, by Sivell, and defendant having testified that both this and the one sued on were written by Mr. Key at the same time, this instrument, copy of which is set out in preceding ground No. 4, was offered in evidence. This was objected to on the ground that it was irrelevant, which was sustained, and the evidence excluded. (6) Because the following material evidence offered by applicant was withheld illegally from jury against his demand: Applicant offered to testify that the instrument referred to in ground 4 was part of contract entered into by Sivell and Hogan, and delivered to Sivell by Hogan at the time the instrument sued on was given Hogan by Sivell. This was objected to on same ground as in ground 4. Defendant offered to give this evidence. (6½) Because the court refused to allow defendant to testify to the conversation which took place between T. M. Hogan and defendant as was testified by J. F. Cleaveland. This was objected to on the ground that Hogan was dead and defendant was an incompetent witness. Court sustained the objection and excluded the evidence. (7) Because the court, after both sides had closed, directed the jury to bring in verdict for the plaintiff for \$100 principal, \$5.50 interest, and costs of suit. This was done over objection of defendant, both as to the direction and as to including the interest in the verdict for damages. (8) Because said verdict is contrary to evidence and the principles of justice and equity. Said motion for new trial was overruled, and the defendant excepted on the several grounds stated in said motion.

Harwell & Lovejoy, for plaintiff in error.
Terrell & Terrell and Henry Reeves, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(64 S. C. 335)

DUNTON v. HARPER et al.

(Supreme Court of South Carolina. June 28, 1902.)

ORDER FOR SECURITY FOR COSTS—VACATING APPEAL—FILING ORDER.

1. Where a judge, under Code, § 195, authorizing the relief of a party from an order taken against him through mistake, surprise, or excusable neglect, vacates an order of another circuit judge, he does not review the vacated order on the merits.

2. Application for relief from orders and judgments taken by surprise or excusable neglect, under Code, § 195, is addressed to the discretion of the circuit judge, and his action is not appealable unless he violates the law.

3. Security for costs whereby the parties acknowledge themselves liable for the costs of the case, and consent that, if plaintiffs fail to recover, defendant may have execution for his costs against them, is sufficient.

4. Where an order is marked "Filed," and entered and recorded on the journal the day when made, but is immediately taken out of the clerk's possession by an attorney, and kept by him in his office, it is not on file while so kept.

Appeal from common pleas circuit court of Barnwell county; Benet, Judge.

Action by F. W. Dunton against Emma H. Harper and others. From order permitting plaintiff to file security for costs after expiration of time fixed in order providing same, defendants appeal. Affirmed. The following is the security permitted filed: "We acknowledge ourselves liable for the costs of this case, and consent that, if the plaintiff fail to recover, the defendant may have execution for his costs against us. Given under our hands this 8d day of October, A. D. 1901. J. Allen Patterson. H. A. Patterson. Witness: W. Gilmore Simms, C. O. P. and G. S."

Robert Aldrich and R. A. Ellis, for appellants. Sloan & Green and J. O. Patterson, for appellee.

POPE, J. Upon notice, and after argument on both sides, Judge James Aldrich, on the 16th day of July, 1901, ordered the plaintiff, who was a nonresident of this state, to file security for costs, under the requirements of rule 10 of circuit court (40 S. E. v), within 60 days from the rising of the court, and that he be nonsuited on failure so to do. The circuit court for Barnwell county arose and adjourned sine die on July 17, 1901. No compliance with rule 10 of the circuit court was made by plaintiff within the 60 days after adjournment of court. A judgment by nonsuit was duly entered by defendants. The attorneys for plaintiff gave notice that on the 6th day of November, 1901, at 12 o'clock, or as soon thereafter as counsel could be heard, plaintiff would, upon all of the pleadings and proceedings in the above-entitled cause and affidavit thereto attached, move before his honor, Judge W. C. Benet, at Barnwell court house, S. C., for an order vacating and setting aside the order of Judge James Aldrich, dated the 16th day of July, 1901, requiring the plain-

tiff to file security for costs within 60 days from the rising of the court, and to vacate and set aside any judgment entered upon said order, upon the grounds of the mistake, inadvertence, surprise, and excusable neglect on the part of plaintiff; and will move the court to extend the time for plaintiff to file security for costs, and to allow the security for costs filed herein, after the time stated in Judge Aldrich's order had expired, to stand as and for a full compliance with said order requiring security for costs; and for such other and further relief as plaintiff may be entitled to, or that the court may think just and proper. The affidavits tended to show that Mr. J. O. Patterson, as plaintiff's attorney, did attend the hearing of the motion before Judge Aldrich for the order requiring plaintiff to enter security for costs, and while not resisting said motion except as to the limitation of 60 days after adjournment of the July, 1901, term of court, he left the court room before the circuit judge announced his ruling, only going into one of the jury rooms for consultation of a case next in order for trial; that said attorney never saw the order until the 27th September, 1901; that said order was not filed by the clerk of court, although the same was duly recorded, on the day it was made, on the court journal, by the said clerk; that said order was never lodged or retained in the office of the clerk of court until judgment was entered on nonsuit. Motion came on to be heard by his honor, Judge Benet, and after full argument he signed the following order: "This motion came on to be heard before me upon notice. The plaintiff asks to be relieved of the order granted by Judge James Aldrich, on the 16th day of July, A. D. 1901, requiring the plaintiff to file security for costs within 60 days from the rising of the court then being held at Barnwell, S. C., and to vacate and set aside any judgment entered upon said order, upon the grounds of the mistake, inadvertence, surprise, and excusable neglect on the part of the plaintiff's attorneys. It appears that the order of Judge James Aldrich, bearing date the 16th day of July, A. D. 1901, was recorded by the clerk of the court, in the journal of the court proceedings, immediately after the order was signed, and after it was so recorded it was turned over to R. A. Ellis, Esq., defendants' attorney, and that said order was never properly filed in the clerk's office until the 24th day of September, 1901, after the time fixed by said order for filing security for costs had expired. It further appears from the affidavit of J. O. Patterson, Esq., and I so hold, that the failure of the plaintiff's attorney to comply with the order of Judge Aldrich, requiring the security for costs in the case to be filed within 60 days after the rising of the court, was by reason of the plaintiff's attorney's mistake, inadvertence, surprise, and excusable neglect, and with no intention to disregard the terms of said order. In addition to this, however, the

¶ 2. See Costs, vol. 12, Cent. Dig. § 484.

order from which relief is asked was withdrawn from the records of the court by the defendants' attorney on the day it was signed, and was never returned to such record until after the time designated in said order for the filing of the security for costs. Now, while the public records of the court are notice to the world, this order, having been withdrawn from the records, could not operate as such notice. It is therefore ordered that the order of Judge James Aldrich, bearing date the 16th day of July, A. D. 1901, and any order of nonsuit thereupon, be vacated and set aside, and that the security for costs heretofore filed by the plaintiff's attorneys in this cause, on the 3d day of October, 1901, stand as and for the security for costs on the part of the plaintiff in this cause. Let all the papers and affidavits submitted by both sides at the hearing of this motion be filed with the order."

From this order the defendants appealed upon the following grounds: "(1) The presiding judge erred in vacating and setting aside the order of Judge James Aldrich, in above-stated case, dated 16th July, 1901, and ordering that the security for costs dated 3d October, 1901, and filed by plaintiff on 4th October, 1901, should stand as and for security of costs, but should have refused plaintiff's motion to set aside and vacate Judge James Aldrich's said order, on the ground that one circuit judge has no jurisdiction to vacate and set aside the order of another circuit judge. (2) The presiding judge erred in holding that the case at bar was one of the cases provided for in section 195 of the Code of Civil Procedure, where a party is relieviable from an order taken against him through his mistake, inadvertence, surprise, or excusable neglect, but should have refused the motion to be so relieved, and should have held that the said relief was applicable only to parties who, through mistake, inadvertence, or excusable neglect, had lost the opportunity to be so heard at the trial or on the hearing of the motion for the order. (3) The presiding judge erred in holding that said order of Judge James Aldrich had ever been properly filed until 24th September, 1901, although recorded by the clerk of the court of common pleas journal on the 16th day of July, 1901, because one of the attorneys of defendants had borrowed said order temporarily from the files after it was recorded; whereas he should have held that, even although said order had never been filed nor recorded, yet it was obligatory and binding on the plaintiff, if the plaintiff was present at the hearing through his attorney, and participated in the argument thereon; and much more so in this case, where the order was not only made after both parties had been heard, but was filed with the clerk for record in open court, and was duly recorded and indexed in the journal of the court of common pleas. (4) The presiding judge erred in holding that the security for costs filed by plaintiff on the

3d day of October, 1901, should stand as valid security for the costs of this case, but should have held that said security, dated on the 3d day of October, 1901 (which is evidently the security intended by this honor), and filed on 4th of October, 1901, was not a valid and proper security for costs, in this: that it does not conform to the form of security prescribed by rule 10 of the circuit court in regard to security for costs, and because it was not given and filed in time."

We will now pass upon these exceptions in their order:

First. When a different circuit judge than that one who passed an order from which relief is sought under section 195 of our Civil Code of Procedure comes to hear such motion, he is not called upon to review on its merits the order referred to. Therefore, accurately speaking, it is not a different circuit judge than that one who made an order undertaking to vacate and set aside an order made by another circuit judge. The theory of the law is, if the order is vacated for any of the grounds set out in section 195, that, if such grounds had been presented to the circuit judge at the time he passed the order, he would have refused to do so. But, apart from all this, the legislature has under its power, under our constitution, vested circuit judges, by section 195 of the Code of Civil Procedure, with power, at any time within one year, "to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." This power may be exercised as to any "judgments, order or other proceeding." It very wisely may be exercised by any judge. This exception is overruled.

Second. This court has repeatedly held that applications under this section (195) of the Code are addressed to the sound discretion of the circuit judge before whom, after notice, the motion is made. See cases: Covington v. Covington, 47 S. C. 263, 25 S. E. 193; Michalson v. Roundtree, 51 S. C. 405, 29 S. E. 66; McDaniel v. Addison, 53 S. C. 222, 31 S. E. 226; Ex parte Carolina Nat. Bank, 56 S. C. 12, 33 S. E. 781; Washington v. Hesse, 56 S. C. 28, 33 S. E. 787. No appeal lies from his exercise of this discretion unless he violates the law. The form of security for costs seems to accord with that prescribed in rule 10. This exception is overruled.

Third. We think the circuit judge was right in holding that this order of Judge James Aldrich had never been filed in the office of the clerk of the court of Barnwell county until the 24th September, 1901, after the date to give security for costs had expired. Lawyers must be careful not to take orders from the clerk's office. We know Mr. Ellis made an honest mistake in doing so in this instance, yet he had no right under the law to do so. This exception is overruled.

Fourth. We have virtually passed upon this exception in our concluding sentences in considering defendants' second exception. It is therefore overruled.

It is the judgment of this court that the judgment of the circuit court be, and is hereby, affirmed.

(64 S. C. 226)

PEEPLES v. MIMS.

(Supreme Court of South Carolina. June 12, 1902.)

PLEADING—AMENDMENT AT SUBSEQUENT TERM.

A judge may vacate at a subsequent term an order requiring a party to amend his pleadings by adding a party defendant, under Code, § 194, authorizing the court before or after judgment, in furtherance of justice, to amend any pleading by adding thereto or striking out the name of a party.

Appeal from common pleas circuit court of Hampton county; Benet, Judge.

Action by W. M. Peeples against Cerdry Mims, and after his death continued by order against his heirs at law. From circuit order vacating order at previous term, requiring administrator of deceased mortgagor to be made party defendant, defendants appeal. Affirmed.

W. S. Tillinghast and Leroy F. Youmans, for appellant. El. F. Warren and A. M. Boozer, for appellee.

GARY, A. J. The question raised by this appeal is whether his honor the circuit judge had the power to set aside and vacate, in 1901, a previous order made by him in 1899, requiring the complaint to be amended by substituting the administrator of the mortgagor (who died during the pendency of the action) as a party defendant. At the time the order was made, in 1899, the personal representative of the deceased mortgagor was a necessary party to an action for foreclosure. *Simon v. Sabb*, 56 S. C. 38, 33 S. E. 799. The case just mentioned shows that the act therein discussed related merely to the remedy, and that it showed upon its face that it had reference to the foreclosure of mortgages executed prior, as well as those executed subsequent, to its passage. In 1900 (23 St. at Large, p. 349) the said act was amended by adding at the end of section 1 the following proviso: "Provided, however, that nothing herein contained shall render it necessary, nor shall it be necessary, to make the personal representative of a deceased mortgagor a party to any foreclosure proceeding; nor in any foreclosure proceeding (if the mortgagor be dead) shall it be necessary to first establish the debt by the judgment of some court of competent jurisdiction in order to obtain a decree of foreclosure and sale; nor shall it be necessary to make the mortgagor, who may have conveyed the mortgaged premises, a party to any action for foreclosure where no judgment for any deficiency is demanded:

provided, further, that no sale heretofore made under foreclosure proceedings to which the personal representatives of deceased mortgagors were not parties shall be invalid by reason of the absence of such personal representatives: provided, further, that nothing herein contained shall be construed to affect in any way the provisions of the act entitled 'An act to amend an act entitled an act to regulate the foreclosure of mortgages of real estate,' approved March 9th, A. D. 1896." Section 194 of the Code is as follows: "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding thereto or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim of defense, by conforming the pleading or proceeding to the facts proved." The practical effect of the order made in 1901 was to amend the pleadings by striking out the name of a party defendant. Under the foregoing section of the Code the court had the right to make such an order at any time. The order passed in 1899 did not prevent the court from exercising this right. In the case of *Pickett v. Casualty Co.*, 52 S. C. 584, 30 S. E. 614, the court says: "It seems that the appeal has been taken under a misapprehension of the force and effect of the order requiring the amendments. A party is compelled to amend his complaint so as to conform to an order requiring amendments to be made, but the materiality of the amendment is a question to be determined by the judge before whom the case is tried. An order requiring amendments expends its force when the issues in conformity to it are presented upon the trial of the case; and when thus presented the trial judge is as untrammelled in considering the materiality of any allegations of the complaint as if the allegations had been inserted in the first instance by the plaintiff's attorneys." This shows that, after an amendment has been incorporated in the complaint, the entire complaint is subject to the provisions of section 194 of the Code, and that the circuit judge had the right and properly granted the order appealed from.

It is the judgment of this court that the order of the circuit court be affirmed.

(64 S. C. 236)

GLENN v. GERALD et al.

(Supreme Court of South Carolina. June 14, 1902.)

PLEADING—AMENDMENT—SERVICES RENDERED AUNT—MARRIED WOMAN'S ESTATE—LIABILITIES—ATTORNEY'S FEE.

1. Where a creditor brings a suit in his own name, and it appears from the allegations and proof that he is the administrator, and intended to sue as such also, the complaint is prop-

erly amended by alleging his representative capacity.

2. Where an aunt visited the house of a nephew, and was taken sick there, and remained seven months, until her death, the nephew can recover for board and nursing furnished her.

3. The separate estate of a married woman is liable for the fees of a physician whom she called in.

4. Where an administrator employs an attorney to sue to sell land in aid of assets, the attorney is entitled to a fee out of such sale.

Appeal from common pleas circuit court of Greenville county; Gage, Judge.

Action by Thomas G. Glenn against George Gerald and other heirs at law of Lucy T. Gerald and M. G. Conyers. From the decree, Warren, Charles, Shuman, and Ella Gerald appeal. Affirmed.

Lewis Dorroh, for appellant. Wm. G. Sirrine, for appellee.

POPE, J. Mrs. Lucy T. Gerald died intestate on the 25th March, 1901, her husband, George Gerald, surviving her. The plaintiff brought his action as an individual, though in his complaint he set up the fact that he had been appointed the administrator of her personal estate, which was less than \$10. He made the defendants parties. The action was appealed from the probate court to the circuit court. The circuit judge ordered an amendment of the complaint by styling the plaintiff also as administrator. This constitutes one of the grounds of appeal. The plaintiff charged his intestate board for seven months, aggregating \$105. It appears that Mrs. Gerald went to his house to pay him a visit of a few days, but, becoming ill, she remained until she died. This charge of \$105 was allowed as a valid claim against the estate of the intestate. This is made a ground of appeal. The intestate, when she took sick, sent for two physicians, who came at her request to render her medical assistance. The bill of one was \$29; that of the other was \$93. Both were allowed as valid claims against her estate. This is made a ground of appeal. A fee of \$25 was allowed the attorney who filed the creditors' bill, and who was also the attorney for the administrator. This is made a ground of appeal. We will now consider these questions in their order.

In the fourth ground of appeal it is alleged: "His honor erred in holding that plaintiff sued both as administrator and individually, and in giving the plaintiff leave to amend the complaint so as to show that the plaintiff sued as an administrator and individually, when he should have held that the caption and allegations of the complaint and the testimony showed that the plaintiff sued only as an individual, and not as administrator." In the complaint it is alleged that the plaintiff's intestate had less than \$10 worth of personal estate, while the

plaintiff's claim was for \$105, and that the real estate of the intestate would have to be sold in order to pay debts. The plaintiff set up the fact that he was the administrator. Section 194 of our Code of Civil Procedure provides that: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." The circuit judge had this in mind when in his decree he provided: "Leave is given to plaintiff to change the caption of his complaint, and amend the same so as to show more clearly that the action herein is brought by Thomas G. Glenn both as administrator and individually. I think the plaintiff intended to sue for himself and as administrator also. That appears from the allegations of the complaint. The evidence tends to show the same, and I think the complaint should be so amended as to make the allegation in the title of the cause." It seems to us that whenever the estate of a deceased person is brought into court for settlement thereof, the personal representative of such deceased person should be a party to the action. Of course, no reference is made to the changes in the law made by the legislature in the act of 1894, and the amendment to the same adopted in 1900 as to mortgages, all of which is fully set out and settled in the case of *Peeples v. Mims*, 42 S. E. 155. For these reasons we do not think the circuit judge erred as herein complained. Let this exception be overruled.

We will next consider the first exception: "His honor erred in allowing the claim of Thomas G. Glenn for board, nursing, and other things and services supplied the deceased, when he should have held that the deceased was a guest in the house of Thomas G. Glenn, received the board, nursing, and other things and the services as a gratuity, and was under no contract or obligation to pay for the same." So much of the plaintiff's testimony wherein he sought to introduce the communications and transactions of the intestate with the plaintiff were clearly incompetent, under section 400 of the Code of Civil Procedure. But when we disallow these declarations and transactions there seems enough left of the testimony to support the circuit judge in his allowance of plaintiff's claim for the \$105. It is true, Mrs. Gerald, the intestate, did go to the plaintiff's house to make a visit, for which plaintiff could make no charge; yet she was taken ill while there, and elected to remain in his family. She received every attention while there. Her physicians finally decided that she could not be removed. Her husband acquiesced in her

¶ 2. See *Husband and Wife*, vol. 24, Cent. Dig. §§ 593 [4, 1]; 593.

staying there for seven months. The husband paid for his own board in plaintiff's house during his wife's sickness. This is a circumstance to be considered. Our cases have held that a gratuity cannot be changed into a charge. *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701, and cases there cited. Still no case has been found which goes to the length of holding that a visit for a day or two while in health can be construed into a right to remain without charge during seven months of illness. A nephew in blood does not owe such a duty to his aunt, who has a home and a husband near by the home of the nephew. That it would have been a nice mark of respect on the part of the nephew not to make a charge against his aunt is undoubtedly true, when viewed from a moral standpoint, but does the law require the nephew to do so without compensation? We cannot say that it does. Hence we sustain the circuit judge, and order the exception to be overruled.

We will next consider the second exception: "His honor erred in allowing claims of Drs. Black and Bramlett, when he should have held that the deceased, in sending for the physicians, bound her husband, and not herself, to pay them for their services." It is admitted that Mrs. Gerald sent for the two physicians whose fees are in question. The amount of their fees is not controverted. It is contended, however, that the husband of Mrs. Gerald was responsible for these fees. It is not contended that the husband of Mrs. Gerald is able to pay these bills of the physicians. Indeed, it is in proof here that this husband conveyed by deed his interest in his wife's lot of land in the city of Greenville to pay her burial expenses. However the latter may be, whether the husband is able to pay these medical fees or not, if he is chargeable with them as his debt, and not that of his wife, her estate would be freed therefrom. But who did contract to pay these bills, the husband or the wife? Unquestionably, it was the wife's contract. Was she able to contract, being a married woman? Section 9 of article 17 of the constitution of 1895 is as follows: "The real and personal property of a woman held at the time of her marriage or that she may hereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or a man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried." If a married woman chooses to contract for the services of a lawyer or physician, or to purchase provisions for herself, under the provisions of the constitution she can do so. We would be correctly understood in making this declaration of the law governing a married woman's contracts. We do not mean that it is not the duty of a married man to support his wife, and supply her needs of body and comfort. Still, if a

married woman makes a contract for herself in any of these matters, she has a right under the constitution to do so. As we understand the facts of this case, this is precisely what Mrs. Gerald did, and her separate estate is liable for such contracts. This exception is overruled.

Did the circuit judge err in his order for the sale of these lands on the ground that no debts had been proved? Under our holdings herein, there are demands against the intestate's estate which have to be paid. The personal estate was only \$2.95. There is no other part of her estate but this lot of land described in the pleadings. The reason assigned by the appellants is not sound, and the exception must be overruled.

Was it error in the circuit judge to sustain the fee of \$25 presented and allowed by W. G. Sirrine, Esq.? We do not think so. He was the attorney for the administrator. Under our decided cases he falls under the restriction thrown around the allowance of such fees. See *Turnipseed v. Sirrine*, 60 S. C. 272, 38 S. E. 423, and cases there cited and discussed.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(64 S. C. 290)

GREEN v. McCARTER et al.

(Supreme Court of South Carolina. June 19, 1902.)

REFERENCE—REVOCATION—ORDER IN CHAMBERS—ACTION AGAINST ADMINISTRATOR.

1. After a judge has revoked an order of reference, the case stands as if no such order had been made, and it is in his power to enter a second order of reference.

2. It is in the power of a judge at chambers to make an order of reference.

3. Where the pleadings show that difficult questions of law are not involved in the case, and that an accounting may be necessary for the information of the court, it is proper to grant an order at chambers referring all issues to a master.

4. A foreclosure suit may be commenced within 12 months after the appointment of an administrator, where no judgment was asked against him for the deficiency, though Rev. St. 1893, § 2322, forbids an action against an administrator to recover a debt of an intestate within 12 months of his appointment.

Appeal from common pleas circuit court of Greenville county.

Foreclosure by J. Lee Green against Annie McCarter and others. From order granting reference of all issues on motion at chambers, defendants appeal. Affirmed.

Heyward, Dean & Earle, for appellants. Carey & McCullough, for appellee.

GARY, A. J. This is an action to foreclose an equitable mortgage. On the 26th. of July, 1901, his honor Judge Klugh granted an order of reference to the master to take the testimony and report the same to

¶ 4. See *Executors and Administrators*, vol. 23, Cent. Dig. § 1738.

the court, together with his conclusions of law and fact, and with leave to report any special matter. This order was made without notice to, or the knowledge of, defendants' attorneys. As soon as said order was brought to their attention, they gave notice of motion for an order rescinding the order of reference, upon the ground that said order was granted without notice to, and without the knowledge or consent of, the defendants or their attorneys, and upon the further ground that the cause was not then in condition to be referred. On the 10th of August, 1901, Judge Klugh granted an order revoking the order of reference. On the 7th of September, 1901, the plaintiff's attorneys served notice of motion for an order referring the cause to the master to take the testimony, and report the same, together with his conclusions of law and fact. At the hearing of this motion, counsel for the defendants contended that the matter had already been heard and disposed of by his honor Judge Klugh, that the circuit judge had no jurisdiction at chambers to hear the motion, and that the cause is not one in which the court could refer all the issues without the consent of the defendants. On the 13th of September his honor Judge Townsend made an order that the motion be granted, and that all the issues of law and fact be referred to the master, with directions to report thereon.

The defendants appealed, and their first exception is as follows: "(1) That his honor erred in considering this motion after the same had been heard and decided by another circuit judge." When Judge Klugh revoked his first order, the case stood just as if no order had been made therein. Judge Townsend was therefore untrammelled in making the second order of reference. This exception is overruled.

The second exception is as follows: "(2) That his honor erred in holding that he had jurisdiction at chambers to hear and dispose of the motion to refer to the master all the issues in the cause." The case of *Bank v. Fennell*, 55 S. C. 379, 33 S. E. 485, shows that a judge at chambers, in a proper case, can grant an order of reference. This exception is overruled.

The third exception is as follows: "(3) That his honor erred in holding that this is a cause that can be referred to the master without the consent of the defendants, and should have held that, under the provisions of the Code of Civil Procedure (especially section 293 thereof) the pleadings here do not disclose a case as can be referred in *in-vitum*." Section 293 of the Code is as follows: "Where the parties do not consent, the court may upon the application of either, or its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases: (1) Where the trial of an issue of fact shall require the examination of a

long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or (2) where the taking of an account shall be necessary for the information of the court, before judgment or for carrying a judgment or order into effect; or (3) where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action. * * *"

In commenting on this action, Mr. Chief Justice McIver, on the part of the court, in *Boulard v. Carpin*, 27 S. C. 235, 3 S. E. 219, uses this language: "It will be observed that the provision of the Code is permissive, merely, not mandatory, and therefore neither party has the legal right to demand a reference of all the issues to the master, but it is a matter addressed somewhat to the discretion of the court. The judge to whom the motion is submitted must determine whether the case is such as to warrant such a reference; and this he may determine either from an inspection of the pleadings, or from affidavits submitted, as to the nature of the case, and the necessity for a long account, and whether 'the investigation will require the decision of difficult questions of law.'" In the case of *Ferguson v. Harrison*, 34 S. C. 160, 13 S. E. 332, it was decided that even in an equity case the circuit judge has no power, without the consent of the parties, to refer the issues to a master for trial unless the case falls under subdivisions 1 or 2 or 3 of section 293 of the Code. Let us see if the pleadings show that the case falls under either of said subdivisions. The complaint, among others, contains the following allegations: "(1) That on the 11th day of June, 1897, one M. E. McCarter was indebted to the plaintiff in the sum of \$3,550.15, for value received, and, to secure the payment of the same, conveyed by way of deed to this plaintiff 335 acres of land in the county and state aforesaid, and 1 acre in the city of Greenville, more particularly described in the said deed as follows: * * * (2) That at the same time, and as a part and parcel of the same transaction, the plaintiff and the said M. E. McCarter entered into written agreement, a copy of which is as follows: * * * Now, know all men by these presents that the conditions and terms of said conveyance, and the stipulations with reference thereto, are as follows: First. The said M. E. McCarter hereby obligates himself, his heirs and assigns, executors and administrators, to pay to said J. Lee Green, six months from the date of these presents, the aforesaid sum, with interest thereon from date at eight per cent. per annum, payable annually, together with fifteen per cent. attorney's fee thereon in case the said debt is not paid at maturity, and is collected by law or through an attorney. Second. The said J. Lee Green on his part hereby obligates himself, upon the payment of the aforesaid debt according to the terms and conditions set

forth, to reconvey said premises unto the said M. E. McCarter or his order. Third. It is agreed by the parties hereto that, in case the said debt is not paid as herein set forth, then the said deed is to have the same force and effect as a mortgage to secure the payment of said debt, interest, costs, and expenses.' * * *

(5) That plaintiff is now the legal owner and holder of said papers, and that no part of the said debt has been paid, except such amounts as are hereinafter mentioned, and there is due and owing the plaintiff on account thereof the sum of \$3,559.15, with interest thereon from the 11th day of June, 1897, at eight per cent. per annum, payable annually, together with fifteen per cent. attorney's fees, less the following credits: \$146, June 11, 1898; \$599.38, January 23, 1899. * * * (7) That on the 25th day of February, 1901, the defendant James C. McCarter was appointed administrator of the estate of the said M. E. McCarter by the probate court of said county and state, and he entered upon the discharge of his duties as such, and is now acting in that capacity; that he has received several hundred dollars (so this plaintiff is informed and believes), belonging to the said estate." The complaint also contains a second cause of action, in which the facts are as complicated as those set forth in the first cause of action. The defendants answered the complaint, denying all the foregoing allegations, except that James C. McCarter was duly appointed the administrator of the estate of M. E. McCarter, deceased. The answer also alleged that Annie McCarter is the widow of the said M. E. McCarter, and was his lawful wife previous to and at the time of the alleged alienation of the premises described in the complaint; also that it appears upon the face of the complaint that, even if all the allegations thereof were true, the action cannot now be maintained, and should be dismissed. The pleadings show that the investigation will not require the decision of difficult questions of law, and that the taking of an account might well be considered necessary for the information of the court. The case therefore falls under subdivision 2 of the foregoing section. This exception is overruled.

The fourth exception is as follows: "(4) That his honor erred in holding that the action can be maintained against the administrator of M. E. McCarter within a year after his appointment." The circuit judge stated the following reasons for refusing to sustain his objection: "I had some trouble with the third point; that is, that the action was commenced less than one year from the granting of letters of administration. Section 2322, Rev. St. 1893, forbids that an action be commenced against an administrator for the debts due by the intestate until twelve months after grant of administration. This section refers, as I understand it, to money actions against the administrator, including applications for judgment for deficiencies in

foreclosure suits. An examination of the complaint in this action shows that no judgment is asked against the administrator. The prayer is merely that the land be sold, and the proceeds applied to the debts, costs, and expenses of the action. This of itself, it seems to me, should take the case out of section 2322, above referred to; but any doubt on the particular point, it seems to me, is removed by the act of 1900 (Acts 1900, p. 349), which provides that in an action of this kind the administrator is a proper party, but not a necessary party; and, whilst the administrator has been made a party in this action, it was not necessary to make him a party, and, besides, no judgment is asked against him. So I am satisfied that the third point urged against the motion should be overruled." These reasons, and the cases of *Peoples v. Mims*, 42 S. E. 155, and *Glenn v. Gerald, Id.*, in which the opinions have just been filed, show conclusively that the objection was properly overruled. This exception is overruled.

The fifth exception is as follows: "(5) That even if it were a cause that could be lawfully referred at all to the master, his honor erred in referring all the issues of law and fact." This exception is disposed of by what was said in considering the third exception, and is overruled.

It is the judgment of this court that the order of the circuit court be affirmed.

(64 S. C. 311)

FOWLER v. HARRISON.

(Supreme Court of South Carolina. June 25, 1902.)

APPEAL — EXCEPTIONS — SUFFICIENCY — OBJECTION TO INSTRUCTIONS — PREPONDERANCE OF EVIDENCE.

1. Exception alleging error in refusing motion for new trial "on the grounds set forth in motion, and given above," is insufficient.

2. An objection that a charge is vague, indefinite, and calculated to leave the jury in doubt, should not be considered, where the court's attention was not called to such fact.

3. Where, in an action on a contract, plaintiff claims that it was for one amount, and defendant for another, an instruction that plaintiff must establish his claim by a preponderance of evidence, and also that defendant must do the same, is proper.

Appeal from common pleas circuit court of Anderson county; Klugh, Judge.

Action by J. S. Fowler, trustee for Annie H. Cunningham, against G. W. Harrison. Judgment for plaintiff. Defendant appeals. Affirmed.

The trial judge instructed the jury as follows:

"This case presents questions of fact for you to determine. As you are aware, where a person has lien for rent or supplies on a crop, under certain conditions, the holder of the lien may seize the crop over which the lien exists; and the law provides that he can make out a statement as to the amount due, and the clerk of the court makes out a

warrant, and the sheriff seizes the crop, and then the lienor may give notice to the sheriff that the amount claimed is not justly due, and the sheriff holds the proceeds until the question is determined by the jury in the court of common pleas. The plaintiff here has instituted a proceeding of that kind in this case. The warrant was issued, and the sheriff seized the goods, and the lienor gave notice that the amount was not due. You will determine whether that amount was due or not, and, in determining that question, you will consider the question as between J. S. Fowler and G. W. Harrison. Now, if a person employs or empowers an agent to transact the whole business, the agent then has authority to do whatever is involved in the scope of his agency. If it is to make a contract and carry out a contract, and he is allowed by the principal from year to year to make the contracts and generally carry out the business, and act just as the principal would act, then whatever he does is binding upon the principal,—whatever he does within the scope of his authority. Now, in this case you will have to determine if there was an agent acting for Fowler; and, if so, did he have the authority to make the contract and change the contract? And if he did make a modification of the contract, that modification would be binding on his principal. Now, the defendant claims that the amount he claims here was not justly due, because principal (Fowler), through his agent, had made a change in the contract which reduced the amount of rent that the defendant, Harrison, was to pay. If you conclude that there was a reduction, then you will allow for said reduction, and you will find a verdict for the defendant, if it amounts to as much as plaintiff claims. But if you find that there was an amount due, then, after the reduction, you will find for the plaintiff; and, if you conclude that there has been no change in the contract, you will find for the plaintiff the amount claimed. It is a question of fact, whether you find that there is an amount due or not; and, if you conclude that the plaintiff is entitled to the whole due, you will find for the plaintiff, giving him the value of 741 pounds of lint cotton,—I believe it is,—at whatever figures you conclude that it is worth. If you conclude that he is entitled to recover less than the whole of it, you will say how much he is entitled to; and, if you do not think he is entitled to anything, you will find your verdict for the defendant. The plaintiff must prove his case by the preponderance of the evidence,—that is, the greater weight of the evidence; and, if the defendant says that the amount was not justly due, he must prove his side, also, by the preponderance of the evidence."

B. F. Martin, for appellant. Tribble & Prince, for appellee.

POPE, J. Under the law of this state regulating attachment of crops to pay rent

during the year 1900, the plaintiff caused the crop of the defendant for rent during the year 1900 to be attached to pay said rent, amounting to \$135.19. Upon the defendant denying that such amount was due, the matter came before the court of common pleas for Anderson county 1st July, 1901, for trial before his honor Judge Klugh and a jury. Verdict was rendered in favor of the plaintiff for \$101.69. After entry of judgment, the defendant has appealed therefrom to this court on the following grounds, which were pressed, viz:

"(1) Because his honor erred in not granting defendant's motion for a new trial on the grounds set forth in said motion, and given above." "On the grounds set forth in said motion; and given above," is the language of appellant in setting forth his exception to the circuit judge's refusal to grant a new trial. We have time and time again pointed out to appellants that an exception must contain in its own statement exactly what is relied upon as erroneous, and in no instance must the appellant rely upon statements elsewhere appearing in the "case." We do not know any better method to apprise appellants of the rule of court on this subject than to enforce it. Respondent invokes the application of the rule of court on this subject. We must therefore decline to consider this exception in its faulty statement. But to relieve appellant, we will say that for our own purposes we did look into the "case," and find the grounds made for a new trial to be groundless. This is not a decision, however, on such grounds for new trial. This exception is overruled.

We will next pass upon the third ground of exception, which is as follows: "(3) Because his honor erred in charging the jury: 'The plaintiff must prove his case by the preponderance of the evidence; and, if the defendant says that the amount was not justly due, he must prove his side, also, by the preponderance of the evidence.' This charge lays upon the defendant the burden of proving a negative, whereas the burden of proving the correlative affirmative is upon the plaintiff. Or at best, the charge, as a whole, is vague and indefinite on this point, and leaves the jury uncertain or under a wrong impression as to how they should decide in the event of its being doubtful as to where lies the preponderance of the evidence." If the charge was "vague and indefinite," and was calculated to "leave the jury uncertain" or "under a wrong impression as to how they should decide in the event of its being doubtful as to where lies the preponderance of the evidence," it seems to us that appellant's counsel should have intervened and called the judge's attention to the matter. This is the better practice. Every circuit judge desires by his charge to be helpful to the jury in reaching a right conclusion. A circuit judge never takes sides with a party before him when he comes to

charge a jury, or, indeed, at any stage of the trial. Lawyers are officers of the court, and should aid the court by suggestions. It is true, these suggestions are usually embodied in requests to charge, but not always, nor necessarily so. But we will not make our response to this exception upon this statement of a lawyer's duty.

We have examined the entire charge, and from that examination we are convinced the jury could not have been misled by the words of the judge complained of. The testimony of the plaintiff and that of the defendant were diametrically opposed to each other as to the contract or lease of the lands in question. The plaintiff, on the one hand, contended for a yearly rent, to wit, 2,400 pounds of lint cotton and a certain number of bushels of corn, while the defendant's witnesses attempted to show that a different agreement entirely as to the rent for the year 1900 was agreed upon between plaintiff's agent and the agent of the defendant. Now, it is very clear that, before plaintiff's contention could be accepted, the jury were obliged to be governed by the preponderance of the testimony leading them to adopt plaintiff's side. If, however, the jury should not be satisfied to adopt plaintiff's view of the rent, by reason of the force and effect of defendant's testimony as to a different contract, then the circuit judge meant that, if the jury accepted the new contract for rent as set up by defendant, they (the jury) must have their minds to accept this conclusion by a preponderance of the testimony. A charge of the presiding judge must always be construed as applicable to the issues on trial before him in a particular case. When, therefore, the circuit judge's charge is thus viewed, it is very evident that no injury resulted to defendant from his language excepted to. The judge's charge will be reported. This ground of appeal is also overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY and JONES, JJ., concur in the result.

(84 S. C. 115)

CARTER v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. June 26, 1902.)

RAILROADS—INJURY TO TRESPASSER—CARE REQUIRED—EVIDENCE.

1. There was evidence that plaintiff went on a passenger train standing at a crossing for the purpose of buying oranges from the fruit vender thereon, and after the train started he jumped from it and broke his leg. *Held*, that allegations in the complaint that defendant failed to give the statutory signals before starting the train were properly stricken out, as defendant owed plaintiff no such duty.

2. In an action by a trespasser for injuries received in jumping from a moving train, evidence as to whether the accident would have

happened if the train had remained standing at the station the usual time is inadmissible.

Appeal from common pleas circuit court of Barnwell county; Benet, Judge.

Action by Daniel Carter against the Charleston & Western Carolina Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

R. A. Ellis and Davis & Best, for appellant. Laura T. Izlar, for appellee.

POPE, J. Plaintiff sues to recover \$5,000 damages received by him, caused by the alleged negligence of the defendant. His complaint alleges two causes of action—one for injuries received through the negligence of defendant in starting its train while standing across a highway at Martins, S. C., without giving the statutory signals, viz., by sounding its whistle or ringing its bell; the second cause of action was the alleged negligence of defendant in starting its train suddenly, so that plaintiff was prevented from alighting from the train in safety, having his left leg fractured above the knee in reaching the ground in alighting from said train. Inasmuch as plaintiff was not a passenger on said defendant's train, nor expecting any one in whom he was interested to arrive or depart on or from the defendant's passenger train, nor was he waiting to cross said highway, but was merely at the railroad crossing expecting to buy some oranges from the newsboy and fruit agent on said train, the circuit judge held that the defendant railway company owed the plaintiff no duty compelling it to ring its bell or sound its whistle before its train should start from its standstill across the highway; and as he was not a passenger or expecting to become a passenger on said train, and, further, as he was not expecting any one to disembark from said train or embark on said train, his cause of action relating to the statutory signals demanded by law of railroads in order to avoid collisions at or on a railroad crossing of a highway, plaintiff's first cause of action, must be eliminated from the complaint. Plaintiff then proceeded to offer testimony as to the want of ordinary care of the defendant in its treatment of the plaintiff. The testimony offered by plaintiff tended to show that plaintiff entered defendant's train to purchase a couple of oranges from the fruit vender on the train; that he had purchased the oranges, but before he alighted from the train it was started, and it was not until the train had gone 75 yards that the plaintiff jumped off, breaking his leg. It was not in testimony that the fruit agent had any connection with the defendant; that the defendant owed any duty to the plaintiff; that the defendant did any act or uttered any word by which the plaintiff was induced to go on its train or jumped off of the same. Under these circumstances, the circuit judge granted defendant's motion for a nonsuit as soon as plain-

tiff completed his testimony. After entry of judgment thereon, the plaintiff appealed upon the following grounds: "(1) Because his Honor struck out of the first cause of action of the complaint the following material allegations: So much of paragraph 5 as alleges that defendant moved its train, 'having in violation of law failed to give the signals required by law before starting said train,'—and also because he struck out the whole of paragraph 7 and so much of paragraph 8 as alleged that said train did not stop as long as required by law; whereas he should have retained said portions of the complaint as a part thereof for the trial of this cause. (2) Because his Honor ruled that the complaint stated that plaintiff 'entered' the car to buy oranges, whereas he should have held that complaint only stated that plaintiff got on platform for purpose stated. (3) Because his Honor ruled that, because plaintiff was not a passenger, he could not, 'therefore, claim any benefit allowed by the statute which requires the blowing of whistles or ringing of bells when approaching a crossing, or the requirements of the statute which say that signals shall be given when the train is at a standstill within a hundred rods of a crossing'; but should have held that the public generally, the plaintiff included, were entitled to the benefits and protection of said statutes. (4) Because his Honor, the presiding judge, ruled that all allegations of the complaint which stated that said train did not stop long enough for passengers to get off and on, as the statute requires, must be stricken out on the ground that plaintiff was not a passenger; whereas he should have held that the public have the right to expect that railway companies will obey the law referred to above and to claim the benefit of that law, in so far as obedience to said law would have inured to plaintiff's safety or disobedience thereto would have resulted in his damage and injury. (5) Because his Honor, the presiding judge, ruled, in the order of nonsuit herein, that there was no evidence to go to the jury; whereas he should have held that notwithstanding that his Honor excluded all testimony going to show the failure of the defendant company's agents and servants to give the statutory signals, and excluded all testimony going to show that defendant failed to stop its train on that occasion the length of time required under section 1687 of the Revised Statutes of 1893, yet there was evidence in the testimony of the plaintiff, Daniel Carter, to go to the jury, where he testified as a cause of his injury that defendant company did not stop its train any length of time,—meaning the length of time it should have stopped,—and his Honor, the presiding judge, under the testimony, should have refused the nonsuit, and allowed the case to go to the jury. (6) Plaintiff excepts to his Honor, the presiding judge's, ruling against the admissibility of the following question: 'On account of your

accident and your forced inattention to your business, how did your farming interests suffer? whereas he should have held that said question was admissible. (7) Plaintiff excepts to his Honor, the presiding judge's, ruling that the following question was inadmissible: 'Will you state, if the train had stopped as long as it usually did, whether you would have been hurt?' whereas his Honor should have ruled the same legally admissible. (8) Plaintiff excepts to that portion of his Honor's remarks, in granting motion for nonsuit, in which he rules that 'less than a minute might be sufficient time to receive and let off passengers at a particular station;' whereas he should have held that the sufficiency of the time necessary to receive and let off passengers, according to the requirements of section 1687 of the Revised Statutes of 1893, was a question for the jury, and should have been submitted to them under the testimony on that point."

As to the first exception, we will say that the object of pleadings is that issuable facts should alone be stated. If, at any time before trial, a motion is made to relieve pleadings of redundant or unnecessary allegations of fact, the trial judge, if convinced that such objectionable facts are stated either in the complaint or answer, should order the same removed. In the case at bar it was admitted that the plaintiff was not at or near the railroad crossing with the purpose of crossing from one side of the railroad to the other side, and, further, that he was not proposing to become a passenger on said railroad train; hence any allegations as to the statutory signals by ringing the bell or sounding the whistle, and also any time that such railroad train should remain at the station, were not and could not be made issuable facts. This being so, the circuit judge was guilty of no error in his ruling as complained of in the first exception, and it is therefore overruled. The second exception, referring, as it does, to a slight mistake by the circuit court in referring to the fact that the plaintiff entered the car to buy oranges, whereas plaintiff only got on the platform of the car, cannot be sustained. If error at all, it was a mistake in favor of plaintiff, and is overruled. The third exception. We have already held that statutory signals were intended to protect the public from collisions at railroad crossings, and have no reference to bystanders who are not affected injuriously by the failure to give such signals. This exception is overruled. The fourth exception. We have already held that any statutory requirement as to the length of a stop at a station referred to railroads and their customs. Overruled. Exception 5. We have already passed upon the matters herein referred to. There was not even an effort made to connect the plaintiff and defendant in a matter of business. Besides, the plaintiff, without any request or order therefor from the defendant, jumped from the train. This ex-

ception is overruled. Exception 6. What matter of concern could any answer to the question propounded as set out in this exception have to the case in hand? If the defendant owed the plaintiff no duty except ordinary care, and without any action on defendant's part the plaintiff jumped from the train of his own motion, the testimony was properly ruled out. Exception 7. The question propounded as set out in this exception could not have brought out any answer which was proper in this case. It was properly overruled. Exception 8. Section 1687 of the Revised Statutes of the year 1893, which is in these words: "Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains for a time sufficient to receive and let off passengers." The plaintiff admits he was not a passenger and did not contemplate becoming one. This statutory regulation was for the benefit of passengers. The general public had no concern with such stops by railroads at their stations unless as passengers or contemplating becoming such. There was no mistake made by the circuit judge in this matter. The exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and is hereby, affirmed.

(64 S. C. 321)

LOGGINS v. SOUTHERN RY.

(Supreme Court of South Carolina. June 25, 1902.)

CARRIERS—AUTHORITY OF CONDUCTORS—ARREST OF DISORDERLY PASSENGERS.

1. Where a passenger on a train has acted disorderly and boisterous, and, after being put off, threw rocks at the conductor and the cars, the conductor has the right, under Gen. St. § 1718, giving him the power of a constable, to arrest him without a warrant, and detain him until he can turn him over to the proper authorities, though at the time of his arrest he was acting in an orderly manner.

Appeal from common pleas circuit court of Anderson county; Townsend, Judge.

Action by James Loggins against the Southern Railway. Judgment for plaintiff. Defendant appeals. Reversed.

T. P. Cothran, for appellant. E. G. McAdams and Tribble & Prince, for appellee.

POPE, J. Briefly stated, the action instituted by the plaintiff sought to make the defendant responsible in \$2,000 for the alleged unlawful arrest and imprisonment of the plaintiff on the 10th day of November, 1900, on the defendant's passenger coaches, while such coaches were transporting passengers for hire between the stations on said railway at Seneca, S. C., and Richland, S. C., through the conductor of said train, who "wantonly, wickedly, and without just cause assaulted

plaintiff, and with force and intimidation restrained plaintiff of his liberty." The answer of the defendant justified the conduct of its conductor in arresting the plaintiff while in its passenger coaches, alleging that the plaintiff, "while under the influence of liquor, behaved in a most outrageous and boisterous manner, shouting and cursing in the presence of ladies and other passengers; that the conductor approached plaintiff and warned him to desist, but he cursed and shouted all the more, when the conductor, as in duty bound, stopped the train and put him off." The cause came on for trial before his honor Judge Townsend and a jury in October, 1901. The verdict was for plaintiff for the sum of \$100. After judgment was entered up, the defendant appealed on the following grounds:

"(1) The presiding judge erred in charging the jury as follows: 'In the argument there was something said about rocks,—assaulting the conductor. If you were to find that the plaintiff was put off of the train under the charge of disorderly conduct, and he assaulted the conductor outside of his train, the conductor did not have the common-law powers to arrest him outside of the train; and, if the conductor went back in his train, the conductor would not have the right to arrest him for that rock-throwing out there, if he were quiet and peaceable; but if he went back in the train, and the conductor had a reasonable apprehension that he was about to commit a breach of the peace again, then he would have the right to take him into custody and detain him until he could turn him over to a magistrate or the proper officer of the law.' The error consisting in this: The act of 1898 (22 St. at Large, p. 776) gives to a conductor on board his train the common-law powers of a constable to make arrests. By the common law, constables had authority to arrest without a warrant those who were engaged in an affray or a breach of the peace committed in their presence. If, therefore, the plaintiff assaulted the conductor,—the former being on the ground, and the latter on the platform, as the testimony tended to show,—the conductor had the right, without warrant, to arrest the plaintiff, either while the latter was on the ground, or after he boarded the train, whether he were at that time peaceable and quiet or not.

"(2) The testimony tended to show that the plaintiff was put off the train for disorderly conduct. While on the ground, as the train moved off, he threw rocks at the train, and struck the conductor, the latter standing on the platform. The train was stopped for the purpose of apprehending the plaintiff. The plaintiff again boarded the train, and was arrested by the conductor while seated in the car. Under these circumstances, the conductor had the right, without warrant, to arrest the plaintiff; and the circuit judge erred in charging to the contrary.

"(3) The presiding judge erred in refusing the defendant's fourth request to charge, as

follows: 'If the jury believe from the evidence that the plaintiff committed an assault upon the conductor, or that he injured a railroad car in the conductor's presence, the latter had a right to arrest him without warrant.' The said request containing a sound proposition of law applicable to the case. If the assault were committed upon the conductor, it was a breach of the peace in his view; if he threw rocks at and injured the car, it was also a breach of the peace, under 22 St. at Large, p. 777,—for either of which the conductor could arrest without warrant.

"(4) The presiding judge erred in the following: Defendant's attorney stated: 'I think the court has indicated that he [plaintiff] could not be arrested for throwing rocks,—for making the assault upon the conductor.' The court replied: 'Yes, sir; I charged that. He would have to have a warrant to arrest him for assault, if he got back on the train and was quiet, and was not committing a breach of the peace, or was not about to commit a breach of the peace.' The error being the same as specified in exception 1.

"(5) The presiding judge erred in refusing the defendant's first request to charge, as follows: 'If the jury believe from the evidence that plaintiff was in a grossly intoxicated condition upon defendant's train on November 10, 1900, and conducted himself in a disorderly manner, or that he used obscene or profane language, accompanied with disorderly conduct, at such time and place, in view of the conductor of said train, the latter had the right, without warrant, to arrest him and have him turned over to a magistrate or other proper authorities for trial as soon as practicable.' Such conduct constituted an offense for which, under the circumstances, the conductor could arrest without warrant.

"(6) The presiding judge erred in not charging the defendant's second request to charge, which was as follows: 'If the jury believe from the evidence that the plaintiff was guilty of disorderly conduct, to the terror of passengers upon defendant's train, on November 10, 1900, the conductor of said train had the right, without warrant, to arrest him and have him turned over to the proper authorities for trial as soon as possible.' Under section 26 of the Criminal Code, such conduct was a breach of the peace, for which the plaintiff was liable, and for which the conductor had the authority to arrest without warrant.

"(7) The presiding judge erred in charging plaintiff's tenth request, which was as follows: 'That under section 1718, Gen. St., conductors are authorized to eject passengers who shall be guilty of disorderly conduct, or for using any obscene or grossly profane language to the annoyance of passengers; and if the jury find from the evidence that the conductor undertook and did arrest plaintiff and deprive him of his liberty, and have him incarcerated, without warrant, the defendant company is liable for damages.' Thus with-

drawing from the consideration of the jury the right of the conductor to arrest the plaintiff without warrant for a breach of the peace committed in his view.

"(8) The presiding judge erred in modifying the defendant's fifth request to charge, which was as follows: 'If the jury believe from the evidence that the conductor rightfully expelled the plaintiff from the train, and that he willfully returned to the train, he was then violating the law, and was subject to arrest without a warrant.' The modification was: 'I charge you that, with the addition of these words: "Provided that such violation of law was a breach of the peace, or tended to a breach of the peace, or gave the conductor, at the time the arrest was made, reasonable apprehension that the peace was about to be broken."' The error consisted in this: The law which authorized the conductor to eject a disorderly passenger implies the right to keep him off. His act in willfully boarding the train again after his ejection, as matter of law, is a breach of the peace, subjecting him to arrest for disorderly conduct.

"(9) The presiding judge erred in charging the jury that if, after his ejection, the plaintiff boarded the train again without permission, he could not be arrested without a warrant, if he was at that time quiet and well behaved, for the reasons stated in the preceding exception, and for the further reason that such rule, if declared to be the law, would neutralize the effect of the statute allowing the conductor to eject disorderly passengers."

The laws of this commonwealth subject railway companies to a high degree of responsibility in the protection of the persons of passengers. This responsibility does not cease in the protection of the persons of passengers. It extends likewise to their freedom from blackguardism from other passengers. Ruffians are not to be allowed on the trains to use blasphemous and disorderly conduct in the presence of passengers. This being true as to the measure of the responsibility of railway companies to their passengers, it is nothing but right and proper to expect that the legislature of this state will clothe railway companies with power to enforce good behavior in their trains. An examination of our statutory laws will show that this has been done. The compilation of the Civil Statutes by Mr. Townsend states the law thus, in sections 2173 and 2174:

"Sec. 2173. Conductors of railroad trains and station or depot agents are hereby declared to be conservators of the peace, and they and each of them shall have the common law power of constables to make arrests, except that the conductors shall only have such power on board of their respective trains and the agents at their respective places of business; and said conductors and agents may cause any person or persons so arrested by them to be detained and delivered to the

proper authorities for trial as soon as practicable.

"Sec. 2174. When any passenger shall be guilty of disorderly conduct, or use any obscene or grossly profane language, to the annoyance and vexation of passengers, or play any game of cards or other game of chance for money or other valuable thing upon any railroad train, the conductor of such train is hereby authorized to stop his train at any place where such offense has been committed and eject such passenger from the train, using only such force as may be necessary to accomplish such removal, and may command the assistance of the employees of the railroad company or any of the passengers to assist in such removal."

The act of 1898 (22 St. at Large, p. 777) also provides: "Whoever willfully discharges any kind of firearms or throws any kind of missile at or into the engine or any car of a train, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than," etc. The circuit judge in his charge recognized the foregoing statutes of the state, but it is suggested by the appellant that he narrowed the provisions of the law when he required that the plaintiff, after being guilty of cursing and other disorderly conduct on the train, and was ejected by the conductor therefor from the train, and while the ejected passenger was on the ground, and while the conductor was on the platform of the car, struck the conductor by throwing a rock against him, and also rocked the train itself, could not be arrested therefor by the conductor without a warrant for his arrest. We cannot agree with the circuit judge. The plaintiff was not arrested until after, as a trespasser, he reappeared upon the train after his ejection therefrom by the conductor. The plaintiff was in flagrant violation of the law from the beginning of his conduct in the passenger coach until his arrest. He resisted his ejection from the car. He threw rocks at the conductor and at the passenger coach. He re-entered the car after his ejection by the conductor. There was no moment of all that time that he was not liable under the law to being arrested, without a warrant, by the conductor. Why, if a bystander were to throw rocks against a passenger coach in the presence of the conductor, under the law, such bystander could be arrested by the conductor without a warrant. By the terms of the act of 1898, which has become sections 2173 and 2174 of our Civil Statutes, the conductor is clothed with all the powers of constables under the common law to make arrests. That power under the common law to make arrests has received judicial construction in our courts, when it has been held as follows: "From time immemorial, constables and watchmen had authority, without warrant, to arrest those whom they saw engaged in an affray or breach of the peace, and to detain them until they should find proper securities." *City Council v. Payne*,

2 Nott & McC. 475, approved in *State v. Bowen*, 17 S. C. 58; *State v. Sims*, 16 S. C. 486. The law is above us all. We sustain this first exception.

As to the second exception, we may remark that it is controlled by our observations on the first exception, and it is sustained.

The third exception is governed by our previous rulings, and is sustained.

The fourth exception is likewise sustained, for the same reasons.

The circuit judge erred in not sustaining, as sound law, the first request of defendant, as set out in the fifth exception. No warrant was necessary to enable a conductor to arrest a person who was guilty of such conduct as is pointed out in the request. It is governed by sections 2173 and 2174 of our statutes. The fifth exception is sustained.

We also sustain exception 6. Very clearly, the law justifies an arrest without warrant in the case suggested in the exception.

Exception 7 is well founded. It was error for the circuit judge to charge the plaintiff's tenth request. The laws of our state, as we have already shown, authorize a conductor to eject a passenger who is guilty of the bad act indicated. There was no arrest made for such conduct. The plaintiff was arrested for a breach of the peace in the presence of the conductor. The charge should not have been made in the form it was.

As to the eighth exception and the ninth exception, we will consider them together. We cannot see how, after a breach of the law in the presence of a peace officer has been committed, the sudden return to good behavior by a passenger should deprive the conductor, who is acting as a constable under the common law, of the right to arrest without a warrant. It is the offense that will be punished. Proof that, after a man has already completed the commission of an offense, he suddenly returns to good behavior, is at best only a mitigation of the offense. These exceptions are sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the action be recommitted to that court for a new trial.

JONES, J., concurs in the result.

(64 S. C. 329)

WILLIFORD v. AETNA LIFE INS. CO.

(Supreme Court of South Carolina. June 25, 1902.)

LIFE INSURANCE—ACTION ON POLICY—ISSUES—
—CANCELLATION FOR INTEMPER-
—ANCE—EVIDENCE.

1. A life insurance policy contained a provision authorizing its cancellation if the insured became so far intemperate as to impair his health or induce delirium tremens. In an action on the policy the answer alleged that after its issue the insured became very intemperate,—to such an extent as to impair his health,—and that defendant, on knowledge of

the fact, exercised its right and canceled the policy during the lifetime of the insured. Held to raise the issue whether at the date the insurance company attempted to cancel the policy the insured was so intemperate as to injure his health.

2. In an action on a life insurance policy, where defendant answers that it canceled the policy, under its conditions, because the health of insured was impaired by the use of intoxicating liquors, an instruction that the issue was whether the health of the insured was so impaired at the time of the cancellation, by intemperance, as to justify the company in canceling the policy, and that, if such was the fact, it would have the right to cancel the policy, but, if his intemperance did not impair his health, it was improperly canceled, was proper.

Appeal from common pleas circuit court of Fairfield county; Gary, Judge.

Action by Addie J. Williford against the Aetna Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Moore & Thompson and Jas. W. Hanahan, for appellant. Ragsdale & Ragsdale and J. E. McDonald, for appellee.

POPE, J. In 1894 the husband of plaintiff procured the defendant to issue him a policy of insurance on his life for the benefit of the plaintiff. The annual premium was \$57.68, and on the 29th day of September, 1894, the first annual premium was paid, and for each successive year until the 29th day of September, 1899, this annual premium was paid to and received by defendant; but on the 30th day of September, 1899, the defendant returned the annual premium of \$57.68 to the husband of plaintiff, alleging that the defendant insurance company, in the exercise of its right under the policy issued to the husband, Quay D. Williford, would and did cancel said policy, because he had become intemperate in the use of intoxicating liquors, to such an extent as to impair the health of said Quay D. Williford. The said Quay D. Williford denied the defendant's right to cancel said policy for such alleged cause. The said Quay D. Williford died on the 4th day of October, 1900. The plaintiff, as the beneficiary of said policy, made proof of the husband's death, and demanded payment of the policy. This was denied. So in January, 1901, the plaintiff brought her action on the policy in question. The answer of the defendant set up four defenses: First. The defendant denied all the allegations of the complaint, except that the plaintiff was the wife of Quay D. Williford, and as such had an insurable interest in his life. Second. That the policy issued to Quay D. Williford contained a condition whereby it might, for certain causes, be canceled in his lifetime; that, if the insured "shall become so far intemperate as to impair his health or to induce delirium tremens," then the policy shall become void, and that after defendant had issued the policy, during the lifetime of said Quay D. Williford, he became very in-

temperate in the use of intoxicating liquors,—to such an extent as to impair the health of the insured; and that as soon as the fact became known to the defendant, to wit, some time in the year 1899, the defendant exercised the right it had reserved to itself in said policy of canceling said policy during the lifetime of the said Quay D. Williford, and did cancel the same, and refuse to accept any further annual payments on the same. Third. That the defendant has offered to pay to the plaintiff the sum of \$164.24, as the amount due from the legal reserve fund according to the actuaries' table of mortality, with the 4 per cent. interest added thereto, which sum was not forfeited by the cancellation of said policy, but the plaintiff has refused to accept the same. For a fourth defense: That the defendant was not allowed the 90 days after satisfactory proof of death, as required by the policy, before this action was brought; and, inasmuch as this 90 days were not allowed after proof of death before suit was brought on the policy, the plaintiff is not entitled to any interest on the money due her on said policy. The cause came on for trial before his honor Judge Ernest Gary and a jury. The result of the trial was a verdict for the plaintiff for \$2,000. A motion for a new trial was refused.

After entry of judgment, the defendant appealed therefrom on four grounds, as follows, which we will dispose of in their order (that is to say, the third and fourth grounds, as to a refusal for a new trial): "(3) Because his honor erred, as a matter of law, in refusing defendant's motion for a new trial upon the ground that the question of fact, whether the insured at the time the policy was canceled was so intemperate as to impair his health having been squarely put to the jury, 'the verdict of the jury should settle the question.' (4) Because inasmuch as the uncontradicted testimony of the insured's physician showed that at the time of the cancellation of the policy the health of the insured had been impaired by his intemperance, and inasmuch as the verdict of the jury was absolutely without evidence to support it, his honor erred, as a matter of law, in refusing to grant defendant's motion for a new trial."

The circuit judge, in his order refusing a new trial, said: "The jury in the case rendered a verdict for the plaintiff for the full amount of the premium on the life policy upon which plaintiff's action was based. Subsequent to the rendition of said verdict, the defendant's counsel made motion for a new trial before me upon the minutes of the court. The motion was fully argued, and, after considering the same, I am of opinion that the motion is to be decided upon the single question of fact, whether at the time the policy of insurance sued upon was canceled the insured was so intemperate as to injure his health. This question was squarely put to the jury, and I am of the opinion

the verdict of the jury should settle the question. * * *

(a) The policy issued contained these clauses:

"Sec. 6. The answers, representations, and declarations contained in or indorsed upon the application for this insurance, which application indorsed hereon is hereby referred to and made a part of this contract, are warranted to be true; and if this policy has been obtained by fraud, misrepresentation, or concealment; or if the insured shall commit suicide; or if he shall become so far intemperate as to impair his health or induce delirium tremens; or if he shall at any time travel or reside outside of the United States, Canada, or Europe, including the waters connecting those countries; or if during any part of the months of July, August, September, or October, he shall travel or reside in the United States south of the 32d degree of north latitude; or if he shall be personally engaged in blasting, mining, aeronautic, or submarine operations; or in the manufacture of explosive substances; or employed on or about any moving railway cars or engine, or in any ship or boat; or if he shall engage in army or naval service in time of war, —then in each and every of the foregoing cases this policy shall become and be null and void, except as provided in sections 7 and 8.

"Sec. 7. After the death of the insured, if it occurs three years or more from the date hereof, three full years premiums having been paid, and the age correctly stated, this policy shall be indisputable for the conditions named in sec. 6, except as to army or naval service in time of war; but said company reserves the right to enforce its provisions as to fraud, misrepresentation, or *intemperance during the lifetime of the insured.*" (Italics ours.)

The words used in the sixth clause are, "or if he shall become so far intemperate as to impair his health or induce delirium tremens," "this policy shall become and be null and void." By the terms of the policy itself, no officer, except certain officers there enumerated, had the right to alter the terms of the policy, viz., "the president, vice president, secretary, and assistant secretary." So we find in the "case" a letter from J. L. English, secretary, as follows: "Hartford, Connecticut, Oct. 19, 1899. Mr. R. J. Blalock, Manager—Dear Sir: We have received several reports upon Quay D. Williford, policy No. 228,750, which satisfy us that he is drinking to excess, and violating the conditions of his policy thereby, and that he misrepresented his habits as to the use of stimulants in his application. This is to instruct you not to make any effort whatever for the collection of another premium under this policy; but, should the premium be tendered to you on or before the day it falls due, return it immediately to the payer, stating to him that the company is unwilling to continue in-

surance under the policy, for the reason above given. Do not fail to heed this instruction, and notify your agent, if necessary. Yours truly, J. L. English, Secretary." The testimony showed that for the first time, to wit, on the 30th September, 1899, Mr. Blalock, as manager, acted under the instructions of J. L. English, as secretary of the defendant company, on which date he alleged that he canceled the policy. So, also, in the defendant's answer it alleged: "(8) That after the defendant had issued the said policy insuring the life of the said Quay D. Williford, he became very intemperate in the use of intoxicating liquors, to such an extent as to impair the health of the insured, and as soon as this fact became known to the defendant, to wit, some time during the year 1899, the defendant exercised the right it had reserved to itself in and by said policy, of canceling said policy during the lifetime of the insured, and notified the said Quay D. Williford that the said policy had been canceled under the right reserved by the company to cancel said policy, and refused to accept any further annual premiums on the same." The testimony offered at the trial showed that the defendant on no other occasion than on the 30th September, 1899, attempted or sought to cancel this policy on the life of Quay D. Williford. Such being the case, the circuit judge made no mistake in holding that the pleadings and testimony raised the issue, "Was Quay D. Williford so intemperate as to impair his health on the 29th day of September, 1899?" The jury by their verdict said he was not so intemperate at that time as to injure his health. The circuit judge refused to disturb their finding.

(b) The testimony of Dr. Buchanan was not the only testimony before the jury as to the effect of the use of alcoholic liquors upon the said Quay D. Williford at the date of the cancellation of the policy, on the 30th September, 1899. Mr. Elliott and two gentlemen in the business employ of Mr. Williford also testified as to such effects of the liquor habit upon him. Dr. Buchanan was very frank, and by his testimony showed himself to be well up in his profession, both by reading and thought. Still, with the testimony—all the testimony—before the jury, it was their sworn duty to find the facts. Having done so, the circuit judge declined to interfere with their finding. He committed no error of law therein. We cannot, therefore, interfere. Exceptions 3 and 4 are therefore disallowed.

We will next examine exceptions 1 and 2, which are as follows: "(1) Because his honor the presiding judge erred in charging the jury that the defendant company must show 'that at the time the policy was canceled Mr. Williford was intemperate at that time, to such an extent as to impair his health'; thereby, in substance, instructing the jury to exclude from their consideration any impairment in the health of the insured that may have result-

ed from his intemperance prior to the time the policy was canceled. (2) Because his honor erred in charging the jury that the question before them for decision was whether or not the health of the insured was so impaired as to 'justify and warrant the company in canceling the policy, whereas he should have charged the jury that any existing impairment of the insured's health from intemperance would, under the contract, have warranted a cancellation of the policy.' In studying the "case," we have been struck with the remarkable field the defendant was allowed to travel or occupy with its testimony. Dr. Buchanan was the family physician of the said Quay D. Williford, and he appealed to the court to protect him from an examination of Mr. Williford's physical condition, his habits, etc.; but the presiding judge required him to testify fully. Then, too, the plaintiff sought to restrict the testimony up to the 30th September, 1899; but again the presiding judge opened wide the door, so that the whole of Quay D. Williford's habits as to drink up to his death were spread before the jury. But when the circuit judge came to charge the jury, he did use the language imputed to him; but let us see what he did say: "Now, the contention of the company is that the deceased became intemperate to such an extent that it endangered his health or impaired his health, and that the company, under that clause which I have just read to you, claimed that it had the right to cancel the policy to the extent of any further insurance; but it simply admits it is liable under section 8; that is, if three or more premiums have been paid, they pay over what is known as the 'legal reserve,' with interest. That is the liability that the company admits it is due the plaintiff. Now, gentlemen, I am going to submit this case to you upon this question of fact. I charge you that it is a part of the contract entered into by the parties, that if the insured, Mr. Williford, became intemperate to such an extent as to impair his health at the time the policy was canceled, that the company would have a right under that clause to have canceled the policy. But to make it binding, it must appear by affirmative testimony in this case that, at the time the policy was canceled, Mr. Williford was intemperate, at that time, to such an extent as to impair his health. Now, as I understand, that does not mean a drink,—an occasional drink; but he must have indulged in the use of alcoholic stimulants to such an extent as to impair his health or to give him delirium tremens, and that impairment must have been at the time that this policy was canceled, because that is the authority under which the company claims to have canceled it, and that is the only authority by which it could have canceled it. His being drunk at a subsequent time, or his health being impaired subse-

quently, would not authorize the cancellation of the policy, unless his health was impaired by the use of stimulants at the time of the cancellation of the policy. Now, that brings up the case for you to try. At the time this check was tendered to the company, was the health of the insured so impaired, at that time, by intemperance, as to justify and warrant the company in canceling the policy under that clause? If his health was impaired at that time by intemperance, I charge you the company would have the right to cancel the policy. But if at the time the check was tendered he was not intemperate to the extent of impairing his health, the company would not have the right to cancel the policy; and, under its own terms, after five payments the insured could go on in that event for nine years and fifty-nine days. What was the state of health of the insured at the time the check was tendered to Mr. Blalock? Was his health so impaired by the use of alcoholic spirits? Had he indulged in alcohol to such an extent as to impair his health? If so, the company would have the right to cancel the policy to the extent of that reserve fund. If it was not impaired by the use of such stimulants, then the company would have no right to rescind the contract, and it would be binding in that event upon the company." We always prefer to quote a judge's charge in full on a point, to show by his own words what he led the jury to accept. In this instance we see that the circuit judge made no mistake as to the law he laid down. If there was any error made, it was in making his charge too favorable to the defendant. It might be doubted, under the language of this policy, if the insurance company had any right of their own will to cancel this policy. It had to be done for a certain cause. It had to be done in the lifetime of the insured. But where? In court or out of court? Can a company for five years receive premiums on the life of one of their customers, and then, upon idle reports, it may be, of the intemperate habits of one of their customers, whose money they still keep in their own treasury, without any hearing, cancel his policy? The case of *Thompson v. Insurance Co.*, 63 S. C. 297-300, 41 S. E. 464, contains some valuable suggestions along this line, but we are not called upon in this case to question the liberality of the circuit judge to the defendant. The first exception is overruled.

2. Nor do we think the circuit judge was in error as set out in the second exception. We have reproduced the charge. The language is fair to the defendant. If anything,—too fair to the defendant. Let this exception, also, be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J., concurs in the result.

(64 S. C. 354)

LENHARDT v. PONDER et al.

(Supreme Court of South Carolina. July 5, 1902.)

FRAUDULENT CONVEYANCE—ASSIGNMENT
FOR BENEFIT OF CREDITORS—
DEED—CONSIDERATION.

1. Under Rev. St. §§ 2146, 2147, providing that an assignment by an insolvent for benefit of creditors, where any preference is given to any creditor, or any provision made other than for distribution among all the creditors equally, shall be void, or if any insolvent within 90 days before an assignment by him makes a conveyance with a view of a preference the same shall be void, it must be shown, in order to set aside the deed as void, that the grantor was insolvent when he made it; that it was made with intent to give an unlawful preference; that the grantee had reasonable cause to believe the grantor was insolvent, and to believe that the conveyance was made in fraud of the assignment law.

2. To avoid a deed under the statute of Elizabeth, it must be shown either that it was without consideration or that it was made in bad faith as to both parties to the instrument.

3. The recital of consideration in a deed may be explained by parol evidence.

Appeal from common pleas circuit court of Pickens county; Townsend, Judge.

Action by Richard Lenhardt against William J. Ponder, in his own right and as executor of Nancy E. Ponder, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The following is the circuit decree:

"This is an action to set aside a deed made to Nancy E. Ponder by W. J. Ponder on the 22d day of January, 1895, for a tract of land containing 370 acres, and for the sale of the said land to pay the debts of the said W. J. Ponder.

"The deed is assailed for fraud on two grounds: First, that it is fraudulent and void under the assignment act, and, second, that it is fraudulent and void under the statute of Elizabeth. The defendants deny both. The case was referred to D. P. Verner, as special referee, to take the testimony and report the same to the court, and hence it is incumbent upon me to pass upon the testimony unaided by specific findings of fact or law by the special referee.

"The testimony is voluminous, and I have carefully studied and considered the same. I am satisfied that at the time the deed in question was made by W. J. Ponder to his wife, Nancy E. Ponder, he was solvent, and that neither he nor his wife, Nancy E. Ponder, intended by the said deed to give her an unlawful preference over other creditors of the said W. J. Ponder, or in any other way to hinder, delay, or defeat other creditors of the said W. J. Ponder. I am satisfied and find that the said deed was made in good faith and upon a valuable consideration, and not with a fraudulent intent, or under any fraudulent agreement as to other creditors, on the part of either W. J. Pon-

der or his wife, Nancy E. Ponder, nor for any unlawful purpose, but was made in payment of valid and existing indebtedness which W. J. Ponder owed his wife, Nancy E. Ponder. The testimony shows beyond all question that the said W. J. Ponder had mortgaged 109 acres of land belonging to his wife to one A. L. Richardson, dated March 13, 1894, with the understanding that the said W. J. Ponder was to pay for the same out of the home tract of land. It is true that the plaintiff produced in evidence a deed from Nancy E. Ponder to W. J. Ponder, dated the 14th day of February, 1894, in which it is stated that W. J. Ponder had paid his wife for the land therein described, and had paid the taxes on the same since 1870, and used and occupied the same as his own during that time; but this is only in the nature of a receipt or admission which it is competent to explain, and I am satisfied from the testimony in the case that this receipt has been conclusively explained by the defendants. I find that the object of making this deed was to enable W. J. Ponder to include it in the said mortgage, and that he did not pay his wife for the same, but that the deed was drawn by a lawyer through whom the Richardson money was borrowed, and he inserted therein the clause above referred to. I am further satisfied from the testimony that W. J. Ponder was to account for this tract of land to his wife in the sum of \$1,500, which the land at that time was well worth. The testimony shows, and in fact it is admitted, that this 109-acre tract of land was sold under this mortgage against W. J. Ponder. At the time the deed from W. J. Ponder to Nancy E. Ponder was made, the said W. J. Ponder was the head of a family, and, of course, entitled to a homestead exemption in land to the amount of \$1,000. The value of this homestead exemption, and the value of the tract of land of 109 acres which W. J. Ponder had mortgaged to A. L. Richardson, I am satisfied is more than the value of the land in question in this case either at the time said deed was made or now. The witnesses in this case testify as to the value of this land both now and then, and I do not think it possible to fix under this testimony the value of this land at more than \$2,500. This alone, it seems to me, is conclusive of the case, but there were other items which went into the consideration of that deed. The testimony clearly shows that Nancy E. Ponder agreed to accept the deed for this 370-acre tract of land in payment of all that W. J. Ponder was due her, and called for her attorney to prepare the papers. All of the facts were laid before this attorney, and in his opinion Mrs. Ponder was also entitled to compensation for the rents which her husband had received from her tract of land, and also for her moneys which he had used, under the understanding that these items would be made good to her, and it was upon this the-

¶ 2. See Evidence, vol. 20, Cent. Dig. § 1912.

ory on the part of the said attorney that the consideration in full was stated to be \$8,000, an amount much more than the land was worth at that time; but Mrs. Ponder no doubt realized at that time that she would soon depart this life, and desired a complete settlement of the whole matter in order that she might dispose of her property to her children, which she did do on the same day the said deed was dated. W. J. Ponder, in his evidence, gave a full history of the transaction from about 1870 down to the execution of the deed, and Capt. Blythe gave a clear and concise statement of the facts attending the execution of the deed and will. The fact that an able and reputable lawyer was employed to prepare the papers and transact the business, under whose advice Mrs. Ponder and W. J. Ponder acted, is strong evidence that the whole matter was in good faith. I see nothing secret about the transaction, as this attorney went from Basley to the home of Mrs. Ponder, and there all the papers were prepared, and some of the neighbors were called in to witness the same. Capt. Blythe gives a clear and concise statement of all that took place at this time, and of the agreement and understanding between Mrs. Ponder and her husband; and from this testimony I am clearly of the opinion that the deed was upon valuable consideration and made in good faith, and with no intent to defeat the rights of the other creditors of W. J. Ponder, or to evade the assignment law of this state; in fact, the evidence is totally insufficient to satisfy me of any fraud whatever on the part of either W. J. Ponder or his wife.

"It is true that, since the execution of the said deed, W. J. Ponder has lost all of his property, but the testimony shows that the great bulk of the debts which caused him to lose this property were made after the execution of this deed to his wife. There is an old saying that 'our hind sights are better than our fore sights,' but it is equally true that we are very often deceived by our hind sights. We are very often led to believe that persons were prompted by wrong motives in their transactions. After a lapse of over six years since the transaction was had, I can see how the creditors of W. J. Ponder could imagine that he and his wife did concoct a scheme to save 370 acres of land from the wreck of his property, but imagination is one thing and proof is another. There is a total failure of evidence to satisfy my mind that any such scheme was concocted or thought of. How could they, in 1895, foresee what has since occurred? At that time he had sufficient property to pay his debts left after the sale of this tract of land to his wife. In my judgment, the balance of his property at that time was worth enough to pay all the debts he then owed, and so find Mr. E. M. Hunt was also his surety on the Lenhardt notes, and at that time the testimony shows that he was entire-

ly solvent. The testimony further shows that both Ponder and Hunt were regarded as good for their debts. Mr. Lenhardt himself says that he considered them good. The fact that after this time both of them became insolvent and lost their property cannot affect the transaction had long before the debts which resulted in the loss of their property were created and enforced, especially when there is not a particle of evidence to show that the deed by W. J. Ponder to Nancy E. Ponder was made with the view to put the said Ponder in position to afterwards incur indebtedness and defraud creditors thereafter existing or then existing. I see no reason, according to the testimony, why W. J. Ponder and his wife should enter into a deliberate agreement to practice fraud upon the creditors of Ponder. In fact, there is no evidence to show that Mrs. Ponder had any knowledge of any of the debts of W. J. Ponder except the mortgage to A. L. Richardson over the tract of land, which was worth much more than it was mortgaged for, and which sold under forced sale for nearly twice as much as that mortgage called for.

"It is clear, under the testimony, that if the plaintiff, Richard Lenhardt, had made efforts to do so when his papers became due, he could have made his money without any trouble, but he chose to stand back for more than six years after the deed in question was made, and after both W. J. Ponder and E. M. Hunt had contracted a great many other debts, including mortgages on their property; and it is his own misfortune that these subsequent debts and liens were paid, and he did not get his money. I am clearly of the opinion that the deed from W. J. Ponder to his wife, Nancy E. Ponder, was made in good faith, to pay just indebtedness, and is not tainted with fraud on the part of either the grantor or grantee, and I so find. I therefore hold that the said deed is neither void under the assignment law of this state nor under the statute of Elizabeth, but a valid conveyance. The fact that Nancy E. Ponder executed her will at the same time the deed in question was made cannot affect the issues here, because the testimony clearly shows that they were entirely different and separate transactions. W. J. Ponder made the deed, which was prepared by the lawyer of Mrs. Ponder, who was at that time sick in bed; and while her lawyer was present she simply had him to draw her will by which she gave her property as provided therein. There is no proof whatever to show that this was any part of a scheme to benefit W. J. Ponder, or to hinder, delay, and defeat his creditors; and I therefore hold that these two transactions were entirely separate and distinct, and have no connection with each other.

"The plaintiffs have filed exceptions to portions of the testimony. I overrule all of these exceptions except the fourth, for the reason that section 400 of the Code does not

apply, and the testimony is otherwise admissible under the charge of fraud made by the plaintiffs. The plaintiffs themselves first introduced the testimony as to the transactions between W. J. Ponder and his wife, and I think thereby, even if section 400 of the Code applied, let down a gap for the defendants to bring out the testimony which they introduced with reference to these transactions. As to the fourth exception, I sustain it in so far as the testimony relates to conversations between W. J. Ponder and his mother in reference to the deed in question; but such parts of said testimony as relate to conversations and transactions between W. J. Ponder and Nancy E. Ponder, I think, are competent. In my judgment, the plaintiffs have failed to make out their contention, either under the assignment law or under the statute of Elizabeth, or to show fraud on the part of either W. J. Ponder or his wife, Nancy E. Ponder, with reference to the matters in dispute in this case, and I so find.

"It is therefore ordered, adjudged, and decreed that the complaint be dismissed, and that the plaintiff pay the costs of this action."

From this decree the plaintiff appeals.

J. M. Boggs, Cothran & Cothran, and M. F. Ansel, for appellant. Carey & McCullough and Blythe & Blythe, for respondents.

GARY, A. J. This is an action by the plaintiff, a judgment creditor of the defendant W. J. Ponder, to set aside a deed to 870 acres of land, executed by the said W. J. Ponder to his wife, Nancy E. Ponder, on the 22d day of January, 1895, on the grounds that the said deed is void under the assignment law and also under the statute of Elizabeth. The facts are set forth in the decree of his honor, the circuit judge, which will be reported. The complaint was dismissed.

We will first consider whether the circuit judge erred in holding that the deed was not void under the assignment law.

Sections 2146 and 2147 of the Revised Statutes are as follows:

"Sec. 2146. Any assignment by an insolvent debtor of his or her property for the benefit of his or her creditors, in which any preference or priority is given to any creditor or creditors of the said debtor by the terms of the said assignment over any other creditor or creditors other than as to any debts due the public, or in which any provision or disposition of property so assigned is made or directed other than that the same be distributed among all creditors of said insolvent debtor equally in proportion to the amount of their several demands, and without preference or priority of any kind whatsoever save only as to debts due the public, and save only as to such creditors as may accept the terms of such assignment and execute a release of their claim against the debtor, and

except as hereinafter provided, such assignment shall be absolutely null and void and of no effect whatsoever.

"Sec. 2147. If any person, being insolvent, within ninety days before the making of any assignment by him or her of his or her property for the benefit of his or her creditors, with a view to give a preference to any creditor or person having a claim against him or her, or who is under any liability for him or her, procures or suffers any part of his or her property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his or her property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or any part of his or her property, or to be benefited thereby or by such attachment, having reasonable cause to believe such person to be insolvent, and that such attachment, sequestration, seizure, payment, pledge, assignment or conveyance is made in fraud of the provisions of this chapter, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited. Nothing, however, in this section shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, and upon a security taken in good faith on the occasion of the making of such loan, or any security bona fide made for advances."

In *Verner v. McGhee*, 26 S. C. 248, 2 S. E. 113, the court says: "The assignment act has no application unless there is either an actual assignment, or a state of facts fully proved or admitted, which in conscience and equity are tantamount to an assignment with unlawful preferences." Mr. Chief Justice McIver reviews the authorities in *Porter v. Striker*, 44 S. C. 183, 21 S. E. 635, and concludes the opinion of the court in the following language: "From this review of the cases upon this subject in this state, the following propositions applicable to the case under consideration are clearly deducible: First. That an insolvent debtor may, by a bona fide mortgage, which is intended merely as a security for a just debt, prefer one of his creditors. Second. That if the mortgage is really designed to operate, not as a security merely, but as a means of transferring the debtor's property to the favored creditor in preference of the other creditors, then it is void under the assignment law. Third. That the question as to what was the intention is a question of fact." The court, in *Finley v. Cartwright*, 55 S. C. 198, 33 S. E. 359, says: "In order to set aside a conveyance as void under section 2147, Rev. St., it is necessary to show: (1) That the grantor was insolvent at the time of the conveyance; (2) that the conveyance was made with a view to give an unlawful preference; (3) that the grantee had reasonable cause to believe that the grantor was insolvent at the time of the conveyance;

(4) that the grantee had reasonable cause to believe that the conveyance was made in fraud of the assignment law; (5) that the conveyance was executed within ninety days previous to the execution of a valid deed of assignment,"—citing *Haynes v. Hoffman*, 46 S. C. 166, 24 S. E. 103. In *Lamar v. Poole*, 26 S. C. 441, 2 S. E. 322, the court uses this language: "The action below assailed the paper in question as a violation of section 2014, Gen. St. It should be remembered that the question of fraud is not involved under that section. A paper may be fraudulent at common law or under the statute of Elizabeth, and might be avoided on that ground by proper proceedings to that end, and yet it might stand free from attack under section 2014, supra. Two things must concur under that section to render an instrument void: First, an assignment, and, second, a preference given in said assignment; and it is the preference which the act inhibits, whether that preference be founded upon a bona fide claim or a fraudulent one." By reference to section 2146, it will be seen that the statute renders null and void any assignment by an insolvent debtor of his property, for the benefit of his creditors, in which any preference or priority is given to any creditor of the debtor by the terms of the assignment over any other creditor other than as therein provided; nevertheless, the doctrine is settled beyond controversy, by the decisions of this court, that a deed or other instrument of writing which is intended have the force and effect of a formal assignment for the benefit of creditors is as obnoxious to the provisions of the statute as if the insolvent debtor had attempted by the terms of a formal assignment to give the preference prohibited by the assignment law. It will also be observed that section 2147 is not in express terms made applicable to cases in which the debtor did not make a formal assignment for the benefit of creditors within 90 days after the execution of the deed or other instrument intended to give the preference prohibited by that section. The necessity for the party attacking the deed to show: (1) That the grantor was insolvent at the time of the conveyance; and (2) that the conveyance was made with a view to give an unlawful preference,—arises whether the case comes within the provisions of section 2146 or section 2147, by the terms of said sections. While it is true that the requirements that the party attacking the deed must show: (3) That the grantee had reasonable cause to believe that the grantor was insolvent at the time of the conveyance; and (4) that the grantee had reasonable cause to believe that the conveyance was made in fraud of the assignment law,—are not applicable in the absence of a formal assignment within 90 days after such deed, these requirements are, however, but the declaration of salutary rules which equity and good conscience demand should be enforced, whether the case arises under section 2146 or section

2147. Applying these principles to the facts of the case, this court is satisfied that the testimony fails to show that either the first, second, third, or fourth of said requirements was sustained by the evidence.

We will next consider whether the said deed was void under the statute of Elizabeth. The rule is thus stated in *Magovern v. Richard*, 27 S. C. 286, 3 S. E. 340: "Was the mortgage void under the statute of fraud? To be void under said statute or at common law, it should be made to appear that it was either without consideration or that it was mala fide,—one or both. In other words, for a paper of the kind to be invulnerable, it should be based upon a valuable consideration and be a bona fide transaction. Now, there can hardly be a doubt—in fact, it is not denied—that *Bollman Brothers* held a large claim on *Richard*, which this mortgage was intended to secure; so that one of the elements necessary to sustain it is present. Was it bona fide or was it mala fide as to both parties to the instrument?—because this is necessary to avoid it. What is mala fide? It must be an intent not simply to assert one's own rights, but, in addition thereto, to defeat the rights of another, participated in, as we have said, by both parties to the instrument." The last-mentioned case is cited with approval in the recent case of *McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86, in which the court also uses this language: "To annul for fraud a deed based upon a valuable consideration, it must not only be shown that the grantor intended thereby to hinder, delay, or defraud, creditors, but it must also appear that the grantee participated in such fraudulent purpose. Even if we were to assume that there is evidence of mala fides in the grantor, yet if the sole purpose of the grantee was to secure her claims, having no intent to hinder, delay, or defeat other creditors, her title cannot be affected by the mala fides of the grantor. The evidence falls utterly to show any intent on the part of the grantee to defraud her husband's creditors, and merely shows a purpose to secure her own bona fide claims. Conceding the insolvency of the firm of which the grantor was a member, it does not appear that the grantee was aware of it; and, if she was aware of it, that would not show fraud in her, since a bona fide creditor has the right to obtain a transfer of property from an insolvent debtor, at a fair price, for the sole purpose of securing or paying the debt." This court is satisfied that the testimony fails to show such facts as constitute fraud, and that the circuit judge was not in error in concluding that the deed was not void under the statute of Elizabeth.

These views practically dispose of all the exceptions except the tenth, which is as follows: "(10) Error in holding that the recital in the deed of 109 acres from *Nancy E. Ponder* to *W. J. Ponder*, to the effect that *W. J. Ponder* had paid for the land, etc., is only in

the nature of a receipt or admission which can be explained, and that it had been conclusively explained. Whereas, he should have held that she, as well as those who claim under her, are estopped now from disputing said recital." The cases of Daniels v. Moses, 12 S. O. 138, 139, and Moffatt v. Hardin, 22 S. C. 27, and 20 Am. & Eng. Enc. Law (1st Ed.) 459 et seq., show that this exception cannot be sustained, for the reasons stated by the circuit judge.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(64 S. C. 371)

STATE v. CONKLE et al.

(Supreme Court of South Carolina. July 5, 1902.)

CRIMINAL LAW — MAGISTRATE'S COURT — CHANGE OF VENUE—APPEAL.

1. Under Act 1896 (22 St. at Large, p. 12), providing that, whenever accused in a criminal case which is to be tried before a magistrate shall file an affidavit that he does not believe that he can obtain a fair trial, the papers shall be turned over to the nearest magistrate, where a party accused before a magistrate files such an affidavit it is mandatory on the magistrate to grant a change of venue.

2. Under Cr. St. § 68, providing that within 10 days after notice of appeal a magistrate shall file the testimony in writing taken at the trial, the proper practice is to take the testimony in writing, and have it signed by the witnesses, but failure so to do may not cause the judgment to be set aside.

Appeal from general sessions circuit court of Newberry county; Gary, Judge.

William Conkle, Thomas Banks, and Neeley Long were convicted of malicious injury in the magistrate's court. From an order of the circuit court reversing the judgment of the magistrate, the state appeals. Affirmed.

Solicitor Sease and Schumpert & Hollo-way, for the State. Cole L. Blease, for appellees.

JONES, J. The defendants, having been brought before a magistrate for trial upon a warrant charging them with malicious injury to personal property, made timely motion for a change of venue to the nearest magistrate, upon an affidavit complying with the act of 1896 (22 St. at Large, p. 12). The magistrate refused the motion and tried defendants, who were found guilty and sentenced. On defendants' appeal, the circuit court reversed the judgment of the magistrate and remanded the case, to be transferred for new trial to the nearest magistrate, pursuant to said act. The state now appeals from the judgment of the circuit court.

The first exception raises the question whether the circuit judge erred in holding that under said act it is mandatory upon the magistrate to order the change of venue, instead of holding that it was discretionary with the magistrate. The act provides:

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 241.

"Sec. 2. Magistrates shall have power to change venue in all cases, civil and criminal, pending before them. * * * Whenever either party in a civil case, or the prosecutor or accused in a criminal case, which is to be tried before a magistrate, shall file with the magistrate issuing the paper an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate, the papers shall be turned over to the nearest magistrate not disqualified from hearing said cause in the county, who shall proceed to try the case as if he had issued the papers: provided, such affidavit shall set forth the grounds of such belief," etc. It being admitted that the affidavit submitted complied with the requirement of the statute, we agree with the circuit court that it was mandatory upon the magistrate to change the venue, and that it was reversible error for the magistrate to proceed with the trial of the case.

Under this view, it becomes unnecessary to consider the other exception, raising the question whether the circuit court erred in reversing the judgment of the magistrate because the testimony of the witnesses was not read over to them and signed by them before sentence was passed, although the testimony was so read over to the witnesses and signed by them after the trial, and prior to the filing of the return of the magistrate on appeal from his judgment. The only provision on this subject to which our attention is directed is that contained in section 68, Cr. St., as follows: "Within ten days after said service [referring to notice of appeal from magistrate], the said magistrate shall file in the office of the clerk of the court the said notice, together with the record and statement of all proceedings in the case, and the testimony in writing taken at the trial and signed by the witnesses." Inasmuch as appeals from magistrates are heard upon the papers required to be filed as above, without examination of witnesses, the implication is that on trials before magistrates the testimony of witnesses should be taken down in writing and signed by them before the magistrate at the trial. This is undoubtedly the proper practice, and its enforcement would be salutary; but we are not prepared to say now that every failure to have a witness to sign his testimony, from accident or otherwise, during the progress of the trial, would of itself be good ground for setting aside the judgment of the magistrate.

The judgment of the circuit court is affirmed.

(64 S. C. 344)

STATE v. HOWARD.

(Supreme Court of South Carolina. July 3, 1902.)

CRIMINAL LAW—APPEAL—REVIEW—BURGLARY.

1. An exception to the legality of the jury will not be considered on appeal when no such objection was raised below.

2. A refusal of a new trial on conviction of a crime is not error in law, where there is some evidence tending to support the charge.

3. Where a servant who has a right to sleep in his master's dwelling goes in, not with intent to lodge, but with intent to steal, by opening the door or raising the sash, and actually steals and carries away his master's goods, he commits a burglary.

Appeal from general sessions circuit court of Beaufort county; Klugh, judge.

Sam Howard was indicted for burglary, and from a conviction he appeals. Affirmed.

W. S. Tillinghast, for appellant. Mr. Davis, for the State.

JONES, J. The defendant was convicted under an indictment for burglary and larceny, and, being recommended to mercy by the jury, was sentenced to five years' imprisonment in the penitentiary. He was not represented by counsel on the trial, but after conviction he secured counsel, and moved for a new trial "on the ground that a joint occupant of a dwelling house cannot be convicted for burglariously breaking into such dwelling house," which motion was refused by the circuit court; "the court being of the opinion that the testimony establishes the fact that the defendant was a servant, and not a joint occupant of the dwelling house is question." The defendant appeals, excepting that the court erred (1) in holding that a man can be indicted for burglary in his own house; (2) in holding that a joint occupant of a dwelling house could be convicted of burglary in breaking and entering such dwelling house; (3) there is an entire failure of evidence of any breaking in this case; (4) that the defendant was without counsel on his trial, and it was incumbent upon the state to try him by a legally constituted jury, and, there being no law authorizing the array of jurors that tried defendant, the conviction was illegal, and the court was without jurisdiction to impose the sentence on him.

These exceptions take a much wider range than is justified by the "case" presented as a basis for exceptions. In reference to the exception touching or alleging illegality of the jury, it does not appear that any objection to any juror or to the venire was raised in the circuit court, or was considered by said court; nor is there any fact stated in the "case" upon which any such exception could be predicated. A new trial will not be granted for alleged illegality of the jury which is asserted for the first time in this court.

The circuit did not hold that a man can be indicted for burglary in his own house, as alleged in the first exception; nor did the court hold that a joint occupant of a dwelling house could be convicted of burglary of such house, as alleged in the second exception. The motion for a new trial was made

upon the single ground stated above, viz., that a joint occupant of a dwelling house cannot commit burglary of such house; and the new trial was refused because the court considered the evidence as showing that defendant was merely a servant, and not a joint occupant. The motion assumed the existence of evidence tending to show a burglary, except that, in view of defendant's counsel, the evidence showed that defendant jointly occupied the house with the prosecutor, and that such joint occupant could not commit burglary in such house. The evidence as to the relation between the prosecutor and the defendant with reference to the house was rather meager. The prosecutor, however, testified that the defendant had been staying with him about a month, and that on the 2d of October, 1901,—the night of the alleged burglary,—between 1 and 2 o'clock, the defendant went out of the house, and, on prosecutor's asking where he was going, defendant answered, "Just a little ways." The defendant testified that he had been working for the prosecutor for three months, for which prosecutor owed him. This testimony supports the view of the circuit judge that the defendant was a servant of the prosecutor, and not a joint occupant of prosecutor's dwelling; but perhaps the testimony might justify an inference that defendant was permitted to lodge in the dwelling house of his employer, and there was no evidence that defendant occupied any room other than that occupied by the owner. We will, therefore, in liberality to the appellant, consider the case as one of a servant permitted to sleep in or occupy the same room with the master and owner of the dwelling, charged with burglary of such dwelling. Was it error of law to refuse the motion for a new trial? If there was any testimony to support the verdict, it was not error to refuse new trial. This court will not consider the sufficiency of evidence to convict, but will examine the testimony only for the purpose of ascertaining if there was any testimony tending to prove the charge; it being error of law to refuse a new trial only when there is a total failure of evidence tending to prove the charge or allegation. There was evidence tending to show that the prosecutor was the owner of the dwelling house, as alleged in the indictment; that on the night of the 2d of October, 1901, between 1 and 2 o'clock, the defendant, who had for some time previous been in the employ of the prosecutor, Paul Cooxan, and had probably been permitted to occupy the same room occupied by the owner as a lodging place, went out of said dwelling, closing the door behind him; that the house was closed up when defendant went away; that early that morning the prosecutor discovered that his trunk had been broken into, and about \$16 in money taken therefrom, and that the sash of the window was open or broken; that the defendant was missing; that the prosecutor pursued, and

¶ 1. See Burglary, vol. 2, Cent. Dig. §§ 2, 3.

found the defendant in Beaufort, in the possession of about \$13 of the stolen money, having spent some for a cart; and that defendant confessed to having taken the money. The testimony was such as required it to be submitted to the jury to determine whether the defendant, after leaving the house that night, returned and entered either the door by pushing it open, or the window by raising the sash, with intent to steal the money, or whether he had taken the money out of the trunk before he left the house that night, between 1 and 2 o'clock; and, in the absence of any complaint as to the charge, we are bound to assume that the jury were properly instructed. If the defendant, being rightfully in the prosecutor's dwelling as his servant, broke open the trunk and stole therefrom the money, that would not constitute burglary; but if, being without the dwelling, he should push open a closed door, or raise a sash, and enter, not for the purpose of using the dwelling house as a lodging place, within his trust and employment, but for the purpose of stealing his master's goods, which, of course, is not within his trust and employment, that would be burglary. A servant's right to enter his master's dwelling depends upon the purpose with which he enters. If he enters pursuant to the trust of his employment, being rightfully in, if he then conceives the felonious purpose, and attempts to carry it out without breaking any inner door, it is not burglary, for there is no breaking and entering with felonious intent; but if, being out of the dwelling, he does that which would constitute a breaking and entering, in a stranger, and does it with the intent to steal or commit a felony, or if, being in without breaking, he breaks an inner door with such purpose, then he commits burglary, for the entrance for such purpose is in violation of his trust and employment. It is true that one cannot commit burglary of his own dwelling house, since burglary is the breaking and entering in the night of the dwelling house of another with intent to commit a felony therein. But a servant who is permitted to lodge in the same room with the master and owner of the dwelling has no such interest in the dwelling house as to make it in any proper sense his dwelling; and, upon the facts in this case, it was properly laid in the indictment as the dwelling of the prosecutor. "When persons are abiding in a house as guests, or by sufferance or otherwise, having no fixed or certain interest in any part of it, and burglary is committed in any of their apartments, the indictment should lay the offense as in the mansion of the proprietor of the house." Archb. Cr. Prac. & Pl. 1094-1099. In 2 Russ. Crimes, 7, citing 1 Hale, P. C. 553, it is stated: "It will amount to burglary if a servant in the nighttime open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or

with any other felonious design," etc. In 2 Bish. Cr. Law, § 97, the author states: "If one is within, however lawfully, and there breaks an inner door, through which he enters a room with burglarious intent, as where a servant lifts the latch and goes into a chamber to commit murder or a rape, it is burglary." In a note to this section the author says: "Probably if the chamber were his own lodging room, the case would be otherwise, because of his quasi interest. * * *" Lord Hale makes the distinction whether the "opening of the door is within his trust." If it is, he considers "the breaking with felonious intent not to be burglary, but otherwise if it is not within his trust." But we do not think that a servant, though permitted to lodge with the master in the master's chamber, has any such interest in the dwelling or habitation as would make it within his trust and employment to enter such chamber with felonious intent to steal the master's goods. The principle is well stated in *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9, thus: "Though he [the servant] might have the privilege of opening and entering his master's mansion house to go to bed therein, he would, it seems to me, be guilty of burglary if he unlocked and entered it in the nighttime with the intent to rob, and did then commit robbery therein; only, to justify a conviction in such a case, the jury ought to be satisfied by the evidence, beyond a reasonable doubt, that the intent to rob existed when the house was entered, not formed afterward." Assuming, therefore, that the defendant was the servant of the prosecutor, and had permission to lodge in the same room with the prosecutor,—there being some evidence that he entered through the closed door, or by raising the window sash, with intent to steal the prosecutor's money, and did so steal the money,—it was not error of law to refuse the motion for a new trial.

Judgment affirmed.

(84 S. C. 350)

STATE v. LARK.

(Supreme Court of South Carolina. July 3, 1902.)

CRIMINAL LAW—APPEAL—REVIEW—OVERRULING DEMURRER—HOMICIDE—INDICTMENT—ARREST OF JUDGMENT.

1. Where a demurrer to an indictment was overruled, and a motion made in arrest of judgment on the same ground was refused, exceptions for error in refusing a new trial do not bring up for review on appeal the overruling of the demurrer.

2. An indictment charging defendant with committing a homicide by striking in the head "with a stone or iron hammer" is not defective because charging the crime disjunctively.

3. An indictment recited that it was found some months before the commission of the alleged offense. The journals of the court showed that the indictment was found after the alleged offense was committed. No motion was

§ 2. See Criminal Law, vol. 15, Cent. Dig. §§ 2445, 2450, 2453.

made to amend. *Held* not good ground in arrest of judgment.

Appeal from general sessions circuit court of Anderson county.

Walter Lark was convicted of manslaughter, and appeals. Affirmed.

M. L. Bonham, for appellant. U. X. Gunter, Asst. Atty. Gen., for the State.

JONES, J. The defendant, indicted for murder, was found guilty of manslaughter, and, before sentence was passed, moved in arrest of judgment on these grounds: "(1) Because it appeared on the face of the indictment that the bill was found at a court begun to be holden on the 10th of February, 1901, and that the offense was alleged to have been committed on the 11th day of October, 1901; so that it would appear that the bill of indictment was found several months before the offense was committed. (2) Because the indictment alleges 'that the said Walter Lark him, the said Will Harmon, then and there, feloniously, wilfully, and of his malice aforethought, with a stone or iron hammer did strike,' etc. The use of the disjunctive conjunction 'or,' in the description of the instrument used, making the indictment fatally defective for uncertainty." The motion was overruled, and the defendant was sentenced. The appeal assigns error in refusing to arrest judgment upon the grounds stated.

It appears that the motion in arrest of judgment is based upon objections to the indictment for defect apparent on the face thereof. Section 57, Townsend's Code, provides that "every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." The purpose and effect of such legislation are to prevent motions to arrest judgment on grounds based upon defects in indictment apparent on the face thereof. It is true that such grounds were taken by the defendant's counsel by demurrer or motion to quash before the jury were sworn, and the same were overruled; but no exception was taken to the ruling of the court on the demurrer or motion to quash, and, in the absence of such exception, the action of the court in that regard is not properly under review. This is sufficient to require a dismissal of the appeal. We will, however, add some observations in reference to the matters upon which a reversal is sought:

Section 56, Cr. Code, provides: "Every indictment shall be deemed and adjudged sufficient and good in law which, in addition to allegations as to time and place as now required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the same, or so plainly that the nature of the offense charged may be easily understood," etc. Section 60, Cr. Code, provides: "Every indictment for mur-

der shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased." The second objection to the indictment relates to the allegation as to the instrument with which death was caused, and it is contended that the use of the disjunctive "or" in the phrase "with a stone or iron hammer" is fatal, for uncertainty and repugnancy. But there is no uncertainty in the statement of the manner in which the death of the deceased was caused. The charge plainly informs the defendant that he is called upon to answer for a homicide committed, not by poisoning, drowning, strangulation, stabbing, shooting with gun or pistol, etc., but by striking on the head with some hard, blunt instrument,—a stone or iron hammer. Whether the particular instrument used was a stone or iron hammer was not material, in the information necessary to the court to enable it to determine whether a crime of which it had jurisdiction was charged, and what punishment to impose in case of conviction; nor was it necessary to enable defendant to prepare for his defense; nor was it necessary in the event of a plea of former acquittal or conviction. It is true that an indictment must not charge the offense disjunctively, as shown in *State v. O'Bannon*, 1 Bailey, 144; but the indictment does not violate this principle, for both the offense and the punishment therefor are the same, whether the instrument of death was a stone or hammer.

The other objection to the indictment, viz., that it shows upon its face that the bill of indictment was found before the offense was committed, is equally untenable in arrest of judgment. Such objection would be fatal if in fact the indictment was found before the alleged time of the crime charged, for it would be absurd to charge the commission of a crime after the finding of the indictment. The indictment, however, charges that defendant, on the 11th day of October, 1901, "did strike and wound," "did kill and murder" the deceased; thus also showing on its face that the crime charged was a past offense, and committed before the finding of the indictment. The recital in the caption is alone relied on to show that the offense was charged to have been committed before the finding of the indictment. But the best evidence of the time of the finding of the indictment was the court journals, of which, doubtless, the trial judge took notice. The cases of *State v. Williams*, 2 McCord, 801, and *Vandyke v. Dare*, 1 Bailey, 65, show that the caption of an indictment is no part of the finding of the grand jury, and may be corrected and amended at any time by the journals of the court; and the case of *State*

v. May, 45 S. C. 509, 23 S. E. 518, shows that under section 58, Townsend's Code, an indictment charging that an offense was committed in a certain year may be amended on the trial by inserting the proper year. As a matter of fact, the recital in the caption was erroneous, because the 10th day of February, 1901, fell on Sunday, and it was impossible that the court should have begun to be holden on that day; and the judge doubtless knew from the journal of the proceedings of the court, begun to be holden by him on the 10th day of February, 1902, at which term the defendant was brought to trial, that the indictment was in fact found during that term. Defects in indictments which may be cured by amendment are not good grounds in arrest of judgment.

The judgment of the circuit court is affirmed.

(64 S. C. 425)

MURCHISON v. MILLER et al.

(Supreme Court of South Carolina. July 21, 1902.)

JUDGE—POWERS IN VACATION—WRIT OF ASSISTANCE—EVIDENCE—RES JUDICATA.

1. Townsend's Code, § 2733, providing that the judge of the circuit court at chambers and in vacation, as well as in term, shall make, direct, and award mesne and final process, *held* to authorize a judge to order a writ of assistance, to enable the sheriff to put the purchaser at a judicial sale into possession, at chambers.

2. Where, on motion for a writ of assistance, there is evidence of knowledge of a judicial sale of the land, and that the motion is resisted on the ground that the sale is void, it is unnecessary to show a deed under the sale and a demand for possession.

3. Where a foreclosure sale has been confirmed on error, and an order entered refusing to enjoin the sale, on motion for writ of assistance respondent cannot set up as a defendant that the sale was void under an agreement between the parties relied on in motion to enjoin.

Appeal from common pleas circuit court of Richland county; Gary, Judge.

Motion by Harriet Murchison, executrix, in her action against Minnie H. Miller, Robert N. Senn, Wm. H. Lyles, and John S. Verner, receiver, for writ of assistance against Minnie H. Miller and her husband, Jasper Miller. From order commanding writ to issue, Jasper Miller and wife appeal. Affirmed.

Frank G. Tompkins and John T. Duncan, for appellants. R. W. Shand, for appellee.

JONES, J. This is an appeal from an order of Judge Ernest Gary, made at chambers, granting a writ of assistance to put a purchaser at mortgage foreclosure sale into possession of the premises.

The grounds upon which the order was granted will appear by reference to the order, which is as follows: "This matter came before me on a rule issued on the application of the plaintiff against the defendant Mrs. Minnie H. Miller, and her husband, Jasper Miller, to show cause why they should not be attached for contempt of court in refusing to

yield up possession of the land purchased by Harriet M. Beckwith under the decree of the court in this case; and that such further order, if any be necessary, be issued to force compliance with said decree. The circuit court adjourned without hearing a return to said rule, and the matter was taken up by me in Columbia on the 10th of September, 1901. The respondents made return by their attorneys, Duncan and Tompkins. It happens that the property in question was mortgaged by Minnie H. Miller to Harriet Murchison, executrix (now Harriet M. Beckwith). The mortgage was foreclosed by a proceeding in court to which Mrs. Minnie H. Miller was duly made a party, and she made default. The property was sold under the decision of the court, from which there was no appeal. The sale of the part now in question to Mrs. Harriet M. Beckwith was reported by the master to the court, and this report was duly confirmed. The decree of the court directed that, upon the making of the deed by the master, the purchaser be let into possession of the premises purchased by her on production of the deed executed by the master, it being recorded. The possession has not been surrendered by the respondents, and they, in their return, dispute the right of the plaintiff to possession, on the grounds that there was no legal sale, by reason of an alleged agreement between Mrs. Beckwith and Jasper Miller, representing his wife, made prior to the sale. This objection has previously been urged by Mr. and Mrs. Miller by a proceeding in the cause had before Judge Townsend prior to the sale, in which Judge Townsend refused to interfere. From the order of Judge Townsend no appeal was taken. It is manifest, therefore, under the decree, sale, and deed in this case, that the plaintiff and purchaser is entitled to the possession of the property covered by her deed, and that the respondent, Mrs. Minnie H. Miller, and her husband, Jasper Miller, claiming to represent her as agent, are improperly refusing to surrender possession. Under these circumstances, it is proper for the court to see that its decree is carried out. Process of contempt might justly be invoked in the court of equity, but plaintiff waives at this stage of the case any right to claim such process, and asks only for such process as will be necessary to carry the decree of the court into effect. Such an order may be passed not only in open court, but by the judge at chambers. It is therefore ordered that the clerk of the court do issue a writ of assistance in the usual form, directed to the sheriff of Richland county, requiring him to put Mrs. Harriet M. Beckwith in person, or by attorney, in possession of the land described in deed of John S. Verner, master, to Harriet M. Beckwith, dated 11th July, 1898, recorded in clerk's office, Richland county, 12th August, 1898, in Deed Book Y, page 546. It is further ordered that the respondents, Jasper Miller and Mrs. Minnie H. Miller, their agents and tenants, be enjoined

from interfering in any way with the execution of said writ by the sheriff, or with the possession of the said lands by Mrs. Harriet M. Beckwith. Let the papers in this cause be filed with the clerk of court, with the original judgment roll."

It is excepted that the circuit judge erred in assuming jurisdiction of the rule to show cause at chambers. It will be observed that the rule to show cause also contemplated judgment for contempt, and when issued it was expected to be heard while the court was in session, but, the court adjourning before a hearing could be had, the matter was taken up before the judge at chambers; but, as no judgment for contempt was in fact made, the principle announced in *State v. Nathans*, 49 S. C. 200, 27 S. E. 52, has no application. The order was in the nature of a writ of assistance to enable the sheriff to put the purchaser at a judicial sale into possession of the premises. The usual practice in this state is to proceed by rule to show cause. *Trenholm v. Wilson*, 13 S. C. 174; *Le Conte v. Irwin*, 23 S. C. 106; *Gerald v. Gerald*, 31 S. C. 171, 9 S. E. 792. The order in such case is final process to enforce the decree of the court of equity, and is like an execution or writ of possession in an action of ejectment. The power to grant such an order at chambers is found in section 2733, *Townsend's Code*, which provides: "The circuit court shall be deemed always open for the purpose of issuing and returning mesne and final process * * * and it shall be competent for any judge of the said courts, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make, direct and award all such process. * * *" It is also recognized in section 402 of the *Code of Civil Procedure*, where it is provided: "(2) Motions may be made to a judge or justice out of court, except for a new trial on the merits."

It is urged under the second exception that it is error to grant the writ, because the decree of sale provided that the purchaser shall be let into possession on production of the deed, and that said deed has never been produced, shown to or served upon the party in possession, *Minnie H. Miller*. While it is proper and usual in applications like this to show that the party in possession refused to deliver the same on production of the deed and demand for possession, proof of such formal production of the deed is not necessary when it is made to appear, as in this case, that the party in possession, with knowledge of the sale, withholds possession from the purchaser on the ground that the sale is void. In such a case, the formal exhibition of the deed to the party in possession would be a useless ceremony.

The remaining exceptions relate to the contention of appellants that the sale was void by reason of an alleged agreement between *Mrs. Harriet M. Beckwith* and *Jasper Miller*, the husband and agent of *Mrs. Minnie H.*

Miller, made after the judgment of foreclosure, and prior to the sale thereunder to *Mrs. Beckwith*. The contention in behalf of *Mrs. Miller* is that in 1897, after the order of foreclosure herein, and after the said property was bid in by *Mrs. Miller* at the first sale thereunder, and after she had failed to comply with her bid, *Mrs. Beckwith*, the mortgagee, agreed that upon *Mrs. Miller's* paying up all court costs and attorney's fees, and paying \$750, that she (*Mrs. Beckwith*) would take a new mortgage exactly like the old one, providing for the payment of the debt within five years, and that the proceedings instituted under the old mortgage should be ended and taken out of court, and that *Mrs. Miller* had complied with her part of the agreement. That there was any such agreement was denied by *Mrs. Beckwith* and her attorney, *Mr. Shand*, who contended that the agreement was merely to postpone the sale under the decree until first Monday in January, 1898. It appears that the property was advertised for resale in January, 1898, and was postponed at the request of *Mrs. Miller*. In February, 1898, on a petition setting up the alleged agreement, *Mrs. Miller* procured from Judge *Townsend* a temporary restraining order enjoining proceedings to sell said property; but, upon return to the rule to show cause issued by him, the rule was discharged, and the temporary injunction was dissolved. No appeal was taken from Judge *Townsend's* order. The property was advertised and offered for sale in March, 1898, and was bid in by *Mr. Jasper Miller*, who failed to comply with the terms of the sale. The premises were resold in May, 1898, and purchased by *Mrs. Beckwith*, who received deed of conveyance dated 11th July, 1898, recorded August 12, 1898. This sale was confirmed by order of the court on July 12, 1898. If there was any such agreement as set up by *Mrs. Miller*, the order of confirmation estops her from asserting it (*Le Conte v. Irwin*, 23 S. C. 111), not to mention the unappealed order of Judge *Townsend*, which refused to restrain said sale upon an application based upon said alleged agreement.

The judgment or order of the circuit court is affirmed.

(64 S. C. 365)

BROWN v. CAROLINA MIDLAND RY. CO.
(Supreme Court of South Carolina. June 17, 1902.)

RAILROADS—FIRES ON RIGHT OF WAY—LIABILITIES—NONSUIT.

1. Where, in an action for damages caused by fire communicated from the right of way of defendant railroad company, there is evidence that an agent of the defendant made a fire in the stove, and went away, that the stove was defective and set fire to the depot, and that the fire was first seen in the roof of the depot, and was communicated from there to the property of plaintiff, it is improper to grant a nonsuit.

Appeal from common pleas circuit court of *Barnwell county*: *Hudson*, Special Judge.

Action by Jennie Brown against the Carolina Midland Railroad Company. From an order granting a nonsuit, plaintiff appeals. Reversed.

Davis & Best, R. C. Holman, J. O. Patterson, and W. A. Holman, for appellant. Robert Aldrich and Izlar Bros., for appellee.

GARY, A. J. This appeal raises the question whether his honor the circuit judge erred in granting a nonsuit on the ground that there was no testimony whatever tending to show that the fire described in the complaint originated within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employes. The fourth, fifth, and sixth paragraphs of the complaint are as follows:

"(4) That on the night of the 10th or the early morning of the 11th (about 1 o'clock a. m.) of January, A. D. 1899, as hereinbefore alleged, the defendant corporation, whose depot was situated on its right of way near its line of road, and the plaintiff's buildings and other property as aforesaid, being situated a like distance therefrom (to wit, five or six feet), allowed fire to remain in or so near said depot building that the same caught or took fire, communicated same to plaintiff's buildings, as hereinbefore alleged, completely destroying them, together with the corn-mill outfit, cylindrical cotton press outfit, cotton gin, gins, feeders, condensers, fans, shaftings, conveyors, and pulleys; that said fire also destroyed the cotton, corn, cotton seed, cans and cases, engines and boilers, shaftings and pulleys, and each and every article as enumerated in the third paragraph of this complaint.

"(5) That, among other things, it was the duty of the defendant company to retain a night watchman at and around said depot at night to prevent just such conflagrations as herein complained of, which they failed, negligently, so to do.

"(6) That said fire would not have occurred but for defendant's carelessness and negligence in allowing same to remain in their stove or heater in said depot, and other fire to remain near or about said depot; and the plaintiff further charges that said defendant allowed a box car to stand between their depot and plaintiff's buildings in a dangerous condition, to wit, a hot box being there-to attached, all of which facts were well known, or should have been known, to said defendant; and by reason of the aforesaid facts the defendant has damaged the plaintiff \$10,000."

The answer, among other things, contained a general denial, which put in issue the allegation that the fire originated within the limits of the right of way of said road in consequence of the acts of its authorized agents or employes.

Section 1688 of the Revised Statutes is as follows: "Every railroad corporation shall be

responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employes, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and it shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance in its own behalf."

W. A. Wright testified as follows: "Did you see the fire that occurred in January of that year at the Carolina Midland depot? Yes, sir. Where were you when you saw that fire? In my bedroom. How far? About two hundred yards. Is that the nearest residence to that depot? Yes, sir. Where did you first see the fire? On top of the roof. The fire appeared to be about the middle of the roof. Was there anything else burning? Soon after the top of the car boxes caught from the falling cinders. Was Mr. Brown's ginney burning? No, sir; none of that part on fire. Did they catch while you were there? Yes, sir. Was there any fire on the lower part of the depot? No, sir; the fire threw a great deal of light in my room, and when I got up I ran to the window on this side next to the depot, where the fire was, and threw the window up, and there was no fire on the lower part of the depot at all."

G. M. Green testified as follows: "Where were you when this fire caught? I was asleep, and was aroused by one of my children which was sleeping on the east side, and I was on the west side, of the house; and I went out on my back piazza and saw the fire, and it seemed as if it was burning in the south end of the depot. Please indicate where you think that fire was on that building? My recollection is that it was burning about the second story part of the building, I could not— Did you go over there? I dressed as quick as I could and went over there. When I got there I found the depot burning, and the platform caught immediately after I got there. Were any box cars on that side? I think there were two or three. There were some, but I don't know where they were. Well, give us an idea about where they were? I know they were between this building, but can't locate them exactly. Are you familiar with the construction of this depot building? Yes, sir. How was it constructed? The offices that were occupied by the agent and waiting rooms were on the first floor. How was the building heated? It was heated by a heater. Where was the heater? It was down stairs in the room of the agent. How did the pipes go out of there? They went out in a coil. How did the pipes get out of the building? Well, I would not like to explain that, for I can't remember it. Give us an idea? My recollection is that it went out

through a stovepipe. At an up story of the building? Yes, sir. Did you ever have an office in that building? Yes, sir. * * * You stated that when you got there this depot was on fire, and afterwards Mrs. Brown's houses and ginney caught? Yes, sir. These cars were burning about the same time." John Eaves testified as follows: "Please tell us how that stovepipe went up through there? It was a stovepipe going through the ceiling, with two little tin collars, that were conductors of heat, sufficient to pass the piping through, and then on the flue of the second story, and from there to the top of the roof, which had a double-case facing, with little holes in it for ventilation, and which had from the first story and the story of the second a two and one-half inch pipe touching it, and, when coming in contact with the wooden structure, was liable to set it on fire, that it was attached to. How close to the wood-work was it? It was fastened to it. What was the ability for the fire to heat this outside piping that was nailed on the wood, if it could be done? It had all the chances. A stovepipe from a stove will oftentimes get red hot; and there being an iron collar, and that would become as hot as the pipe. What kind of a stove did they have? An upright coal stove. Where was the stove situated? In the freight agent's office, downstairs on the first floor. How did the piping run from the stove? Perfectly straight, through the overhead ceiling on the first floor, and up through the roof." Anthony Ingram testified as follows: "Do you remember the night of this alleged fire? Yes, sir. Did you do any work on that night? Yes, sir. Down where? To the Southern depot. What position did you hold down there,—what were your duties around the depot? I delivered freight. Anything else? Made fires, kept fires, delivered freight, gave out freight, and attended to the lamps. What time did you leave there? I left there about 11 o'clock with Mr. Hammett. Do you remember what condition you left the heater in? It had been raining, and we left a fire in there. What kind of a fire? A coal fire. Was it a small fire or a large one? It was a pretty good fire. It was red hot. I made a fire about half-past 8. What did you burn in that heater? Coal. What time did the train come? It was due there about 9 o'clock,—9:20,—and did not get there until 9:30. Do you know what condition that heater pipe was in? Down below it was in a pretty bad fix, because it was burnt out. Was there anything else that you know? Well, what we call 'exhaust pipes,' to hold hot water. I never saw any in them. I made a fire; and, the way those things are situated upstairs, they cannot hold water. Did I understand you to say you made the fire, and you did not have water in them? Yes, sir. Do you know how close the wood-work was to the burnt place? I suppose it was about a half a foot. Was that upstairs? Yes, sir; they had some cotton there."

There was no positive testimony that the fire originated within the limits of the right of way of the defendant in consequence of the acts of any of its authorized agents or employes. Nevertheless the nonsuit was not proper if the circumstances detailed in evidence tended to show that the fire originated as alleged. The testimony showed that an authorized employe of the defendant made a fire in the stove about half past 8 o'clock; that there was a good fire in the stove, and it was red hot when he left, about 11 o'clock; that there was no water in the exhaust pipes, which seem to have been defective; that the stovepipe was so constructed as to make it liable to set the wooden structure on fire; that the stovepipe went through the roof of the building, and there is where the fire was first discovered. These and other circumstances appearing in evidence satisfy us that his honor the circuit judge erred in not submitting the case to the jury.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

On Rehearing.

(July 5, 1902.)

PER CURIAM. After careful examination of the petition herein, we have failed to discover where any material question of law or of fact has been overlooked.

It is therefore ordered that the petition be dismissed, and the order staying the remittitur heretofore granted be revoked.

(64 S. C. 374)

HOLSTEIN et al. v. BOARD OF COM'RS OF EDGEFIELD COUNTY.

(Supreme Court of South Carolina. July 7, 1902.)

JUDGMENT OF UNITED STATES COURT—CONCLUSIVENESS.

1. Where the United States circuit court declares a statute authorizing townships to subscribe bonds in aid of a railroad constitutional, the supreme court of the state will give full faith to such judgment, and refuse to enjoin the corporate authorities of such township from carrying into effect such judgment, though such court had previously declared similar acts unconstitutional.

Petition by J. D. Holstein and James E. Hart for an injunction against the board of commissioners of Edgefield county. Dismissed.

The following is the petition:

"First. That your petitioner J. D. Holstein is a citizen of the county and state above mentioned, and is a resident and taxpayer in Wise township, in said county; and that your petitioner James E. Hart is a citizen of the said county and state, and is a resident and taxpayer in Pickens township, in said county.

"Second. That on the 22d day of Decem-

¶ 1. See Judgments, vol. 30, Cent. Dig. § 1512.

ber, A. D. 1883, the general assembly of said state passed an act entitled 'An act to authorize counties, townships, cities and towns interested in the construction of the Carolina, Cumberland Gap and Chicago Railway Company to subscribe to the capital stock of said company,' in and by which act, and in section 1 thereof, it is, among other things, provided 'that for the purpose of aiding in raising the capital stock of the said Carolina, Cumberland Gap and Chicago Railway Company, in addition to private subscription, it shall and may be lawful for any county, township, city or town in any county through which the said railway runs, or which is interested in its construction, to subscribe to the capital stock of said company such sum or sums in bonds or money as a majority of their qualified voters may authorize the county commissioners of such county or the municipal authorities of such city or town to subscribe, anything contained in the charter of such municipal corporations to the contrary notwithstanding.'

"Third. That pursuant to the authority contained in and granted by said act, the voters of Pickens township, in said county, subscribed the sum of \$15,000 to the capital stock of the said railway, and likewise, pursuant to such authority, the voters of Wise township, in said county, subscribed the sum of \$12,500 to the capital stock of the said railway; and pursuant to said subscriptions the county commissioners of said county, on the 1st day of May, 1888, issued bonds in behalf of Pickens township of the denominations prescribed in and by said act, amounting in the aggregate to the sum of \$15,000; and on the same day the said county commissioners, pursuant to said authority, issued bonds in the denominations prescribed in said act on the part of Wise township, amounting in the aggregate to the sum of \$12,500.

"Fourth. That, after all the payments of principal and interest we have made upon said bonds so issued as aforesaid in behalf of said townships, your petitioners are informed that the holders of said bonds now claim that there is still due and remaining unpaid thereupon, in the aggregate, about the sum of \$40,000, to wit, that there still remains unpaid upon the bonds issued in behalf of Pickens township the sum of \$22,000, and upon the bonds issued in behalf of Wise township the sum of \$18,833.75, together with interest on each of said sums from the 1st day of January last; that, for the purpose of paying the sums so claimed to be due as aforesaid upon the said bonds, the county commissioners of the county of Edgefield, consisting of J. M. Bell, Jr., R. A. Cochran, and A. G. Williams, claiming to act as the corporate authority for the said townships, have resolved forthwith to issue, and now intend immediately to issue, negotiable coupon bonds for and on behalf of the said townships. That is to say, the said board of

county commissioners have resolved to issue for and in behalf of Wise township negotiable coupon bonds amounting in the aggregate to the sum of \$13,800, and for Pickens township the said county commissioners have resolved to issue such negotiable coupon bonds amounting in the aggregate to the sum of \$16,100.

"Fifth. Your petitioners are informed, believe, and allege that the said act of the legislature so authorizing the said townships to subscribe to the capital stock of said railway was and is unconstitutional, on account of the absence of a corporate purpose of the townships incorporated by said act, and that therefore the bonds so issued by the said county commissioners on the 1st day of May, 1888, were and are illegal, null, and void, and constituted, and do now constitute, no valid legal indebtedness against the said townships, and that therefore the people of the said townships are not now obligated to pay the same. On which account your petitioners allege that the county commissioners of said county should not now be permitted to issue new bonds against said townships in accordance with their resolution above mentioned, and thereby impose upon the people of the said townships a grievous debt, where none now exists in law. On which account your petitioners desire that the said county commissioners should not be permitted so to issue such bonds, but that they should be restrained and perpetually enjoined from executing and carrying into effect their said resolution so to do. Your petitioners and all other taxpayers of said townships are without remedy to permit the imposition of the illegal debt that will result from the execution of the programme contemplated by said resolution of said board, except by the aid of this honorable court.

"Wherefore, your petitioners pray that the said county commissioners may be restrained and perpetually enjoined from signing, sealing, and issuing such bonds in accordance with their resolutions above referred to. That the process of this honorable court may forthwith issue, directed to the said county commissioners, requiring them to show cause on a day to be appointed why they should not be restrained and perpetually enjoined from issuing such bonds; and that in the meantime an order may be issued by this honorable court preventing and restraining them from issuing such bonds until the further order of the court."

J. M. Bell, Jr., R. A. Cochran, and A. G. Williams, constituting the board of county commissioners in and for the county of Edgefield, make the following return to the rule to show cause why the prayer of the petition herein should not be granted:

"First. That they admit the allegations made by and contained in paragraphs 1, 2, 3, and 4 of the petition.

"Second. They deny the allegation in paragraph 5 of the petition that the act of the

legislature so authorizing said townships to subscribe to the capital stock of said railway was and is unconstitutional, on account of the absence of a corporate purpose of the townships incorporated by said act, and that therefore the bonds so issued by the said county commissioners on the 1st day of May, 1888, were and are illegal, null, and void, and constituted, and do now constitute, no valid legal indebtedness against the said townships.' On the contrary, these respondents allege that the said bonds so issued constitute a valid and legal indebtedness against said townships, and that said bonds have been so declared and adjudged as valid and binding upon said townships in suits brought against said townships. On which account these respondents allege that the question of the validity of said bonds is res adjudicata, and should not now be made by the petitioners or other citizens of the said townships, and should not now be considered by this honorable court. That is to say, these respondents respectfully show unto the court: That heretofore a suit was instituted in the district court of the United States for the district of South Carolina by Henry A. V. Post, surviving copartner of the firm of Post & Pomeroy, against the said Pickens township, to recover 'certain past-due installments of interest and coupons upon and attached to certain bonds issued by the said township' under and by authority of the act of 1888, referred to in the petition herein; said coupons so sued on being attached to the bonds issued on the 1st day of May, 1888, and mentioned in the petition. That said suit came on to be tried on the 8th and 10th days of April, 1889, and resulted in a verdict and judgment against said Pickens township in the sum of \$11,392.12. That at the same time a similar suit was instituted in the same court by the same party against Wise township upon coupons on bonds issued by said township under the same act (being the identical bonds described in the petition), which suit came on to be tried on the 7th day of April, 1900, and resulted in a verdict and judgment in favor of said plaintiffs against said Wise township in the sum of \$11,973.75. That an appeal was taken from the judgment so rendered by the district court in the case against Pickens township to the United States circuit court of appeals (it being understood and agreed that the result of said appeal was to be equally applicable to the judgment so rendered against Wise township) and upon such appeal the judgment so rendered against Pickens township by the district court was affirmed. That in and by said judgment it has been finally determined and adjudicated that the bonds so issued by and in behalf of Pickens and Wise townships are valid and binding obligations of said townships, respectively. In reference to the matters hereinbefore represented, your respondents further allege that, the executions issued upon the said

judgments so rendered by the district court having been returned wholly unsatisfied, the said district court issued against the predecessors of these respondents, in 1900, a rule to show cause why a mandamus should not be issued from said court, requiring a tax levy upon the property of each of said townships to be made, sufficient to pay and discharge each of said judgments in full; that the predecessors of these respondents (being the identical persons who now constitute the said board, with one exception) made full return to said rule, and submitted for the consideration of said court every reason that appeared to their attorneys why the said bonds did not constitute valid obligations of said townships, and why said mandamus should not issue. Nevertheless, when the matter came up to be heard, the court adjudged said return to be insufficient, and made said rule absolute. Thereupon, the county commissioners in and for said county made a levy of about 28 mills upon the property of said townships, and the auditor of the county is required in and by said mandamus to place such levy upon his tax duplicate.

"Third. Your respondents further allege: That, regarding such levy burdensome, beyond the ability of the people to pay or bear, they desire to grant any relief that may be within their power under the law, and therefore they adopted the resolution to which reference is made in paragraph 4 of the petition. But these respondents did not adopt such resolution arbitrarily or in disregard either of their duty or the best interest of the people, but acted pursuant to the judgment of the people of said townships as expressed in a mass meeting called for the purpose of considering what should be done under the circumstances. That at said mass meeting the following resolutions were adopted by the people of the said townships: 'Resolved, that the committee heretofore charged with the duty of looking after the interest of the townships in the matter of railroad bonds are hereby authorized to offer to the attorneys of the bondholders the sum of \$30,000 in full settlement of the entire liability of Pickens and Wise townships on account of such bonds, to be paid within ninety days after notice of the acceptance of such offer. Resolved, further, that in the event that said offer shall be accepted, said committee are instructed to cause new bonds to be issued by the county commissioners for said townships, to be divided between said townships in proportion to the amount now outstanding against them, respectively, sufficient to raise said sum of \$30,000, and thereupon to negotiate for the floating of said bonds, and for the payment of said sum to the bondholders.' Your respondents further show: That on the 9th day of March, 1890, the general assembly of this state passed an act entitled 'An act to authorize and empower cities, towns, townships and other municipal corporations to issue

negotiable coupon bonds for the refunding or payment in whole or in part of bonded indebtedness, and any unpaid past due interest thereon, existing at the time of the adoption of the present constitution,' under and by authority of which act, and in section 1 thereof, it is, among other things, provided 'that any city, town, township or other municipal corporation, for the purpose of refunding or paying the whole or any part of its bonded indebtedness existing at the time of the adoption of the present constitution, and any unpaid past interest thereon, shall be, and it is hereby, authorized and empowered to issue its negotiable coupon bonds, from time to time and in such amounts as shall be proper, and to use and dispose of the same either by sale or exchange, for the purposes aforesaid.' That the act last above mentioned was amended by the general assembly by an act approved February 11, 1902, by striking out section 5 thereof, and by inserting in lieu of said section another and additional section 5, in and by which amendment it was, among other things, provided 'that for the purpose of issuing the bonds provided for in this act, the county boards of commissioners of the counties of this state, or such other officers as may hereafter be charged with the performance of the same duty, shall be, and they are hereby declared to be, the proper corporate authority for the townships of their respective counties to issue such bonds.'

"Wherefore your respondents allege, that by the said act of 1896, as so amended by the act of 1902, they are fully authorized to issue the bonds in accordance with their said resolution, and that hence, under the conditions so hereinabove recited, it is their duty so to issue such bonds, and for the best interest of the people of said townships that said bonds should be issued.

"Wherefore, your respondents respectfully submit that the injunction for which the petitioners pray should not be granted, but, on the contrary, that they should be authorized to issue bonds in accordance with their said resolutions, and that said bonds should be declared by this honorable court, when so issued, to be valid obligations of said townships, respectively."

S. McGowan, Mr. Simpkins, and E. H. Folk, for petitioners. B. E. Nicholson and Sheppard Bros., for respondents.

GARY, A. J. This is a petition, addressed to the court in the exercise of its original jurisdiction, for an injunction restraining the county board of commissioners of Edgefield county, as the corporate authority of Pickens and Wise townships, from issuing negotiable coupon bonds in accordance with the provision of an act entitled "An act to authorize and empower cities, towns, townships and other municipal corporations, to issue nego-

tiable coupon bonds for the refunding or payment, in whole or in part, of bonded indebtedness, and any unpaid past due interest thereon, existing at the time of the adoption of the present constitution," approved 9th March, 1896, and amended 11th February, 1902. The petitioners base their right to an injunction on the ground that the act authorizing the said townships to subscribe to the capital stock of the Carolina, Cumberland Gap & Chicago Railway Company was unconstitutional on account of the absence of a corporate purpose of the townships incorporated by said act, and therefore that the bonds issued in pursuance of said act did not constitute a valid bonded indebtedness against said townships. The respondents contend that the bonds so issued constitute a valid and legal indebtedness against said townships, and that they have been so declared and adjudged in suits brought against said townships in the circuit court of the United States. The facts in detail will be seen by reference to the petition and return, which will be set out in the report of the case. Statutes similar to that authorizing said townships to subscribe to the capital stock of said railroad company have been construed in *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242; *Whitesides v. Neely*, 30 S. C. 31, 8 S. E. 27; *State v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; *State v. Neely*, 30 S. C. 603, 9 S. E. 664, 3 L. R. A. 672; *Oongaree Const. Co. v. Columbia Tp.*, 49 S. E. 535, 27 S. E. 570; *Coleman v. Broad River Tp.*, 50 S. C. 321, 27 S. E. 774; and in all of these such acts were held to be unconstitutional. The United States circuit court has, however, construed the act authorizing said townships to subscribe to the capital stock of the Carolina, Cumberland Gap & Chicago Railway Company to be constitutional, and rendered judgments against said townships which are binding on these petitioners. The question to be determined by this court is what effect shall be given to said judgments. Section 1, art. 4, Const. U. S., provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." In the case of *McCullough v. Hicks*, 63 S. C. 542, 41 S. E. 761, it was held that this provision applies to a judgment of the circuit court of the United States. That court has adjudged said bonds to be valid and legal obligations against said townships, and this question must be regarded as settled as to those bonds. If we should allow this question as to these bonds to be again brought in review, we would fail to give full faith and credit to the judicial proceedings of the United States circuit court.

Having reached this conclusion, it necessarily follows that the petition must be dismissed, and it is so adjudged.

(84 S. C. 413)

STEINMEYER et al. v. STEINMEYER et al.
(Supreme Court of South Carolina. July 17,
1902.)

INSURABLE INTEREST—SOLE OWNERSHIP.

1. Where a deed of gift has been adjudged void as against the grantor's creditors, the grantee has an insurable interest in the house thereon, the decree adjudging the conveyance void providing that the property, if necessary, should be subjected to the payment, after exhausting the grantor, of the judgment in favor of his creditors.

2. An insurance policy requiring sole and unconditional ownership is not void when taken out by the grantee of realty by deed of gift, though the deed has been adjudged void as against the grantor's creditors.

Appeal from common pleas circuit court of Charleston county; Watts, Judge.

Action by Ella G. Steinmeyer and George E. Steinmeyer against Carrie A. E. Steinmeyer and the Germania Fire Insurance Company. From the decree, the plaintiffs and defendant company appeal. Affirmed.

Bulst & Bulst and J. E. Burke, for appellants Steinmeyer. Mitchell & Smith, for appellant insurance company. Mordecai & Gadsden, for appellee.

JONES, J. This contest involves the question whether the Germania Fire Insurance Company is liable on its policy of fire insurance issued to Carrie Steinmeyer, and, in the event of such liability, who is entitled to the proceeds of the policy. The defendant company issued its policy to Carrie Steinmeyer on the 8th day of May, 1899, insuring certain buildings therein mentioned known as No. 118 Beaufain street, in the city of Charleston, S. C., against loss or damage by fire. These buildings were partially destroyed by fire on the 24th day of May, 1899, and the damage was adjusted at \$580. The insurance company denies liability, alleging that the policy is void by reason of the breach of the conditions of said policy, the answer in this regard being as follows: "(5) Further answering, and for further defense, this defendant alleges that the said policy of insurance contained a provision or condition that the same should be void if the interest of the insured in the property be not duly stated herein; and this defendant is informed and believes, and on information and belief avers, that the interest of the said Carrie A. E. Steinmeyer was not truly stated in said policy, inasmuch as the said Carrie A. E. Steinmeyer has been adjudicated to hold said property as trustee, and that by reason of said violation of said provision or condition of said policy the said policy has become null and void, and this defendant is not liable thereunder. (6) That said policy of insurance contained a further provision or condition that the same should be void if the interest of the insured be other than unconditional and sole ownership, or if any change took place in the interest, title, or possession of the subject of insurance, ex-

cept change of occupants, without increase of hazard, whether by legal process or judgment, or by voluntary act of the insured or otherwise. And this defendant is informed and believes, and on information and belief avers, that the interest of the insured, the said Carrie A. E. Steinmeyer, was not unconditional and sole ownership, and that her interest and title in the subject of insurance has been changed, inasmuch as the said Carrie A. E. Steinmeyer has been adjudicated not to have been unconditional and sole owner in said property, and that she held the same in trust; and that by reason of said violation of said provisions and conditions of the said policy the said policy has become null and void, and the defendant is not liable." The policy contained provisions that the entire policy "shall be void * * * if the interest of the insured in the property be not truly stated herein, * * * If the interest of the insured be other than unconditional and sole ownership, * * * or if any change, other than by death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise." The property insured was originally owned by Eliza R. Steinmeyer, who conveyed the same to Carrie Steinmeyer in May, 1894, who every year thereafter up to the date of the policy in question insured the premises in the defendant company in her own name and interest. In 1897 creditors of Eliza Steinmeyer brought an action to set aside this deed, with other conveyances, as in fraud of their rights, and as the result of that suit this court affirmed the decree of the circuit court rendered August 13, 1894, adjudging said conveyance to be voluntary, and subjecting the property conveyed, if necessary, after exhausting the grantor, to the payment of the judgment in favor of the grantor's creditors. The decree of this court in said cause (Steinmeyer v. Steinmeyer, 53 S. C. 9, 33 S. E. 15) was rendered April 18, 1899, and the remittitur was filed in the circuit court May 2, 1899. Six days thereafter the policy in question was issued. After the fire, which occurred on the 24th day of May, 1899, the property was sold under the order of the court, and the proceeds applied to the judgment in favor of the said creditors, leaving a balance due thereon more than the amount of the insurance money claimed.

Do these facts warrant a conclusion that the policy is void by reason of a breach of the quoted conditions? We think not. The clause or condition last quoted, relating to change of interest, title, or possession, is not applicable, for such condition refers to change of interest after the issuance of the policy and before the fire. In this case it appears that there was no change of interest between the issuance of the policy and the fire. The other conditions relate to the interest or own-

ership of the insured at the time of the insurance. Such conditions are reasonable and valid, and a breach of them should prevent a recovery. In 1 May, Ins. § 283, the author says: "Inquiries about a greater or less interest and a more or less perfect title usually refer to the quality of the estate, having reference to its duration,—whether an estate in fee, for life, for years or at will,—to what is vested in distinction from what is conditional or contingent, and not to questions of incumbrances, as affecting the quantity of estate." The question, then, is, what was the interest of the insured, and was her ownership sole and unconditional, with respect to the insurance company, at the time of the insurance? The title of a grantee in a voluntary conveyance by the owner is good against the grantor and all the world, subject to the equity of the grantor's creditors to have the property, if necessary, applied to the payment of their judgment against the grantor. In the absence of actual fraud, as in this case, a voluntary deed is not void *ab initio*, and it is unassailable even by the creditors of the grantor until it is legally ascertained that the property is necessary to pay the creditor after exhausting the grantor. *Suber v. Chandler*, 18 S. C. 529. Then it is void only as against the right of the creditor to subject it to his judgment. When it is said that such a voluntary deed is "void" or "set aside," these terms must be understood as meaning only that the conveyance, while good against all others, shall not operate to defeat the equity of the creditors of the grantor. With respect to any right of the insurance company, the insured, by the grant of the owner, was invested with the fee-simple title at the time of the insurance. The insured's ownership was sole because no one else had any interest in the property as owner, and it was unconditional because the quality of her estate therein was not limited or affected by any condition. The right of the grantor's creditors in certain contingencies to subject said property to their claims did not give such creditors any interest in the property as owners, nor did the judgment declaring the deed void as against creditors operate to restore the fee to the grantor, with respect to the insurance company. The status of the voluntary grantee at the time of the insurance was rather that of one holding the fee subject to an incumbrance, the equity of the grantor's creditors. The existence of a lien or incumbrance on the insured's property is not a breach of the condition which requires sole and unconditional ownership. *Insurance Co. v. Weill*, 28 Grat. 389, 26 Am. Rep. 364; *Carrigan v. Insurance Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Carson v. Insurance Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Hubbard v. Insurance Co.*, 33 Iowa, 325, 11 Am. Rep. 125; *Dolliver v. Insurance Co.*, 128 Mass. 315, 35 Am. Rep. 378. It does not appear that any inquiries were made by the insurance com-

pany as to the existence of incumbrances against the property, and no representations were made by the insured touching her interest in said property except what would be involved by the use of the terms of the conditions considered. The insured was in the use and possession of the premises under said deed at the time of the insurance, and clearly had an insurable interest therein; and it is difficult to say how she could have described her interest or estate in the property other than as sole and unconditional owner. All would admit that she would have been such an owner if the claims of the grantor's creditors had been paid by any one, or in any way released or discharged, before sale of the premises. But as the creditors had no title in the premises to convey, how could the mere payment of their claims add anything to the insured's title, beyond merely removing an incumbrance? Under the circumstances, the position of the insured was not essentially different than would be the position of any debtor insuring property held in fee simple, but subject to an outstanding mortgage or judgment lien. Such outstanding incumbrances may undoubtedly affect the risk, but the insurance company may, if it sees fit to do so, protect itself against such risks by appropriate stipulations in the contract.

The next question is, who is entitled to the proceeds of the policy,—the insured, Carrie Steinmeyer, or the plaintiffs, who claim as creditors of the grantor, Eliza Steinmeyer? The contention of the plaintiffs is that, in respect to the proceeds of the policy, Carrie Steinmeyer, while not being an express trustee, has a relationship to plaintiffs in the nature of a quasi trustee, and public policy will, therefore, require that the proceeds of the policy should be applied, *ex æquo et bono*, to the plaintiff. To sustain this proposition plaintiffs cite the cases of *Paper Co. v. Langley*, 23 S. C. 129; *Olyburn v. Reynolds*, 31 S. C. 118, 9 S. E. 973; *Green v. Green*, 50 S. C. 532, 27 S. E. 952, 62 Am. St. Rep. 846. The two last-named cases held that insurance money collected by a life tenant on a total loss by fire should be used in rebuilding or should go to the remainderman, reserving the interest of the life tenant for life to him, upon the ground that a life tenant, with respect to the property insured, was a quasi trustee to the remainderman, and that public policy requires such a disposition of the proceeds of insurance so affected. These cases are not applicable, as the insured in this case was not a life tenant insuring for full value buildings, the fee in which belonged to remaindermen, with whom the insured occupied a relation of trust with respect to the preservation of the property insured. The case of *Paper Co. v. Langley* comes more closely to the point in hand; but in that case the insured had purchased property at a sheriff's sale under circumstances amounting to fraud in law,

and while in possession under the sheriff's deed had insured the property, and, it having been burned, received the insurance money. The court, having held the sale void by reason of the conduct of the purchasers in entering into an agreement having the effect to chill the bidding, held the insured accountable to the true owner for the insurance money. The language used by the court was: "If, as we have seen, the defendants stood in the relation of quasi trustees towards the plaintiffs, then the money received by them for the insurance on the house of the plaintiffs belonged, *ex aequo et bono*, to the plaintiffs. This money may be regarded as a compensation, in part at least, for the loss of property which has been adjudged to be the property of the plaintiffs, and therefore in equity and good conscience it belongs to the plaintiffs. Any other view would, contrary to well-established principle, enable the defendants to make profit for themselves out of the quasi trust property. It is, in effect, money had and received by the defendants to the use of the plaintiffs, and as such recoverable by the plaintiffs, subject, however, to a deduction of all amounts actually paid by the defendants, either by way of premiums or otherwise, in effecting or collecting such insurance." In the case just cited the insured effected insurance on the property of another, of which he had obtained possession under circumstances which rendered the sale voidable by the owner. In this case the insurance was effected by one to whom the original owner had conveyed by deed, which the original owner and grantor could not assail. This case should be decided upon correct principles of law as applicable to the respective rights of the parties under the particular facts. All must admit, and we have already held, that the insured had an insurable interest in the buildings which were partially burned, and that such insurable interest is covered by the policy. No one has estimated the value of such insurable interest except as valued in the adjustment of the amount of the loss, \$580. Can it be said that the insured shall take nothing as the fruit of her contract with the company, for which she alone paid the consideration? The proper solution of the question requires that notice be taken of the nature of the policy of insurance. The authorities generally agree that a contract of fire insurance is a personal contract between the insurer and insured, by which the former undertakes to indemnify the latter for the loss he sustains by fire. Being a personal contract, it does not run with the buildings said to be insured, is not an incident to the thing insured. Being a contract of indemnity, it is essential that the insured have an insurable interest in the subject of insurance. 1 May, Ins. §§ 2, 6; 16 Am. & Eng. Enc. Law (2d Ed.) 840-843; Carpenter v. Insurance Co., 16 Pet. 496, 10 L. Ed. 1044; Annely v. De Sausure, 26 S. C. 505, 2 S. E. 490, 4 Am. St. Rep.

725; Swearingen v. Insurance Co., 52 S. C. 315, 29 S. E. 722. If, therefore, Carrie Steinmeyer had an insurable interest, and her loss with reference to that interest has been estimated to be the fund in dispute, and if the contract for which she alone paid the premium is one of personal indemnity, upon what principle of law, justice, or public policy can that which is hers be given to the creditors of another? It is not doubted that the creditors of Eliza Steinmeyer had the right to resort to the insured property, or to that into which the insured property had been converted, having the right to follow the property of their debtor; but this gives them no right to the insurance money, which does not represent their debtor's property, but represents the amount of personal indemnity going to Carrie Steinmeyer for her loss. In 14 Am. & Eng. Enc. Law (2d Ed.) 843, the law is thus stated: "Money due on a policy of insurance, procured by the grantee on buildings situated on the property, title to which has been conveyed to him in fraud of the grantor's creditors, is not to be deemed proceeds of the property, and cannot be subjected by the grantor's creditors to the payment of his debts. A policy of insurance against fire is not an incident to the property insured, but is a mere special agreement with the insured, indemnifying him against such loss or damage from fire as he may sustain thereby. If the creditors have a lien by mortgage, judgment, or execution, they can insure their own interest; but they can have no right to attach insurance money due to any one but their own debtor." Among the cases cited to support the text is Forrester v. Gill, 11 Colo. App. 410, 53 Pac. 230, which is exactly in point, and thus reasons out the proposition: "A transfer of property made with the intent to defraud creditors is void as to them, and their right to follow the property extends to its proceeds or other form of property into which the fraudulent grantee may have converted it. If the fund which the plaintiff seeks to subject to the payment of his debt was the proceeds of the property, the evidence was admissible, and its exclusion error. The main question in the case, therefore, is, 'Was the money due from the insurance company the proceeds of the property?' We think this question must be answered in the negative. Insurance is a contract of indemnity. The insurer agrees for a consideration to pay to the insured a stipulated amount in case the latter shall sustain a loss or damage in consequence of the happening of some event or contingency contemplated by the contract. It is a personal contract, and does not run with the title to the property. Cummings v. Insurance Co., 55 N. H. 457; May, Ins. §§ 1, 6. The money which the insurance company agreed to pay to Mrs. Craft was not payable as a price for the property, and its payment would not operate to convert the property into a fund. It was her personal inter-

est in the property which was insured, and the agreement was to pay to her personally a certain amount in case of injury to her interest from a specified cause. That she had an insurable interest is conceded, and, even if it were not conceded, is settled by the adjudications. The fund which the plaintiff seeks to reach does not in any sense represent the property. Therefore it cannot be taken for the husband's debt, as the property itself might have been. The fact that the transaction by which her interest was created might have been avoided by her husband's creditors gives them no claim to money payable to her as compensation for the destruction of that interest upon a contract which she had the right to make, which in no manner affected the interest of her husband, and in consequence of which no injury could result to those creditors. *Lerow v. Willmarth*, 91 Mass. 382; *Bernheim v. Beer*, 56 Miss. 149; *McLean v. Hess*, 106 Ind. 555, 7 N. E. 567; *Nippe's Appeal*, 75 Pa. 472." We agree, therefore, with the circuit court, that the defendant company is liable upon the policy, and that *Carrie Steilmeyer*, the insured, is entitled to receive the proceeds thereof. This renders it unnecessary to consider any further the exceptions.

The judgment of the circuit court is affirmed.

(54 S. C. 396)

WILLIAMS et al. v. HALFORD et al.

(Supreme Court of South Carolina. July 11, 1902.)

DEPOSITIONS—NOTICE—PARTITION—CONVEYANCE TO MISTRESS—RELIEF IN EQUITY.

1. Under Rev. St. § 2345, providing that reasonable notice of not less than 10 days must be given by the party proposing to take depositions to the opposite party, a notice to take a deposition *de bene esse* on the 23d, served on the 13th, is sufficient.

2. An action by a wife and child, under Rev. St. 1893, § 1887, against illegitimate children, for three-fourths value of lands conveyed by the father to his mistress, and by her to her children, is one in equity, and issue of title on the pleadings is not properly submitted to the jury.

3. Under Rev. St. 1893, § 1887, providing that where a person having wife or children shall in any way convey to another with whom he is living in adultery any larger proportion of his estate, after payment of debts, than one-fourth thereof, such conveyance shall be void in favor of his wife and children for so much as it shall exceed such one-fourth part of his real estate, a suit to enforce such right is one in equity.

Gary, A. J., dissenting in part.

Appeal from common pleas circuit court of Colleton county; Watts, Judge.

Action by *Julia Williams* and *J. H. Williams* against *J. R., B. F., J. W.,* and *J. W. Halford*, *Harriett Turner*, *Laura Abbott*, and *John Black*. From order granting nonsuit, plaintiffs appeal. Reversed.

Griffin & Padgett, for appellants. Howell & Gruber, for appellees.

POPE, J. It is established by the testimony in this case: That one *J. J. Williams*, in the year 1852, while residing in the state of Florida, was married to one *Julia Albritton*, a resident of that state, and that the fruits of that marriage were one son, the plaintiff *J. H. Williams*, and two daughters, both of whom (the daughters) died. That the husband and wife lived together as man and wife until some time in the year 1858 or 1860, when the said husband, *J. J. Williams*, deserted his family in destitute circumstances, and removed to the state of South Carolina, in which latter state he lived for many years, to wit, from 1859 to the year 1896, when he died. That in the year 1860 the said *J. J. Williams*, having changed his name to *J. J. Halford* under celebration of marriage, took as his wife one *Jane Crosby*, with whom he cohabited until her death, in or about the year 1894. Of this cohabitation the said *Jane* bore the said *J. J. Halford*, alias *Williams*, six children, one of whom died, which children bore and still bear his name. That the said *James J. Halford*, alias *Williams*, when he removed from the state of Florida to this state, had in his possession some \$250 or \$300 in gold coin. *J. J. Halford*, alias *J. J. Williams*, was a very industrious man, being a blacksmith and wheelwright. That he piled his trade till the date of his death, though in the last few years of his life he was stricken with paralysis. The testimony points out that the treatment of his last alleged wife and her children was all that could be desired. He cared for their education, and when two of the boys, *Jas.* and *B. F.*, were old enough, he took them into his shop and taught them his trade, as well as afterwards employing them in his establishment. That in the year 1878 or 1879 the son *J. H. Williams*, from the state of Florida, came to see his father, *J. J. Halford*, alias *J. J. Williams*, being received and introduced as his son into his family, where he remained for about one year. That *J. J. Williams*, alias *Halford*, never, so far as the testimony discloses, told any one why he deserted his wife in Florida; but the sequel possibly discloses the cause of his leaving her to have been her infidelity to her marital vows, for she bore several children after he left her. He never denied his first marriage and the paternity of *J. H. Williams*. That in the year 1871 *J. J. Williams*, alias *Halford*, for love and affection and \$5, conveyed by deed to the second alleged wife, *Jane Crosby*, under the name of *Jane Halford*, as his wife, 200 acres of land in Colleton county, also a sorrel mare colt, one buggy, one cart, thirteen head of stock cattle, thirty head of hogs, the tools of his trade, all his household and kitchen furniture, and also her distributive share of the estate of her father, the late *Jacob Crosby*, for and during her natural life. Then to be given to the chil-

¶ 1. See Depositions, vol. 16, Cent. Dig. § 44.

dren born to him by the said Jane Halford, share and share alike, with the power in said Jane Halford, alias Jane Crosby, to sell or exchange any of said property, and invest the proceeds thereof in other property of any kind, all of which shall be subject to the provisions of this deed. That the testimony shows that the said Jane Halford, alias Jane Crosby, was very poor when the marriage ceremony was performed between herself and J. J. Williams, alias J. J. Halford, and that, apart from the property given to her by her husband, she only received after her marriage \$25. That under the contract and control of the said J. J. Williams, alias Halford, in December, 1880, Miner O. Carter, at the price of \$700, conveyed 15 acres of land in the town of Walterboro, in Colleton county, S. C., unto the said Jane Halford, alias Crosby, whereon J. J. Halford, alias Williams, dwelt with the said Jane as his wife, and her children, until her death, and whereon were located his shops as blacksmith and wheelwright; and that the said Jane Halford, alias Crosby, in the year 1881, by deed, conveyed this 15 acres of land to her children, reserving to herself a life estate therein. That one A. S. Barnes, in December, 1882, conveyed to J. J. Halford, alias Williams, at the price of \$100, a small tract of land containing 15 acres, in the county of Colleton, S. C. That by deed made 2d May, 1892, J. J. Halford, alias J. J. Williams, conveyed, at the alleged price of \$400, to his alleged wife, Jane Halford, alias Jane Crosby, all of his estate, real and personal, now or hereafter possessed. That J. J. Halford, alias J. J. Williams, in the year 1893, in consideration of \$100 paid by him, received a quitclaim deed from Mrs. Jane E. Bellinger to the 15 acres in the town of Walterboro already conveyed to Mrs. Jane Halford, alias Jane Crosby. That it was announced by the plaintiffs that by their present suit they only sought the 15 acres in Walterboro and the Barnes tract of 15 acres in the county. An action was brought by the first wife and J. H. Williams, as plaintiffs, in November, 1896, against the five children of Jane Halford, alias Jane Crosby, and one John Black, to receive three-fourths of the 15 acres in Walterboro, and of the Barnes tract of 15 acres in the county, alleging that the defendants, as the illegitimate children of said J. J. Williams, alias Halford, owned the other one-fourth interest in said lands. This action was for partition. Of course, the complaint alleged the foregoing history of the parties, claiming that the first marriage, in 1852, was the only marriage, and that of 1859 or 1860 was merely pretensive. The answer of the defendants denied all the facts set out in the complaint, and then a second defense alleged: "That neither plaintiffs, nor their ancestors nor predecessors nor grantors, were seised or possessed of the premises described in the complaint within ten years last past before the commencement of this action. (2) That these defendants' ancestress, Jane Hal-

ford, under whom they claim, entered into possession of the premises described in the complaint under claim of title exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, and that there has been a continued occupation and possession by the said Jane Halford of the premises included in such claim for more than ten years last past before the commencement of this action and before the death of the said Jane Halford. (3) That while in actual occupation and possession of the said lands as aforesaid the said Jane Halford, now deceased, during the entire term of her occupancy of more than ten years before her death, improved the said premises and protected much of it by substantial inclosures; and that each of the several lots or tracts described in the complaint were partly improved by the said Jane Halford while she was in actual possession thereof, and as to the portions thereof not cleared and not cultivated the same was so left uncleared and uncultivated according to the usual course and custom of the adjoining country."

The cause came on for trial before Judge Watts and a jury at the November term, 1900, of the court of common pleas for Colleton county, S. C. The pleadings were read, and "the court then stated that the question he would submit to the jury was whether or not the plaintiffs were entitled to partition of the lands described in the complaint." At the trial the facts brought out by the plaintiffs' witnesses were as substantially embodied in our sketch of the case. At the close of plaintiffs' testimony, counsel for defendants made motion for a nonsuit. In granting it, his honor, Judge Watts, said: "The Court: How much is in dispute? Counsel for plaintiffs: Two tracts (the fifteen acres in Walterboro). The Court: Gentlemen, you have given me about the toughest nut to crack that I have had in a long time. From the testimony in this case, there is no question in my mind that the Bellinger tract, or the tract over there, ought not to go to the jury, and I grant a nonsuit so far as that is concerned, because the testimony shows that Mrs. Carter conveyed to Mrs. Halford, and later a quitclaim deed was given to her husband by Mrs. Bellinger, then afterwards he conveyed to her, and that gives her a good title to that. If a man conveys by title property he has no title to and he afterwards gets title to it, that is a good title. If a man conveys property he has no title to, and afterwards acquires title to it, then title passes. I will grant a nonsuit as to this town property of fifteen acres, but I don't think under the pleadings they are entitled to recover any of the county property, but I will allow them to amend their complaint so as to add that they be required to account for three-fourths of this county property. Mr. Gruber: That ruling, I understand, would end the present hearing? The Court: Yes."

After entry of judgment the plaintiffs ap-

pealed therefrom on the following grounds: "(1) For that his honor, R. C. Watts, erred in withholding and in refusing to admit the testimony taken *de bene esse* of Julia Williams to go to the jury, and in holding that ten days' notice had not been given the respondents; (2) for that his honor erred in granting a nonsuit in this action, the same being a suit on the equity side of the court; (3) for that his honor erred in holding that it was necessary to amend the complaint to recover, under section 1887 of the Revised Statutes, as indicated in *Hull v. Hull*, 8 Rich. Eq. 65; (4) that his honor erred in holding that there was no evidence to go to the jury and in granting a nonsuit."

We will consider these exceptions:

First, we think the circuit judge was in error when he refused to allow the testimony taken *de bene esse* of Mrs. Julia Williams to be admitted; the sole ground of objection being that 10 days had not elapsed between the date of notice served and the date at which the testimony was taken. The notice was served on the 13th day of November, 1900, and testimony was taken on the 23d day of November, 1900. Our Revised Statutes provide as follows on this subject: "Section 2345. * * * Reasonable notice, not less than ten days, must first be given in writing by the party or his attorney, proposing to take depositions to the opposite party or his attorney of record, as either may be nearest." Fractions of days are not recognized in our laws. Our Code of Civil Procedure, at section 407: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." Excluding the 13th and including the 23d, makes 10 days as the notice given, which is a compliance with the statute. This ground of exception is sustained.

We will next consider, out of its order, the fourth exception. Supposing for the present moment that such issues as are raised by the parties litigant here should be governed by the verdict of a jury, we think the circuit judge was in error in holding that there was no testimony on the material issues involved. It is clear to our minds that the testimony tended to establish the first marriage between J. J. Williams and Julia Williams in the year 1852, and the birth of the co-plaintiff, J. H. Williams, as the issue of that marriage; also that J. J. Williams, alias Halford, attempted to marry Jane Crosby in 1859 or 1860, while his wife was living; that J. J. Williams and Jane Crosby cohabited as husband and wife, but that really in law she was his kept mistress, and that the defendants are the issue of that illicit cohabitation; that Jane Crosby was very poor, never inheriting but \$25; that J. J. Williams, alias Halford, gave her all he had from time to time twice by deed; that the said J. J. Williams made the trade for his concubine, Jane Crosby, alias Halford, for the 15 acres of land in Walterboro, al-

though the deed was made to her; that Williams, alias Halford, had as his purpose to give his property to his mistress, and through her to her children. This purpose Jane Crosby by deed endeavored to consummate. So that there was testimony, if the jury should accept it, on all these material issues. The case should have gone to the jury. The circuit judge was in error in granting the nonsuit.

We will now consider the second and third exceptions. It has been the settled purpose of the law-making power of this state to prevent a man from giving away or conveying to his mistress and his illegitimate children more than one-fourth of his estate, real and personal, for nearly two centuries. As cited by the circuit judge and the parties to the action, the section of the Revised Statutes of 1893 was numbered "1887," but under the new codification of our laws by Mr. W. H. Townsend it is numbered "Sec. 2368," and is as follows: "Sec. 2368. If any person who is an inhabitant of this state, or who has any estate herein, shall have already begotten or shall hereafter beget any bastard child, or shall live in adultery with a woman, the said person having a wife or lawful children of his own living, and shall give, or settle, or convey, either in trust or by direct conveyance, by deed of gift, legacy, devise, or by any other ways or means whatsoever, for the use and benefit of the said woman with whom he lives in adultery, or of his bastard child or children, any larger or greater proportion of the real clear value of his estate, real or personal, after payment of his debts, than one-fourth part thereof, such deed of gift, conveyance, legacy or devise, made or hereafter to be made, shall be null and void only in favor of wife and legitimate children for so much of the amount or value thereof as shall or may exceed such fourth part of his real and personal estate." The words are carefully selected,—"*shall give, or settle, or convey, either in trust or by direct conveyance, by deed of gift, legacy, devise, or by any other ways or means whatsoever.*" Their meaning is not to be mistaken. The law intends to uproot at the instance of the lawful wife and children any plan or device of the husband and father to give more than one-fourth of his estate to his paramour and bastard children. Whoever undertakes this circumvention of the lawful wife and children, or either one of them, undertakes to commit a fraud upon this statute. If the lawful wife and child set on foot proceedings in the courts of the country to upset such illegal contrivances, he usually proceeds upon the equity side of the court of common pleas, because he or she or they do not and cannot set aside absolutely deeds of conveyance for the benefit of the mistress or bastard children by the husband and father. All that can be done is to have such rights of the lawful wife and children or child, as the case may be, to three-fourths of the estate

of the husband and father set apart to them, leaving the other one-fourth in the possession of the mistress or bastard child or children, as the case may be. The attempt to invalidate the statute (section 2368) is a fraud upon said statute. To divide lands between parties owning the same in different quantities is to partition lands. Frauds and partition belong to what is known as the equity side of the court of common pleas. This does not prevent the circuit judge from framing issues for trial by jury. The case at bar furnishes an apt illustration of issues to be sent down for trial by a jury. These issues may have been sent: Was the plaintiff Julia Williams ever married to James J. Williams in the year 1852? Is the complainant, J. H. Williams, the lawful son of the said James J. Williams? So, also, other issues might have been sent down by the circuit judge for trial by a jury. The whole, however, was not properly a jury case,—a case on the law side of the court. Not being an action on the law side of the court, the circuit judge erred in granting a nonsuit as a matter of law. So far as the circuit judge's order directed an amendment of the complaint, usually we would hold that to be no error, but as he made that order in granting a nonsuit we will set it aside. We sustain the second and third grounds of appeal.

It is the judgment of this court that the judgment of the circuit court be and the same is hereby reversed, and the action is remanded to the circuit court for trial.

JONES, J., concurs in the result.

GARY, A. J., concurs in the result, but dissents from so much of the opinion as sustains the first and third exceptions. The commission to take the testimony was executed within 10 days after service of the notice; therefore the opposite party was not allowed the time prescribed by the statute. The views expressed by POPE, J., are at variance with the decided cases in this state.

(64 S. C. 408)

WIDEMAN v. PATTON.

(Supreme Court of South Carolina. July 14, 1902.)

GUARDIAN AD LITEM—ACTION BEFORE MAGISTRATE—APPEAL.

1. Under Code Civ. Proc. § 136, providing that, where an infant is a party, he must appear by a guardian, to be appointed by the court, and section 88, subd. 15, providing that the provisions of the Code as to actions shall apply to magistrate's courts, a magistrate has power to appoint a guardian ad litem in a suit in his court.

2. Under Code Civ. Proc. § 368, providing that on appeal from a magistrate the court shall give judgment according to the justice of the case, and may affirm or reverse in whole or in part, the court on appeal has power to order new trial before the magistrate.

3. Where, on appeal from a magistrate, the circuit court fails to review an exception involving the merits, the supreme court on appeal will send the case back for such consideration.

Appeal from common pleas circuit court of Greenwood county; Townsend, Judge.

Action by Janie Wideman, by her guardian ad litem, J. W. McCaslan, against George Patton. From judgment for plaintiff in magistrate court, defendant appeals, and from circuit judgment plaintiff appeals. Modified.

Graydon & Giles, for appellant.

JONES, J. This action was commenced in a magistrate court to recover the possession of personal property, and resulted in a verdict and judgment for the plaintiff. Defendant appealed to the circuit court on several exceptions, two of which only were considered by the circuit judge: (1) That there was no evidence to establish the fact that a guardian ad litem had been appointed for the plaintiff, who was a minor; (2) that the magistrate erred in holding that he could appoint a guardian ad litem. The circuit court ordered a new trial, sustaining said exceptions. The appeal to this court excepts to the rulings, and raises the further point that the circuit court has no power to order a new trial in a magistrate's court.

We hold that a magistrate has power to appoint a guardian ad litem to conduct a suit in his court. Section 136 of the Code of Civil Procedure provides: "When an infant is a party he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof," etc. Section 88, subd. 15, provides that "the provision of this Code of Procedure respecting forms of actions, parties to actions, * * * shall apply to these [magistrates'] courts." In this case it appears that the plaintiff, preparatory to bringing the action, filed with the magistrate her petition in the usual form, praying that J. W. McCaslan be appointed as guardian ad litem and authorized to prosecute said action, and that the magistrate, by order, made such appointment. These papers were before the magistrate, and he was bound to take notice of them, whether they were specially put in evidence or not. Besides, the objection raised before the magistrate was not that there was no evidence of the appointment of said guardian ad litem, but that the magistrate had no power to make the appointment; and that the guardian ad litem is a county officer, the jailer, and cannot act in such capacity. The magistrate properly overruled both objections, but the form of the objection assumed the fact that such appointment had been in fact made.

We do not doubt the power of the circuit court in a proper case to order a new trial in a magistrate court on appeal therefrom. Article 5, § 15, of the constitution, provides that courts of common pleas shall have appellate jurisdiction of inferior courts, etc.; and section 368 of the Code of Civil Procedure.

¶ 1. See *Infants*, vol. 27, Cent. Dig. § 211.

dures provides that: "Upon hearing appeal [from magistrate] the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any and all parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings not affecting the merits of the action and not within the knowledge of the magistrate, the court may determine the alleged error of fact on affidavit, and may in its discretion inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the magistrate, and it is shown by the affidavits served by the appellant or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may in its discretion set aside or suspend judgment, and order a new trial before the same or any magistrate in the same county at such time and place and on such terms as the court may deem proper. Where a new trial shall be ordered before a magistrate, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served." In the case of *Green v. Commissioners*, 27 S. C. 9, 2 S. E. 618, the question was raised, but not decided, whether a circuit judge could order a new trial in the inferior court except in a case of default, under section 368 above; and in the case of *Miller v. Schmidt*, 20 S. C. 588, it would seem that the circuit judge could order a new trial in the inferior court except in a case of default, but in that case a petition was made in the circuit court without notice for a new trial, and that was quite sufficient to sustain the refusal of the court to grant a new trial. The doubt thus suggested as to the point now made was, however, removed by the case of *Du Bose v. Armstrong*, 29 S. C. 290, 6 S. E. 934. In that case, which was an action of claim and delivery of personal property, upon a trial of the issues the jury rendered a verdict for plaintiff, by which the jury "found the mule for the plaintiff upon the payment of thirty-five dollars to the defendant." The trial justice, upon motion, struck out of the verdict the words "upon the payment of thirty-five dollars to the defendant" as surplusage, and judgment was entered upon the verdict thus altered. Upon appeal the circuit court ordered a new trial. One of the exceptions taken to the order of the circuit court was that he erred in ordering a new trial. This court affirmed the judgment, saying: "Section 368 of the Code, under which his honor Judge Witherspoon acted, is very broad. It provides that in cases of appeal from trial justices' courts the appellate court, upon hearing the appeal, shall give judgment according to the justice of the case, without regard to technical errors and defects which

do not affect the merits. Whatever may have been the intention of the jury, the verdict is not in accordance with the form specified in the Code in actions of claim and delivery of personal property, nor was it in such form as the court could so correct or amend as to bring it in form. And it appears to us that his honor reached the right conclusion, to wit, that the case should go back for a new trial." This was an express holding that the circuit court could order a new trial in a magistrate or trial justice court, under section 368, in a case which was not a default case. This, we think, is a correct conclusion. The general appellate jurisdiction conferred on circuit courts by the constitution and the statute necessarily includes the power to grant a new trial before the magistrate in a proper case. The statute does not undertake to abridge such right in any express terms. On the contrary, the right is recognized expressly. The last sentence of section 368 applies as well to the first part of the section authorizing "judgment according to the justice of the case," as it does to that portion of the section relating to judgments by default. The term "new trial" is not strictly applicable except in cases where issues had been joined; and it would be a remarkable construction to limit the regulations as to new trials to judgments by default, to which the term does not apply in strictness, and exclude such regulations in reference to trial actually had, to which the terms properly apply; and this, too, in the absence of any language clearly expressing such intent. In this case, however, it was not proper to grant a new trial before the magistrate upon the grounds so considered. On examining the case we find that the circuit court failed to consider the exception, which was "that the verdict is contrary to the evidence of the case, proof showing that title to property then, and had always been, vested in the defendant, and that he had not parted with the same for value or otherwise." This exception involved the merits, and ought to have been considered by the circuit court before ordering a new trial. As this court has no jurisdiction to pass upon that question, we deem it proper that the cause be retained in the circuit court for the purpose of considering the same.

The judgment of the circuit court is reversed, and the cause remanded to that court to consider the appeal from the magistrate on said exception.

(64 S. C. 383)

WALTERBORO & W. RY. CO. v. HAMPTON & B. R. & LUMBER CO.

(Supreme Court of South Carolina. July 5, 1902.)

ACTION ON CONTRACT—NONSUIT—EVIDENCE.

1. Where, in an action on a written contract, a letter and a telegram were introduced tending to show assent by one of the contracting parties to the contract, it was error to

grant a nonsuit on the ground that there was no evidence in writing of such assent.

2. Where the pleadings in an action on a contract do not raise any issue as to the performance of certain conditions in the contract, a nonsuit for failure to prove the performance of such condition was erroneous.

Appeal from common pleas circuit court of Colleton county; Watts, Judge.

Action by Walterboro & Western Railway Company against Hampton & Branchville Railroad & Lumber Company. From an order granting nonsuit, plaintiff appeals. Reversed.

Howell & Gruber, for appellant. Jas. W. Moore, for appellee.

GARY, A. J. The appeal herein is from an order of nonsuit granted on the ground that no evidence was introduced of the written assent to the contract on the part of the Green Pond, Walterboro & Branchville Railway Company. The first and second paragraphs of the complaint allege the corporate existence of the plaintiff and defendant; the other allegations of the complaint are as follows: "(3) That on the 5th day of January, A. D. 1897, the plaintiff and the defendant entered into another contract, whereby the defendant, upon sufficient consideration, contracted and agreed to and with the plaintiff to furnish for shipment over the railroad of the plaintiff during the continuance of such contract not less than 600,000 feet of lumber per month. (4) That said contract went into effect and became operative on the 25th day of March, 1897, and has been in full force and effect ever since that time. (5) That the defendant has failed and neglected to furnish for shipment over the railroad of the plaintiff 600,000 feet of lumber per month for the first three months under said contract, commencing on the 25th day of March, 1897, and ending on the 25th day of June, 1897, the defendant having furnished for shipment over the railroad of the plaintiff during the said period of three months only 1,039,216 feet of lumber. (6) That the plaintiff was to be paid as its proportion of the freight charges for hauling and transporting said lumber the sum of 60^{ths}/₁₀₀ cents per thousand feet; that the plaintiff's costs and expenses to haul and transport the said lumber, which the defendant failed and neglected to ship for the said period of three months, would have been small and inconsiderable, amounting to not more than \$50; that by reason of the defendant's failure to furnish for shipment over the railroad of the plaintiff 600,000 feet of lumber per month for each of said three months this plaintiff has been damaged, to its injury \$412.17."

The answer of the defendant admitted the allegations contained in the first and second paragraphs of the complaint, but denied each and every other allegation thereof, and set up the following defense: "For a second defense herein denies that defendant has fur-

nished for shipment over the railroad of plaintiff during the time mentioned in complaint only the amount of lumber specified in complaint, and alleges that the defendant has furnished for shipment over the said railroad under the said contract 100,000 feet of lumber per month during the time mentioned in complaint."

The defendant's attorney served the following notice: "Please take notice that at the trial of each of the three causes entitled as above the defendant will introduce certified copies or other secondary evidence of the following documents and instruments in writing, in case you fail to produce for evidence the originals thereof: (1) Articles of agreement between the Walterboro and Western Railway Co. and the Hampton & Branchville Railroad and Lumber Co., in regard to shipping wares, merchandise, lumber, and freights, and as to divers other matters, dated January 5, 1897. (2) The memorandum of agreement in writing, which was drawn up previously to the above-mentioned agreement, and which was the basis of the said above-mentioned agreement. (3) Letter directed to J. R. Stokes, Esq., president W. & W. Railroad Company, dated at Savannah, Ga., January 30, 1897, and signed 'F. B. Papy, Genl. Freight Agent,' relating to matters connected with the agreement first above named."

The contract was introduced in evidence, and marked "Exhibit A." The ninth clause thereof is as follows: "(9) That this contract, being first assented to in writing by the Green Pond, Walterboro and Branchville Railway Co. and Charleston and Savannah Railway Co., shall go into effect immediately upon the loading of the vessel chartered by Campbell & Shirer to be loaded at Port Royal, and for the loading of which the party of the second part has to furnish about 108,000 feet of lumber, and shall continue in full force and effect, subject to all the stipulations and reservations herein contained, for a period of eighteen months from the date upon which the same goes into effect."

The record contains the following: "Counsel for plaintiff now wishes to introduce in evidence a letter. Counsel for defendant stated that it should first be proved that Mr. Papy has the position he signs there, and had the authority to make this assent. Counsel for plaintiff states that when a party is served with notice to introduce in evidence a certain paper he cannot be required to prove the execution, nor can the party who requires him to produce it object to it. It has been expressly held by our supreme court, and is the law, so far as I know, in every state. They have given us notice to produce these papers, and I offer them in evidence. The court, after hearing argument, stated: 'After hearing those authorities, I am inclined to think Mr. Gruber is right. I will allow it, and note an exception. I rule that a paper having been called for and inspected under the authorities, I am inclined

to think Mr. Gruber has the right to produce it without formal proof.' Exhibits B and C introduced in evidence, as follows: 'Plant System, Savannah, Ga., Jany. 30th, 1897. J. R. Stokes, Esq., Prest. W. W. R. R. —Dear Sir: Your superintendent handed me the agreement between the W. & W. R. R. and the H. B. R. R., and stated that they were ready to execute it as soon as Mr. Mauldin was. As I told you personally, there are many matters embraced in the agreement that this system or the C. & S. Ry. should not be a party to. They relate entirely to matters local between yourselves. The C. & S. Ry. is only interested in that agreement so far as it relates to the rates of freight and divisions of the same. I am authorized by my management to say that we approve of the contract so far as it relates to any matter in which the C. & S. Ry. is a party, and that you can file this letter with the contract as a part of the same. After you have executed the contract, please send me a copy. Very truly yours, F. B. Papy, Genl. Freight Agent.' 'To J. R. Stokes, Walterboro, S. C. Subject: Referring to my letter handed Mr. Fincken with the P. and B. contract, the C. & S. and G. P., W. & B. Ry. Co. agree to be bound by this contract as per your telegram; which was the object of this letter. F. B. Papy.'"

There is testimony to the effect that the plaintiff and the defendant commenced to operate under said contract on the 25th day March, 1897. The following appears in the record: "Plaintiff rests. Gen. Moore, for defendant: At this stage we move for a nonsuit. The plaintiff rests his case on this contract. There is a clause in this contract which provides—it is the ninth clause—that before it shall go into effect it must be first assented to in writing by the Green Pond, Walterboro and Branchville Railway Co. and the Charleston and Savannah Railway Co. That is a provision of the contract. It is the condition precedent, and until that condition precedent is satisfied the contract cannot go into force. The plaintiffs, in proving their contract, are obliged to prove the assent of the Charleston and Savannah Railway Co. and by the Green Pond, Walterboro and Branchville Railroad Co. They have attempted to do that by the evidence they have submitted, and I submit they have not proved the assent in writing which they should have proved. The assent of a corporation can be proved by the duly accredited and authorized agents of the corporation, and it is the business of the party proving the assent to show that they are the duly accredited agents of the corporation by some act showing that the particular individual who claims to have acted in making the contract had the power to make the contract. I submit, further, that the letter of Mr. Papy is dated January 30, '97, and the contract, by Mr. Fincken's testimony, was not signed until the 15th of March following; so that at the

time that assent was made there was no contract in existence. Mr. Gruber argued in opposition to the motion, contending that the assent of the Green Pond, Walterboro and Branchville Co. had been shown, that the existence of the contract was admitted, and the proof showed that the parties had operated under its terms; that the telegram showing such assent was in evidence, but, if not properly proved, then he asked to be allowed to offer such proof. The Court: A motion is made for a nonsuit on the grounds stated by Gen. Moore. I think I will have to grant the nonsuit on this ground: That this contract shows that it must be assented to in writing by the Green Pond, Walterboro and Branchville Railroad Co., and there is nothing to show that they did. There is sufficient testimony to go to the jury, in my opinion, that the Charleston and Savannah Railway Co., by parties properly authorized— There is enough testimony to go to the jury that it has assented; and, if there was any way in the world in which I could let Mr. Gruber prove that telegram, I would let him, but the mere fact that Mr. Stokes got the telegram would not be sufficient. They would have to hunt up the operator to prove it, and I cannot delay the court. So, on the ground solely of there being no proof before me at all that the Green Pond, Walterboro and Branchville Railroad Co. has assented in writing to the contract, I will grant a nonsuit. They rely on a written contract here, and I grant a nonsuit on that ground." Thereupon his honor granted an order of nonsuit on the ground just mentioned.

It will not be necessary to consider the exceptions in detail. It will be observed that the presiding judge did not rule that the letter and telegram were insufficient evidence of assent in writing on the part of the Green Pond, Walterboro & Branchville Railway Company to the terms of the contract. On the contrary, it appears that he would have ruled that they were sufficient, if he had regarded them as properly before the court for consideration. The record discloses the fact that the letter and the telegram were offered in evidence, and, after the ruling of the circuit judge, were introduced in evidence as Exhibits B and C. They were therefore properly before the court for consideration at the time his honor granted the nonsuit; and, as they tended to show compliance by the Green Pond, Walterboro & Branchville Railway Company with the conditions mentioned in the ninth clause of the contract, the order of nonsuit was erroneous.

Furthermore, by reference to the pleadings, it will be seen that they do not raise the issue as to the performance of said condition by the railroad company mentioned in the ninth clause of the contract; and, as there was testimony tending to prove all the allegations of the complaint put in issue by the answer, the nonsuit was erroneous for this reason likewise.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(64 S. C. 430)

BAKER v. IRVINE (two cases).

BAKER et al. v. SAME.

(Supreme Court of South Carolina. Aug. 11, 1902.)

COSTS ON APPEAL.

1. Where, for sake of convenience, three cases were heard together, and the papers were entitled in the names of the parties in each case, the prevailing party may tax appeal costs for case and exceptions and argument in each case.

Appeal from common pleas circuit court of Greenville county; Gage, Judge.

Actions by J. A. Baker and by W. C. Baker and by J. A. Baker and W. C. Baker against W. H. Irvine. From judgments for plaintiffs, defendant appeals. Affirmed.

Carey & McCullough, Adam C. Welburn, and B. M. Shuman, for appellant. Blythe & Blythe, for respondents.

JONES, J. The defendant in the three above-entitled actions appeals from the taxation of costs as allowed by the circuit court. The clerk of the court had taxed one set of supreme court costs for the three cases, viz. \$10 for making and serving a case containing exceptions, and \$25 for argument in the supreme court, which action was reversed by the circuit court, Hon. Geo. W. Gage presiding, who held that costs for said items should be taxed in full for plaintiff in each case. Appellant contends that only one set of costs for the three cases should be allowed, inasmuch as only one case containing exceptions was in fact served, and only one argument in fact made in the supreme court; the cases being heard together and the papers entitled as above. These being cases at law, the right of costs must follow the result, and neither the circuit court nor this court is at liberty to do otherwise than enforce the strict legal right of the prevailing party, without regard to any real or supposed hardship. The costs allowed were in conformity with the statute. The circuit court held, as a matter of fact, that the three cases were never consolidated, and in law could not have been consolidated, and that separate judgments were rendered in each case by the magistrate, by the circuit court, and by the supreme court. 62 S. C. 293, 40 S. E. 672. This being so, the fact that, for sake of convenience, the cases were heard together, and the papers were entitled as above, would not constitute the three cases one in fact. Each case being separate and distinct, the "case" with exceptions" and the "argument" must be treated as made in each case. *Bogan v. Sprock*, 37 S. C. 606, 16 S. E. 35.

The judgment of the circuit court is affirmed.

EWBANK v. EWBANK.

(Supreme Court of South Carolina. Aug. 11, 1902.)

LIMITATIONS—PAYMENT—RENEWAL OF DEBT.

1. An equitable mortgage, and the note secured thereby, barred by limitations, are revived, as between the original holders, by a payment on the note.

Appeal from common pleas circuit court of Greenville county; Klugh, Judge.

Action by Amy S. Ewbank against Herbert B. and Arthur L. Ewbank and others, and from circuit decree Arthur L. Ewbank appeals. Modified.

Oscar Hodges and B. A. Morgan, for appellant. Stanyarne Wilson, for respondent.

JONES, J. In this action for partition of real estate, a controversy arose between above-named defendants involving the statute of limitations, interposed by respondent against a claim by appellant to have respondent's interest in the premises applied to a note due by respondent to appellant, and secured by an instrument conceded to be an equitable mortgage of respondent's interest in the premises. The note was for \$500, dated February 6, 1880, payable February 6, 1882, credited with \$400, May 13, 1892. The master reported that it was admitted by counsel for Herbert B. Ewbank that the note is not barred by the statute, by reason of the payment of \$400 on the note, May 13, 1892, and certain admissions or acknowledgments of the debt made by Herbert Ewbank, in letters written by him to Arthur Ewbank in the year 1899; and that it was further admitted that as the testimony showed that Herbert Ewbank was at the time of the last payment a nonresident of this state, and has remained continuously absent therefrom since that time, the statute of limitations was suspended, and that it would not avail him as to the note, under section 121, Code. The contention was that the equitable mortgage given to secure the note was barred. The master reported against this contention in the following language: "The question thus presented is one of some difficulty of determination, on account of the apparent absence of any direct adjudication of the matter by our own courts. In the case of *Nichols v. Briggs*, reported in 18 S. C. 473, it was held that, although the note be barred by the statute, that the mortgage given to secure it was not barred, and could be enforced within 20 years from the date of its execution. The court in this same case, quoting with approval from 1 Hill, *Mortg.* § 8, used the following language: 'A mortgage being given as a security for a debt, the general rule is that no mere change in the mode or time of payment, nothing short of an actual payment of the debt or an expressed release, will operate as a discharge of the mort-

¶ 1. See *Limitation of Actions*, vol. 22, Cent. Dig. §§ 634, 641.

gage. The lien lasts as long as the debt.' 'In equity, a mortgage is always regarded merely as a security for the debt. The debt is the principal and the mortgage an incident only.' Section 1207, 2 Jones, Mortg. The same author, in the same section, used the following language: 'So long as the statute does not bar a recovery on the note, it does not bar a foreclosure of the mortgage. If, by nonresidence of the mortgagor, time be deducted from the period of limitation, so that an action on the debt is not barred, neither is an action to foreclose the mortgage barred.' It seems to me that when a note and mortgage is barred, and when a subsequent part payment, promise, or acknowledgment is made, that it renews the mortgage, so far as it affects the mortgagor's interests in the premises. Section 1202, 1 Jones, Mortg." The master was reversed by the circuit court for reasons thus stated: "There is practically but one question raised by the exceptions, and that is whether the instrument of writing given as security to the above note in controversy is barred by the statute of limitations. The master rightly holds that said writing, under the authority of Bryce v. Massey, 35 S. C. 127, 14 S. E. 768, is an equitable mortgage, and that, being without seal, it was barred after six years. Arthur v. Screven, 39 S. C. 77, 17 S. E. 640. The note secured by said instrument matured February 6, 1882. Payments were made on it down to February, 1884, after which no payment was made until May, 1892, a period of more than eight years. It is conceded that both the note and equitable mortgage were barred at the date of the last-mentioned payment, and it is also conceded that said payment removed the bar of the statute as to the note. Park v. Brooks, 38 S. C. 300, 17 S. E. 22. But the position of the defendant H. B. Ewbank, as set forth in his fifth exception, is that 'the payment on the note made May 13, 1892, was a new promise, made for the payment of the debt only, and not a promise to renew a security previously given for the debt.' It seems to me that this position must be sustained. As said by the master, and so far as my researches go, there is an apparent absence of direct adjudication on this point by our court. But the authorities cited by the master go to show that the note and mortgage are regarded as separate and distinct evidences of securities for the debt; so much so that where the note is barred and the mortgage not, as in the case of Nichols v. Briggs, 18 S. C. 473, or where the note is void for alteration and the mortgage is not so affected, as in the case of Plyler v. Elliott, 19 S. C. 257, recovery may still be had on the mortgage, although the right of action on the note is lost. And the doctrine is well settled that where the principal on a note renews it by a payment or a new promise, whether before or after the bar of the statute

has fallen, such renewal does not bind the surety. Walters v. Kraft, 23 S. C. 578, 55 Am. Rep. 44. And it seems that such new promise does not revive the negotiability of a bill or note originally possessing that incident, but only revives the bare contract to pay. 1 Pars. Cont. (6th Ed.) 434. So that whether the mortgage be regarded as an incident of the debt or as a contract for its security or payment it is not revived by a mere revival of the note, but must be revived, if revived at all, by an explicit contract to that effect."

We think the view taken by the master was correct. A mortgage is an incident to the debt it secures. It follows the debt when the debt is assigned, and it is discharged in whole or in part when the debt is paid in whole or in part. It would seem to follow logically that the legal effect of a payment upon a note in renewing or reviving the debt, or preventing the bar of the statute, would also apply to the mortgage as incident thereto, certainly as between the original parties. It is true that in this state a payment which prevents the bar of the statute, and preserves or renews the remedy, is or implies a new promise to pay the balance due upon the old debt, which should be alleged upon as a new cause of action. Fleming v. Fleming, 33 S. C. 505, 12 S. E. 257, 26 Am. St. Rep. 694. This, however, does not separate the mortgage from the debt, which is the same debt in a new form. Such new promise is not substantially different from a renewal or substantial obligation, which would not affect the lien of a mortgage given to secure the original debt. No mere change in form of the debt secured by mortgage will impair the lien of the mortgage. Gibbes v. Railroad Co., 13 S. C. 253; Burton v. Pressly, Cheves, Eq. 1. While we have found no case in this state directly deciding the point in controversy, upon principle we think it must be held, with reference to the statute of limitations and as between the original parties, that the lien of a mortgage exists and is enforceable so long as the debt which it secures exists and is enforceable. The authorities in other jurisdictions sustain this view. Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Bottles v. Miller (Ind. Sup.) 14 N. E. 732; Murray v. Emery (Ill.) 58 N. E. 828; Harper v. Edwards (N. C.) 20 S. E. 393; Kenaston v. Lorig, 84 N. W. 823, 81 Minn. 454; Johnson v. Johnson, 81 Mo. 331. See, also, 19 Am. & Eng. Enc. Law (2d Ed.) 289.

The defendant Arthur L. Ewbank is therefore entitled to have the proceeds of the sale of Herbert B. Ewbank's interest in said land, or so much as may be necessary to satisfy his debt, applied to said debt for which judgment was rendered by the circuit court.

The decree of the circuit court is modified in accordance with the views herein announced.

(64 S. C. 423)

FORT v. SOUTHERN RY.

(Supreme Court of South Carolina. July 18, 1902.)

CARRIERS — LIABILITY TO PASSENGER — EXEMPLARY DAMAGES.

1. Plaintiff purchased a ticket, and boarded a mixed train, and was carried near his destination, when the conductor received orders to take the engine back, which he did. Before it returned, plaintiff walked about a mile to his destination. Held that, there being no proof of willfulness, wantonness, or rudeness, plaintiff was not entitled to exemplary damages.

Appeal from common pleas circuit court of Lexington county; Buchanan, Judge.

Action by James C. Fort against the Southern Railway. From judgment of nonsuit, plaintiff appeals. Affirmed.

G. T. Graham and P. H. Nelson, for appellant. B. L. Abney and E. M. Thomson, for appellee.

JONES, J. The appeal herein is from an order of nonsuit. The plaintiff, having purchased of defendant a ticket as passenger on the morning of June 28, 1901, boarded defendant's train at Pellon for Columbia. The train was a freight train, with a combination passenger, baggage, and express car attached. When the train reached Cayce, a station about two miles from Columbia, the conductor received orders from the company to take the engine back to Perry's on some emergency, the nature of which was not disclosed in plaintiff's evidence. Upon receiving this order, the conductor side-tracked his train at Cayce, and told plaintiff and another passenger that they would have to get off and take another train to Columbia, as he had to go back. Plaintiff, being informed that the other train would not go to Columbia until about 5 o'clock that afternoon, requested to be taken back to Pellon, which the conductor declined to do, as he was only taking back the engine. Plaintiff applied to the station agent or operator at Cayce, but he did not make any effort to procure a conveyance for plaintiff to Columbia, and plaintiff failed in his effort to hire a conveyance. Thereupon plaintiff, with the other passenger, walked from Cayce to the bridge at Brookland, about one and a half miles, riding, however, about a half mile of that distance in a wagon going that way, and after crossing Brookland bridge took the Columbia street car. The weather was warm, and the plaintiff, unused to walking much, was made tired by his walk of about a mile, and was worried and annoyed by the failure of defendant to transport him to Columbia. The said train reached Columbia later in the day, and plaintiff returned home on defendant's train that afternoon. There was some evidence tending to show that when the engine was ordered back to Perry's from Cayce the railroad authorities were informed that there were two passen-

gers on board for Columbia. There was no evidence whatever of any rudeness or insult to plaintiff by defendant's agents. Upon this evidence nonsuit was granted on the ground that the action was for willful tort, and that there was no evidence to show any wantonness or willfulness in the conduct of defendant. The exceptions relate solely to the question whether there was any evidence tending to show a willful tort.

We think the nonsuit was proper. One who boards as passenger a mixed freight and passenger train takes passage subject to the delays incident to that mode of conveyance. For any unreasonable delay considering that mode of conveyance, the passenger has redress for the actual damages occasioned thereby; and, if the conduct of the defendant company is such as to show a wanton or willful disregard of duty to such passenger, exemplary damages may be awarded. In this case the only question being as to exemplary damages, and there being no evidence tending to show any wanton or willful disregard of defendant's duty to plaintiff, the nonsuit was proper.

The judgment of the circuit court is affirmed.

(64 S. C. 405)

Ex parte JETER.**STOKES v. JETER et al.**

(Supreme Court of South Carolina. July 14, 1902.)

ALIENATION OF HOMESTEAD—SIGNATURES.

1. The provisions of Const. 1895, art. 8, § 28, relating to homestead exemptions, and prescribing method of waiving homestead by deed or mortgage, apply only to homesteads set off since the adoption of the constitution.

2. The mortgage of a homestead assigned before the constitution of 1895, but executed after, does not require the signature of both husband and wife, as required by such constitution, to make it valid.

Appeal from common pleas circuit court of Spartanburg county; Klugh, Judge.

Petition by Jno. C. P. Jeter in case of Wm. T. Stokes, Jr., against Luella C. and J. Coleman Jeter. From order dissolving temporary injunction, petitioner appeals. Affirmed.

Carson & Scaife, for appellant. Munro, Duncan & Sanders, for appellees.

JONES, J. The appeal in this case is from the following decree of Judge Klugh, which recites the facts: "It appears that in 1890 a homestead in the premises described in the complaint in this cause was set off to the defendant Luella C. Jeter, she being at that time a married woman. In 1900 she executed and delivered to the plaintiff a mortgage over this land, and at the February term of the court of common pleas for Union county, 1901, judgment was rendered in this cause against the defendants for the foreclosure of

¶ 1. See Carriers, vol. 2, Cent. Dig. § 1023.

¶ 1. See Homestead, vol. 25, Cent. Dig. §§ 177, 178.

the said mortgage. On the 15th day of February, 1901, a petition was filed by Jno. C. P. Jeter, the husband of the defendant Luella C. Jeter, setting out that he was her husband; that the land described in these proceedings had been set off as a homestead to Luella C. Jeter; that she had mortgaged this land to the plaintiff, but that he had not signed this mortgage; and praying that the master for Union county be restrained and enjoined from selling said premises, and that he be made a party to said cause, and be allowed to come in and answer. On this petition his honor Judge Townsend granted a temporary injunction, and the matter comes before me on a motion made by the plaintiff to vacate and set aside this injunction. After hearing argument, I am satisfied that the constitution of 1895 is not retroactive, and that the husband has no such rights in a homestead set off to a wife prior to the adoption of this constitution as the petitioner, John C. P. Jeter, now claims. I am therefore of opinion that the mortgage from the defendant Luella C. Jeter to the plaintiff is good, and that the signature of the petitioner is not necessary to give it validity. It is therefore ordered and adjudged that the temporary injunction heretofore granted by his honor Judge Townsend be, and the same is, dissolved and set aside." Appellant excepts to this order, alleging errors in holding: "(1) That the mortgage given by Luella C. Jeter to the plaintiff was a good and valid lien upon her homestead. (2) That the provisions of the constitution of 1895 prescribing method of waiving homestead by deed or mortgage applied only to homesteads set off since the adoption of the constitution. (3) In dissolving the injunction granted by Judge Townsend without giving petitioner an opportunity of establishing the facts set out in his petition."

We find no error. Constitutions, like statutes, must be construed as acting prospectively, unless a contrary intent appears by express language or necessary implication. No such contrary intent appears in article 3, § 28, relating to homestead exemptions. Bank v. Kohn, 52 S. C. 124, 29 S. E. 625. The language of the constitution is: "The general assembly shall enact such laws as will exempt . . . a homestead. . . . The title to the homestead to be set off and assigned shall be absolute and forever discharged from all other debts of the said debtor then existing or thereafter contracted except as hereinafter provided: . . . provided, further, that after a homestead in lands has been set off and recorded, the same shall not be waived by deed of conveyance, mortgage or otherwise, unless the same be executed by both husband and wife, if both be living." The homestead, having been assigned before the adoption of this constitution, is not affected by the provisions restricting alienation or waiver thereof. The facts alleged in the petition did not, therefore, present a proper case for injunction, and in such case it was

not error to dissolve the temporary injunction. Cudd v. Calvert, 54 S. C. 457, 32 S. E. 508.

It is therefore the judgment of this court that the judgment of the circuit court be affirmed.

(64 S. C. 339)

SLOAN v. SEABOARD & R. RY. CO. et al.
(Supreme Court of South Carolina. July 5, 1902.)

NEGLIGENCE—PLEADING—DEMURRER.

1. Where, in an action to recover for personal injuries, two or more acts of negligence are alleged as contributing to the injury, the plaintiff may submit his whole case to the jury under allegations of one cause of action, without election, under Act 1898, Code Civ. Proc. § 186a, providing that where two or more acts of negligence are set forth in the complaint as causing the injury the party was not to be required to elect upon which he shall go to trial.

2. Where a demurrer is interposed to a whole complaint, it cannot be sustained as to one portion thereof and overruled as to the balance.

Appeal from common pleas circuit court of Abbeville county; Gage, Judge.

Action by Thomas Sloan against the Seaboard & Roanoke Railway Company, the Raleigh & Gaston Railway Company, as lessees of the Georgia, Carolina & Northern Railway Company, and the latter company. From order sustaining in part demurrer, both parties appeal. Reversed on plaintiff's appeal; on defendants' appeal, affirmed.

Wm. N. Graydon, for plaintiff. Wm. P. Greene and J. L. Glenn, for defendants.

POPE, J. Both parties to this action being dissatisfied with the order made by his honor, Judge Gage, in passing upon the demurrer interposed by the defendants to the complaint, that said complaint failed to state facts sufficient to constitute a cause of action, have appealed from said order. The complaint, so far as its first, second, and third paragraphs are concerned, stated the residence of the plaintiff and the acts of incorporation of the defendant railways, the first two of whom are alleged to be controlling and operating the last, the Georgia, Carolina & Northern Railway, in this state. The other paragraphs are as follows:

"(4) That on the 1st day of April, 1901, the plaintiff was in the employ of the defendants in the mechanical department of the said defendants at their shops in the city of Abbeville, S. C., and was under the direction and control of the officers of said defendants, and it was a part of the plaintiff's duty to assist in moving cars from one part of the yard to another part when ordered by those in authority.

"(5) That on the 1st day of April, 1901, the plaintiff was ordered by one of the officers of said defendants to assist the switch engineer to move a car box from one part of the yard to another, and in pursuance of

said order plaintiff went between the car he was ordered to move and the car attached to the engine, and opened the knuckle of the car he was ordered to assist in moving, and signed the engineer to come back and make the coupling. The engineer attempted to make the coupling, but owing to the fact that said coupling was defective, the pin in the said coupling or drawhead being broken, said coupling failed to work; and the cars would not couple together, but, impelled by the force with which the engine ran against the car, the said car ran down the track and was about to run off the switch. The plaintiff then waived the engineer to stop, and went after the car to apply the brake and keep said car from running off the switch. When plaintiff was about halfway across said track of said railroad the engineer carelessly, negligently, and with great force, disregarding his duty in the premises, and well knowing the dangerous position in which plaintiff was, unless he stopped said engine, ran said engine back with great force and violence, pinned plaintiff between said cars, dislocated his hip, bruised him internally, and inflicted great and permanent injury upon the plaintiff.

"(6) That by reason of the defective machinery as aforesaid, and the careless, reckless, and negligent conduct of the engineer operating said switch engine, this plaintiff was mashed, bruised, his hip dislocated, was made ill and sick, was compelled to walk on crutches for three months, lost his employment, for which he was receiving \$23 per month, suffered great pain, and has been permanently and seriously disabled, to his damage \$2,000.

"(7) That by reason of the carelessness and the negligence of the defendants in attempting to move a car with a broken and defective coupling or drawhead, and by reason of the carelessness and negligence of the defendants' engineer in operating said switch engine, the plaintiff herein was injured in the manner and by the means hereinabove set forth, to the damage of the plaintiff in the sum of \$2,000."

The demurrer was as follows: "Upon the call of the case for trial the defendants' attorneys interposed an oral demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action, in that the complaint showed on its face that the defective appliances of the defendant, alleged and set forth in the complaint, did not contribute to the injury of the plaintiff as a proximate cause, and that it further appears from the face of the complaint that the alleged injuries of the plaintiff were the result of the negligence of a fellow servant of the plaintiff engaged in the same work on the same train of cars, which fellow servant was not plaintiff's superior officer or the agent of the defendants, and he had no control over nor direction of the plaintiff at the time of the alleged neg-

ligence, which grounds of demurrer were taken down by the stenographer."

After argument the circuit judge passed this order: "The defendants in this case having interposed a demurrer to the plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that the complaint shows on its face that the alleged defects in the defendants' appliances were not a proximate cause of the plaintiff's alleged injuries, and in that the complaint shows on its face that the alleged injuries were the result of the negligence of a fellow servant of the plaintiff engaged in the same work on the same train of cars, which fellow servant was not plaintiff's superior officer or the agent of the defendants, and who had no control over or direction of the plaintiff at the time of the alleged negligence, after argument of counsel I hold that so much of the demurrer as relates to the alleged defects in defendants' appliances should be sustained, and that so much thereof as relates to the negligence of the fellow servant be overruled; my ruling being that the question whether one party sustains to another the relation of fellow servant is a mixed question of law and fact, which must be settled by the verdict of the jury."

Plaintiff's exceptions were as follows: "(1) Because his honor erred in sustaining so much of defendants' demurrer as related to the defective appliances, it being respectfully submitted that a plaintiff has the right, under the act of 1898, now section 186a of the Code of Civil Procedure, to set out as many causes of action as he pleases, and cannot be required to elect on which he shall go to trial, but shall have the right to submit his whole case to the jury, under the instruction of the court. (2) Because, the demurrer having been interposed as a whole, his honor should have overruled the demurrer, as said demurrer was on the ground that the complaint failed to state facts sufficient to constitute a cause of action; and if the complaint stated any cause of action the entire demurrer should have been overruled. (3) Because, under section 186a of the Code of Procedure, the defect in the machinery having been stated in the complaint as contributing to the injury, it was error in his honor to sustain a demurrer to it."

Defendants' exceptions are as follows: "(1) Because his honor should have held that the complaint shows on its face that the alleged injuries of the plaintiff were the result of the negligence of a fellow servant of the plaintiff engaged in the same work on the same train of cars, which fellow servant was not plaintiff's superior officer or the agent of the defendants, and who had no control over nor direction of the plaintiff at the time of the alleged negligences resulting in the alleged injuries, and should have held, therefore, that the complaint stated no cause of action against the defendants, and should have sustained the demurrer and dismissed the com-

plaint. (2) Because his honor erred in holding that the question of fellow servant is a mixed question of law and fact, to be passed upon by a jury, and in overruling the demurrer on that point, when he should have held that it was first for the court to say from the facts alleged in the complaint whether one party bears to another the relation of fellow servant; and that it is further for the court to say, as a matter of law, whether under the given state of facts (the allegations of the complaint) a cause of action was stated, or whether any negligence is alleged for which the defendants are liable. (3) Because the allegations of the complaint in this case show that the injuries received by the plaintiff were the result of the negligence of the defendants' switch engineer, who was engaged in the same department of work as the plaintiff and upon the same train of cars, and that the said switch engineer was not plaintiff's superior officer, nor the agent of the defendants, but that he was operating the said engine and train of cars under the direction of the plaintiff, and had no control over nor direction of the plaintiff, and his honor should have concluded, as a matter of law, that the switch engineer was the plaintiff's fellow servant, for whose negligence the defendants were in no wise responsible to the plaintiff; that he should therefore have sustained the demurrer, and dismissed the complaint."

We will first in order dispose of plaintiff's exceptions.

First. We think this ground of exception well taken. Even before the act of 1898, now section 186a of our Code of Civil Procedure, this court had pointed out, in *Mew v. Railway Co.*, 55 S. C. 97, and 32 S. E. 830, that when the allegations of the complaint show co-operating causes leading to the result instead of any cause sufficient of itself to produce the result such acts of negligence might very properly have all been alleged in a single cause of action. "It was only when the alleged acts of negligence were distinct and independent, and capable severally of producing the result complained of, that it was necessary, previous to the act (1898), that each of said acts of negligence should be stated as a separate cause of action. But, where the act complained of is the resultant of several co-operative acts of negligence, manifestly the cause of action is single." In the complaint at bar the resultant is the injury to the plaintiff; the co-operating causes thereof are the defective appliances of defendants for coupling the cars in question, and the defective car put in motion thereby, and the failure of switching engineer to heed the signals of plaintiff to stop his engine, and the reckless disregard of his signal by the engineer, by carelessly, negligently, with great force, driving his engine against the car, thereby injuring the plaintiff. It is true the circuit judge regarded that there were two causes of action thus stated in the complaint. However, the act of 1898, now

section 186a of our Code, is as follows: "That in all cases where two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party in such suit shall not be required to elect upon which he shall go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court, and to recover such damages as he has sustained, whether such damages arose from one or another, or all such acts or wrongs alleged in the complaint." And the terms therein employed seem to have changed what had been the practice in the circuit courts as recognized by this court. It has been held that in those cases, where confessedly two causes of action are stated, this new act requires that both causes shall be submitted to the jury. See *Bowen v. Railway Co.*, 58 S. C. 226, 36 S. E. 591, where the court held: "The acts of negligence alleged are: (1) Failure to comply with the statutory requirements as to signals; (2) 'causing the said locomotive and train of cars to approach the plaintiff without warning and unexpectedly to him, and at a rapid and high rate of speed.' The plaintiff, under the act of 1898 (22 St. at Large, p. 693), entitled 'An act to regulate the practice in the courts of this state in actions ex delicto for damages,' had the right to submit to the jury both acts of alleged negligence." See, also, *Glover v. Railway Co.*, 57 S. C. 234, 35 S. E. 510; *Proctor v. Railway Co.*, 61 S. C. 184, 39 S. E. 351; *Appleby v. Railroad Co.*, 60 S. C. 48, 38 S. E. 237. This exception is sustained.

We must sustain the second exception. The demurrer was to the whole complaint, for its failure to state a cause of action. The circuit judge overruled the demurrer to a part of the complaint and sustained it as to a part. Under exception 1 we have held that the complaint only stated one cause of action. Such being the case, under the authority of *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615, and *Lawson v. Gee*, 57 S. C. 502, 35 S. E. 759, it was not in the power of the circuit judge to sustain a demurrer to a part of the allegations of a complaint setting out a single cause of action. The Code provides a different remedy. In *Buist v. Salvo*, supra, this court held: "A demurrer cannot be sustained which is good only as to some of the paragraphs of the complaint. A demurrer, to be well taken, must be interposed to the whole complaint or to one of its causes of action, but objection to irrelevant paragraphs should be by motion, under section 181 of the Code." This exception is sustained.

Third. This exception must be sustained by reason of the views already herein expressed in passing upon exceptions 1 and 2.

Let us now consider the three exceptions presented by the defendant: First. Inasmuch as this exception deals with only that

part of plaintiff's complaint relating to the engineer of defendants' train, which we have already held was only one of the co-operating causes contributing to plaintiff's injuries, and as we have also held, under the authority of *Bulst v. Salvo*, supra, and *Lawson v. Gee*, supra, that a demurrer could not be sustained as to part of one cause of action, this exception is overruled. Second. The foregoing holdings compel us to overrule this exception. Third. We must overrule this exception, in view of our holding already announced in this case.

It is the judgment of this court that so much of the circuit court judgment as is affected by plaintiff's exception be overruled and reversed, and that so much of the judgment of the circuit court judgment as is covered by the exceptions of defendants be affirmed.

(64 S. C. 432)

BOLT, Clerk and Administrator, v. GRAY.
(Supreme Court of South Carolina. Aug. 11, 1902.)

COSTS—LIQUIDATED CONTRACT.

1. Where a note was renewed by payments at intervals up to 1892, it was a liquidated contract, and on suit thereon the prevailing party has the right to tax costs on fee bill in force prior to Act Dec. 22, 1892 (21 St. at Large, p. 30), relating to costs, and excepting liquidated contracts; the allegation of a new promise since that date being only an allegation of a promise to pay the balance due on such liquidated contract as it existed at the time of the payment, in 1892.

Appeal from common pleas circuit court of Laurens county; Gage, Judge.

Action by John F. Bolt, as clerk and administrator, against William L. Gray. From the judgment, plaintiff appeals. Reversed.

Simpson & Barksdale, for appellant. Ball & Simkins, for respondent.

JONES, J. This is an appeal from an order of the circuit court sustaining the action of the clerk of the court in refusing to tax costs in favor of the plaintiff in the above-stated action. The clerk refused to allow plaintiff costs on the ground that the suit was brought August 31, 1897, after the passage of the act of December 22, 1892 (21 St. at Large, p. 30), which repeals attorney's costs, except as to causes then pending or existing liquidated contracts, and that the cause of action in this case was not a liquidated contract existing at the time of the passage of the said act. The complaint alleged the execution of a note by defendant to Jane Fleming on October 3, 1892, and payments thereon each year thereafter, except 1890, of specified sums, including a payment of \$38, October 1, 1891, and a payment of \$50, January 4, 1892. The fifth paragraph of the complaint is as follows: "(5) That after the expiration of six years from the date of maturity of said note the said defendant, William L. Gray, on the 7th

day of April, 1893, paid to the said J. H. Wharton, as administrator as aforesaid, the sum of forty-four and thirty-five one-hundredth (\$44.35) dollars on the said debt, and thereby, in consideration of the moral obligation resting upon him to do so, promised anew to pay the balance due, and thereafter to become due, as principal and interest, upon the said debt." The theory upon which the circuit court, concurring with the clerk, proceeded, was that the action was upon the new promise based upon the last alleged payment and not upon the original contract. This, we think, was erroneous; for in the recent case of *McBryer v. Mills*, 62 S. C. 38, 39 S. E. 788, it was held that the allegation in the complaint of a payment made by defendant upon the note described within six years before the commencement is an allegation that defendant has done an act from which a new promise is implied by law. In paragraph 4 the complaint alleged payments on the note described, October 1, 1891, and January 4, 1892, within six years before the action was commenced, and previous to the act of 1892, supra. Since a debt or contract is a liquidated contract when its terms and the amount due are certain, the complaint, independent of the fifth paragraph above, alleged upon a liquidated contract existing at the time of the passage of the act of 1892, and is therefore expressly exempt from its operation. The allegation in the fifth paragraph of the complaint does not destroy the legal effect of the other allegations of the complaint. At most, the only effect of such allegation is to make the complaint not only one upon a liquidated contract, existing at the time of the passage of the act under consideration, but also upon the new promise made April 7, 1893, to pay the balance due upon said liquidated contract as it existed at the time of the payment made January 4, 1892.

The judgment of the circuit court is reversed, and the case remanded for taxation of costs in conformity with the conclusion herein announced.

(64 S. C. 433)

CITY COUNCIL OF GREENVILLE v. MAULDIN.

(Supreme Court of South Carolina. Aug. 11, 1902.)

INJUNCTION—ALTERATION OF STREET GRADE—ASSESSMENT OF DAMAGES—ESTOPPEL—DISSOLUTION—DAMAGES.

1. Complainant in action to restrain defendant from prosecuting proceedings, under a city charter, to secure an assessment of damages caused by the alteration of the street grade, alleged that defendant's proceedings under the statute were illegal and unauthorized, and that the city was not liable to make compensation, and that the change of grade was made under an act which did not provide for compensation. *Held*, that the injunction was properly dissolved, there being no statement of any fact to show that the city was not liable, and the denial of liability being simply a legal conclu-

sion unsupported by the correct legal conclusions deducible from the facts stated.

2. Where a city appointed an arbitrator to assess damages to a lot owner on the alteration of the grade of a street under its charter, it was estopped from suing to enjoin such proceedings after the award, although it denied its liability.

3. Where an injunction is dissolved, the case may be referred to ascertain amount of damages under injunction bond.

Appeal from common pleas circuit court of Greenville county; Klugh, Judge.

Action by the city council of Greenville against W. L. Mauldin. From an order dissolving an injunction, plaintiff appeals. Affirmed.

B. A. Morgan and Carey & McCullough, for appellant. Mauldin, Hubbell & Haynsworth and Parker & Patterson, for respondent.

JONES, J. The complainant in this case sought an injunction to restrain defendant from prosecuting proceedings begun by him, under section 30 of the charter of the city of Greenville (19 St. at Large, p. 114), to secure an assessment of damages alleged to have been done to defendant's property by the altering and lowering the grade of Main street, in said city, during 1895 and 1896. The appeal herein is from an order of Judge Klugh, dated June 29, 1901, dissolving the temporary injunction previously granted by him in said cause, and also from an order of the same judge, dated August 10, 1901, dismissing the complaint, and referring to the master to ascertain what damages, if any, the defendant may have sustained by reason of said temporary injunction. The exceptions to both orders are numerous, and we shall not undertake to follow them in detail, but will consider what we deem the principal and controlling points involved.

We will notice, first, whether there was error in dismissing the complaint for failure to state facts sufficient to warrant the injunction sought; because, if the complaint was properly dismissed on that ground, it is manifest that the temporary order of injunction must fall also. We think the complaint was properly dismissed. The city of Greenville is liable to abutting lot owners for damages sustained by reason of altering the grade of its streets. *Paris Mountain Water Co. v. City Council of Greenville*, 53 S. O. 82, 30 S. E. 699. The manner of assessing such damages or compensation, as provided in section 30 of the charter of Greenville, is exclusive. *Garraux v. City Council of Greenville*, 53 S. O. 575, 31 S. E. 597. But the statutory tribunal to assess compensation having no power to determine the right to compensation, and having power only to fix the amount of compensation, a court of equity, upon a complaint stating facts showing that the right of the lot owner to claim any damages is disputed, may restrain or suspend the action of the statutory special tri-

bunal until the proper court has determined the question as to the liability to make compensation. *Railway Co. v. Riddlehuber*, 38 S. O. 308, 17 S. E. 24; *Cureton v. Railroad Co.*, 59 S. O. 376, 37 S. E. 914; *Glover v. Remley*, 62 S. O. 52, 39 S. E. 780; *Railroad Co. v. Burton*, 63 S. O. 348, 41 S. E. 451. Tested by the foregoing principles, the complaint fails to make a case justifying interference with the statutory proceedings. It appears by the complaint that the defendant, Mauldin, is the owner of certain real estate fronting on Main street of Greenville for about 105 feet; that the city of Greenville, in improving said street, has lowered the grade thereof to an average depth of 15 inches along defendant's premises; that section 30 of the city charter provides as follows: "That the said city council shall have power and authority to close all such roads, streets and ways within said city as they may deem necessary, by sale of the freehold therein, either at private or public sale, as they may adjudge best for the interest of the said city; and they shall have power and authority to lay out, adopt, alter, widen and open all such streets, roads and ways as they may from time to time deem necessary for the improvement and convenience of the said city: Provided, that the owners of land over which any such road, street or way may pass, and any person damaged by the closing or from the altering of any such street, road or way, shall be duly compensated therefor by the city council; and whenever any road, street or way is to be laid out, closed, opened or widened, in case the said city council and the owners of the land over which the same shall pass, or the person damaged by the closing or altering as aforesaid, cannot agree upon the amount of compensation to be paid to such owner or persons, the same shall be assessed by three commissioners to be appointed, one by the city council, one by the land owner or person damaged, and the third by the two commissioners thus appointed; and in case any land owner shall neglect or refuse to appoint a commissioner within five days after notice so to do, then the chairman of the board of county commissioners of the county of Greenville shall appoint a commissioner, who, with the one appointed by the city council, shall select a third commissioner: Provided, that either party may appeal from such assessment to the court of common pleas for said county, by serving written notice of such appeal upon the other party within five days after such assessment shall have been made, when the issue of value shall be submitted to a jury." The complaint further shows that in response to the defendant's demand for arbitration to assess compensation, under section 30 above, for alleged damages resulting from said alteration of the street grade, the plaintiff had appointed an arbitrator to represent said city on the board of arbitrators; but at the same time denying its liability, and giving notice

that it did not waive any rights it might have had under its charter or the laws of the state by entering into the said proceeding; that a majority of said arbitrators had assessed the sum of \$1,000 as damages to defendant; that both sides had appealed therefrom to the court of common pleas, in which court the appeal was there pending. The thirteenth allegation of the complaint is as follows: "Plaintiff denies that it is liable at all in damages to the defendant by reason of the improvements hereinbefore above referred to, out of which alone the defendant claims to have been damaged, and alleges that its liability has never yet been settled by any tribunal authorized by law and having jurisdiction; and that section 30 of the act of 1885, under which the defendant is proceeding, provides only for assessment of damages in the cases therein mentioned, and after the legal liability of the plaintiff has already been established before an appropriate tribunal, which plaintiff alleges upon information and belief has never yet been done." The fourteenth allegation states that defendant's proceeding under the statute is illegal and unauthorized, and may result in serious and irreparable injury to the plaintiff unless enjoined. In all this there is no statement of any fact showing that the city of Greenville is not liable to make compensation under its charter to the defendant, but, on the contrary, the legal conclusion from the facts stated is that the said city is liable to make compensation, under section 30 of its charter. The denial of its liability in the complaint is merely the statement of a legal conclusion, which goes for naught, and is not only supported by, but is in conflict with, the correct legal conclusions deducible from the facts stated. The complaint further alleges that the lowering of the street grade was made by the city council pursuant to the provisions of the act of December 22, 1891 (20 St. at Large, p. 1372), which does not provide for compensation; and that section 30 of the charter (19 St. at Large, pp. 106, 114) has no application; but the contention based upon this—that the city is not liable to make compensation under section 30—has been already disposed of in the case of *Paris Mountain Water Co. v. City Council of Greenville*, 53 S. C. 82, 30 S. E. 699.

There is another reason why the injunction was properly dissolved, and the complaint dismissed. The statutory remedy for securing compensation was intended to be expeditious as well as exclusive. When, therefore, one is notified of proceedings under the statute, and conceives that he is not liable to make compensation, or that the claimant has no right to ask compensation at all, he must move promptly to have the statutory proceedings stayed or suspended until the disputed right or liability to compensation can be determined by a court having jurisdiction. To this end, the complaint

should clearly set forth the facts which are relied on to show that the right or liability to compensation is in dispute, and should in that suit seek to have such disputed liability determined, before the special statutory tribunal to fix the amount of compensation has acted. Otherwise, the right to receive, or the liability to make compensation, must be deemed and taken as conceded. The statutory tribunal having jurisdiction to fix the amount that shall be paid as compensation, and having proceeded to a determination without intervention from a court of equity, the result of such determination cannot be directly or indirectly assailed or overthrown, except by appeal in such special proceedings as provided by the statute. It is of no avail whatever for one with notice of the proceedings under the statute to content himself with denying liability, and disclaiming intention to waive any right, nevertheless to sit quietly by, and permit the claimant to secure the verdict of a jury or other tribunal to assess the amount of compensation, and then wake up to the importance of enjoining or suspending the statutory proceedings on the ground that there is no liability to make compensation. He must himself take timely proceedings to test the disputed right or liability, and to restrain or suspend the proceedings under the statute, before the board or special jury has acted. In this case, the plaintiff participated in the special proceedings, and took no step to have such proceedings stayed until after an adverse decision and the appeal therefrom by the plaintiff.

Having dissolved the injunction, there was no error in the order of reference to ascertain the damages resulting to defendant by reason of the injunction, and recoverable under the injunction bond; such practice being in accord with the rule approved in *Hill v. Thomas*, 19 S. C. 235. All exceptions are overruled.

The judgment of the circuit court is affirmed.

(64 S. C. 444)

MAULDIN v. CITY COUNCIL OF GREENVILLE.

(Supreme Court of South Carolina. Aug. 11, 1902.)

ALTERATION OF STREET GRADE—ASSESSMENT OF DAMAGES—APPEAL—PROCEDURE—INJUNCTION.

1. Under Code, § 286, providing that in condemnation proceedings, if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict, judgment may be entered on the verdict of a jury on appeal from assessment by arbitrators for altering grade of street under special statutory proceedings and appeal therefrom.

2. Where, pending condemnation proceedings, a city brought an action to enjoin their further prosecution, and obtained a temporary injunction, which was dissolved on appeal, it is proper to continue the proceedings on the appeal in condemnation; the appeal in the injunction proceedings not continuing the same.

3. Under a city charter providing that either party could appeal from the assessment of damages on changing the grade of a street, the court need not add, as a condition to such appeal, that the notice of appeal state the ground on which a review of the proceedings would be asked.

4. Evidence of a mayor of a city that a certain named person was city engineer is sufficient to prove that he held such office, without the production of the written appointment.

5. Right to compensation of abutting property owner for altering grade of street does not depend upon whether his buildings had been originally erected with reference to a street grade obtained from the city engineer.

6. Measure of damages for altering grade of street is the difference between the market value before and after the alteration.

7. The cost of lowering the floor of a house, the loss of tenants, and the depreciation in rental value of property, are to be considered in estimating the damages for changing the grade of a street.

Appeal from common pleas circuit court of Greenville county; Klugh, Judge.

Statutory proceeding for assessment of damages by W. L. Mauldin against city council of Greenville. From judgment on trial of appeal from arbitrators' assessment, defendant appeals on following exceptions:

"(1) Error in ordering the said case to trial after the defendant had given notice of intention to appeal from the order of his honor, dissolving the temporary injunction in the case of City Council of Greenville v. W. L. Mauldin, being a case to enjoin the plaintiff from a further prosecution of this proceeding until its appeal in the case of city council against Mauldin could be heard and determined. (2) Error in not sustaining defendant's motion to dismiss plaintiff's appeal upon the ground that it was too general and indefinite. (3) Error in allowing the witness W. L. Mauldin to testify that G. L. Norman was city engineer at the time the said witness alleges he obtained the grade of the sidewalk for the purpose of erecting the building at the corner of Main and Washington streets, and in allowing the said witness to testify that the said G. L. Norman fixed the grade for the plaintiff at that time; it being respectfully submitted that the records of the city council were the best evidence of this fact, and there was no testimony going to show that the said G. L. Norman had authority from the city council to establish grades. (4) Error in permitting plaintiff's counsel to ask the witness W. L. Mauldin the following question, over objection of the defendant: 'What did it cost you to place your property in the same relative position to the street after the change of grade that it was before the grade was changed?' and allowing witness, over objection of defendant's counsel, to answer the question; it being respectfully submitted that the measure of damages in this case was not the expense which the plaintiff incurred in lowering the floors of his building, but the difference in the market

value of the property before and after the change of the grade. (5) Error in allowing, over the objection of defendant's counsel, plaintiff's counsel to ask the said witness the following question: 'Tell the jury what you have paid, actually, in lowering the floors that you have lowered;' it being respectfully submitted that the city council is not responsible to the plaintiff for the money that he paid in actually lowering the floors, even though it be responsible in damages at all; the true test being the difference in the market value of the property before and after the alleged alteration. (6) Error in allowing the witness W. L. Mauldin to testify as to the contents of a written protest which he claims to have filed with the defendant before the grade was changed; it being respectfully submitted that the instrument itself is the best evidence of its contents, and its absence was not satisfactorily accounted for. In this connection, error in not striking out the evidence of the witness as to the contents of said protest. (7) Error in allowing the witness P. T. Hayne, over the objection of defendant's counsel, to testify that 'my idea is that the property was damaged in value just whatever it would cost to bring that property back on the grade;' it being respectfully submitted that the defendant is not bound by the idea of the witness as to the measure of damages, although such idea be consistent with the rules of law, which was not the fact in this case. (8) Error in not striking out the testimony of the said witness P. T. Hayne as to the property of Mrs. E. M. Cleveland, and the effect of the alteration of the grade upon the said property; the same being mere hearsay, and otherwise irrelevant. (9) Error in allowing the following question, over objection of defendant's counsel, to be propounded to the witness R. Mays Cleveland: 'Suppose you had a tenant in there, and after the sidewalk had been lowered you lost the tenant, would it be easier to get a new tenant after it was cut down than before it was cut down, getting the same rent?' Said question being entirely hypothetical, and otherwise incompetent; the true measure of damage being the difference in the market value of the property before and after the alteration. (10) Error in allowing the witness J. H. Haynes to testify as to what he charged the plaintiff for lowering the floors; it being respectfully submitted that the defendant cannot be held responsible for such charge. (11) Error in not ruling out the following question propounded to the witness G. B. Carlisle, defendant's attorneys having objected to the same: 'Suppose that Gov. Mauldin had not made those new steps, but had left it just like it was, and if you had to get boxes to get up in there, would you have stayed there?' The said testimony being entirely irrelevant, and its only effect being to confuse and mislead the jury. (12) Error in holding competent, over objection of defendant's counsel, the following question which was propounded

the witness G. B. Carlisle: 'Would the rental value have been as high if it had not been fixed with the new steps?' It being respectfully submitted that the said question was entirely incompetent, and not responsive to the question of damages, as contemplated by the charter under which this proceeding was instituted. (13) Error in allowing the witness Henry Briggs to testify as to who was city engineer at a certain time in the history of the city; it being respectfully submitted that this was a matter of record, and the record should have been introduced, or its absence satisfactorily explained. (14) Error in holding competent, after objection on the part of defendant's counsel, the following question propounded to the witness T. W. Barr: 'Would it be an advantage for the city to give you a grade, and you build your property according to that grade, and the city should decide to change the grade, and come and cut it down two feet,—would that be an advantage or disadvantage?' It being respectfully submitted that the said question had no relevancy to the issue of damages contemplated by the charter, and was otherwise incompetent. (15) Error in ruling out proof of an ordinance of the city of Greenville defining the duties of the city engineer; the said ordinance having been ratified on the 7th day of December, 1893, and being the only ordinance vesting the city engineer with power to fix grades. (16) Error in ruling out an ordinance providing for a special assessment to pay for street improvements, ratified on the 7th day of February, 1893, being the ordinance under which the grade in front of plaintiff's property was lowered. In this connection, error in ruling that whatever part of the ordinance had been declared unconstitutional could not go in evidence now, for the reasons: (a) At the time the grade of this street was lowered, the said act and ordinance had not been declared unconstitutional, but, on the contrary, had been declared constitutional in so far as they affected sidewalks. (b) The fact that this decision was subsequently overruled by this court should not operate to the prejudice of the defendant, or subject it to damage, when, at the time the said work was done, it was acting in obedience to legislative authority which declared it the duty of this defendant to grade the said sidewalk, and by virtue of a decision of this court which declared the said act constitutional in so far as it affected sidewalks, and that the city council had the right to charge and collect as against the abutting property owners two-thirds of the costs of the said improvements. (17) Error in charging the jury that the charter of the city of Greenville provides 'that where a person's property is injured by lowering the grade about his property, he shall be compensated for it'; it being respectfully submitted that there is no such provision in the said charter, and the work in question was not done under the charter, but under act of 1891. (18) Error in

charging the jury, 'If you think that the lowering of the grade from what it formerly was has left his property in such condition as to leave it less valuable than it was before, then he has been deprived of, either in the loss of tenants, or diminution in the value of property, or the expense that he has been put to will be the amount of compensation which he will be entitled to have awarded him.' (a) It appearing in this case that the work was done under legislative authority in good faith, and under direct sanction of a decision of this court which held that the city council had the right so to do, and which act not only made no provision as to damages, but allowed the defendant to assess two-thirds of the costs of the said improvements upon the abutting property owners, thereby recognizing especial benefit to the said property. He should have charged that the defendant could not be held responsible for damages by reason of the said work under these conditions. (b) Even if the defendant was liable in damages, it is respectfully submitted that the true measure of damages in such case is the difference in the market value of the property before and after the said alteration. (c) He should have submitted to the jury the question as to whether or not the alteration and repairs of the street in question were of such a character as would entitle the property owner to compensation. (19) Error in not holding that this work was done under Act 1891 (see 20 St. at Large, p. 1372), and not under the charter, which act makes no provision for damages, and plaintiff, therefore, was not entitled to any in this proceeding." Affirmed.

B. A. Morgan and Carey & McCullough, for appellant. Mauldin & Hubbard and Haynsworth, Parker & Patterson, for respondent.

JONES, J. This is a special proceeding by W. L. Mauldin, under section 30 of the charter of Greenville city (19 St. at Large, p. 114) to secure compensation for damages to his property abutting on Main street of said city, resulting from the lowering of the grade of said street. The board of arbitrators appointed pursuant to said section of the charter as the special tribunal to assess the amount of damages awarded Mauldin \$1,000 as damages. Both parties appealed to the circuit court, and the issue of the amount of damages was submitted to a jury under instructions from the court, and the jury found a verdict in favor of the plaintiff for \$2,000. From the judgment entered thereon, on motion of defendant, the defendant appeals upon numerous exceptions set out in the case, and herewith reported.

The first question arises on respondent's motion to dismiss the appeal on the grounds: (1) That there is no authority for entering judgment upon a verdict in a special proceeding like this; and (2) that there is no right of appeal from the verdict in such proceeding.

Whether this proceeding be deemed an action or a special proceeding, the statute provides for the submission of the issue to a jury in the court of common pleas. Section 286 of the Code provides that, if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. We see no reason why judgment may not be entered on a verdict in an issue in this form of proceeding as in other civil proceedings. The design of the statute was to give a summary and expeditious mode of securing compensation, and it is not at all probable, in the absence of specific language indicating such intent, that the statute merely intended the verdict of the jury in the court of common pleas to operate merely as an award upon which another action must be brought to make it effective. The entry of judgment was therefore properly made. If the party in whose favor the verdict is does not enter, or cause to be entered, any judgment thereon, the other party desiring to appeal may cause judgment to be entered thereon, as in this case. The judgment is one from which an appeal may be taken, as shown in the case of *Atlantic Coast Line R. Co. v. South Bound R. Co.*, 57 S. C. 321, 35 S. E. 553; for, if the proceeding be regarded as an action removed into the court of common pleas from an inferior jurisdiction, an appeal would lie under subdivision 1 of section 11 of the Civil Code of Procedure; and, if it be regarded as a special proceeding, it is appealable under subdivision 3 of the same section.

While the appeal from the award of the arbitrators was pending, and before trial in the circuit court, the city council of Greenville brought an action against W. L. Mauldin for an injunction to restrain the further prosecution of the special proceedings, and obtained a temporary injunction, which was dissolved afterwards. Before the trial herein, the city council, having given notice of intention to appeal from the order dissolving the temporary injunction, objected to proceeding with the trial until after the determination of said appeal from the order of dissolution. This was overruled, and to this ruling appellant excepts. We see no error in this. When the temporary injunction was dissolved, there was no obstacle to proceeding with the hearing, as the notice of intention to appeal from the order dissolving the temporary injunction could not operate to restore the injunction.

The second exception imputes error in not sustaining defendant's motion to dismiss plaintiff's appeal from the decision of the arbitrators upon the ground that it was too general and indefinite. The same might be said of this exception. The point which appellant argues under this exception is that plaintiff's notice of appeal stated no grounds upon which a review of the proceedings before the arbitrators would be asked. In the case of *Atlantic Coast Line R. Co. v. South*

Bound R. Co., 57 S. C. 317, 35 S. E. 553, it was held necessary, in an appeal from condemnation proceedings for right of way under section 1747, Rev. St., that the grounds of appeal be stated. This, however, was because the statute giving the right of appeal expressly required "notice of the intended appeal, with the grounds thereof," to be served, and provided for the submission of an issue to the jury "if the court shall be satisfied of the reasonable sufficiency of the grounds." The statute in the case here contains no such requirements. The clause of section 30 of the city charter relevant to this matter is as follows: "Provided, that either party may appeal from such assessment to the court of common pleas for said county by serving written notice of such appeal upon the other party within five days after such assessment shall have been made, when the issue of value shall be submitted to a jury." The court was correct in not adding a condition to the appeal and submission to a jury which the statute did not impose.

Exceptions 3 to 16, inclusive, relate to rulings as to admissibility of testimony. Exception 3 imports error in allowing the witness W. L. Mauldin to testify that G. L. Norman was city engineer at the time the witness said he obtained the grade of the sidewalk for the purpose of erecting the buildings, and in allowing the witness to testify that G. L. Norman fixed the grade for the plaintiff; the objection being that the records of the city council were the best evidence of the fact, and there was no testimony to show that G. L. Norman had authority to establish grades. It appears that W. L. Mauldin was mayor of the city at that time, and was in a position to know who was city engineer. It is not always necessary to prove the written appointment of officers. It was sufficient in this case to prove that the officer acted and was recognized as such. Besides this, it appears that, later in the testimony, it was shown from the minute book of the city council that G. L. Norman was the city engineer. But, further, such testimony was immaterial, as plaintiff's right to recover compensation, and the amount of his compensation, did not depend upon whether his buildings had originally been erected with reference to a street grade obtained from the city engineer, and in this view it was immaterial whether the city engineer had power to fix grades or not.

The other exception as to rulings as to the admissibility of testimony was discussed by appellant only in so far as the testimony related to the measure of damages; appellant's general contention being that the rulings referred to in the exceptions violated the rule that the measure of damages in this case was the difference between the market value before and after the lowering of the street grade. Conceding this to be the correct measure of damages, we do not think the circuit court erred in admitting the testimony as to the costs of lowering the floors of the build-

ings to conform to the street grade, or as to the loss of tenants in the event such changes in the buildings were not made. The market value of property depends very largely and usually upon its rental value, and the rental value would largely depend upon the convenience of ingress and egress for customers, and the handling of wares and merchandise, and this would be much affected if the sidewalk and street grade were materially below the floors and entrances of the store buildings. These were but elements or factors which would ordinarily enter into a correct estimate of the diminution in value of the buildings by reason of the changes made necessary by the alteration of the street grade. The rule as to the true measure of damages contended for by appellant was substantially charged to the jury in these words: "If you think that the lowering of the grade from what it formerly was has left his property in such condition as to leave it less valuable than it was before, then [what] he has been deprived of, either in the loss of tenants or diminution in the value of property, or the expense that he has been put to, will be the amount of compensation which he will be entitled to have awarded him."

The remaining exceptions, which relate to the right of plaintiff to compensation, or the liability of defendant to make compensation for damages done to abutting property by altering the street grade, as provided in section 30 of the city charter, have all been conclusively disposed of, adversely to appellant's contention, in the cases of *Mauldin v. City Council of Greenville*, 53 S. C. 287, 81 S. E. 252, 48 L. R. A. 101, 69 Am. St. Rep. 855; *Garraux v. Same*, 53 S. C. 575, 81 S. E. 597; *Paris Mountain Water Co. v. Same*, 53 S. C. 82, 30 S. E. 699; and the case of *City Council of Greenville v. Mauldin* (decided at this term) 42 S. E. 200. All exceptions overruled.

The judgment of the circuit court is affirmed.

(64 S. C. 455)

GIBSON v. CITY COUNCIL OF GREENVILLE.

(Supreme Court of South Carolina. Aug. 11, 1902.)

MANDAMUS TO CITY—ASSESSMENT OF DAMAGES—CHANGE OF GRADE.

1. A mandamus will be granted to compel a city council to appoint a commission to assess damages to abutting property by altering the grade of a street where the only defense is that the liability is not conceded, but is denied, and the city has not been adjudged liable therefor.

Appeal from common pleas circuit court of Greenville county; Klugh, Judge.

Action by W. C. Gibson against the city

council of Greenville. From an order granting a motion for mandamus, defendant appeals. Affirmed.

B. A. Morgan and Carey & McCullough, for appellant. Haynsworth, Parker & Patterson, for respondent.

JONES, J. The appeal in this case is from an order of mandamus by Judge Klugh, dated August 10, 1901, commanding the city council of Greenville, within 30 days after the service of the order, to appoint a commission to assess the amount of damages suffered by the plaintiff, W. C. Gibson, through the alteration of the grade of Main street, in the city of Greenville, as provided in section 30 of the charter of said city.

Mandamus was resisted solely on the ground that "liability in this case is not conceded, but is denied, nor has it been adjudged liable heretofore;" and the consideration of exceptions imputing error must be restricted to that point. In the case of *Garraux v. City Council of Greenville*, 53 S. C. 575, 81 S. E. 597, this court sustained the contention of the city of Greenville that section 30 of the city charter (19 St. at Large, p. 114) afforded a remedy to an adjoining lot owner to obtain compensation for damages resulting to his lot from an alteration of the grade of the street, and that such remedy is exclusive. That remedy contemplated the assessment of compensation by three commissioners to be appointed,—one by the city council, one by the landowner or person damaged, and the third by the two commissioners thus appointed. The court further said that the city council could be compelled by mandamus to perform the ministerial duty of appointing a commissioner. In the case just cited, the city council of Greenville defeated an action for damages at common law on the ground that the statutory remedy is exclusive, and now attempts to defeat the remedy provided by statute on the ground that it has not been heretofore adjudged liable to make compensation, and that such liability is denied, and that such issue cannot be determined in the statutory remedy. This is no defense whatever against the performance of its plain ministerial duty under the statute; the undisputed facts being that W. C. Gibson is the owner of the lot abutting on Main street, in said city; that the grade of said street has been altered by the city council; that the lot owner claims to have been damaged thereby, and demands compensation; that the lot owner has requested the city council to appoint a commissioner to assess compensation under section 30 of the city charter; and that the city council has refused to make such appointment.

The judgment of the circuit court is affirmed.

¶ 1. See *Mandamus*, vol. 33 Cent. Dig. § 291.

(115 Ga. 324)

BLANDFORD v. STATE.

(Supreme Court of Georgia. July 17, 1902.)

LARCENY—EVIDENCE.

1. A conviction of simple larceny, under an indictment charging one with the offense of larceny from the house, may lawfully be had when the evidence introduced is sufficient to show that the accused wrongfully and fraudulently took and carried away the property which the indictment alleges was contained in the house; because the distinct offense of simple larceny is involved in the crime of larceny from the house. But such a conviction is wholly unsupported by evidence which tends to show that the accused took and carried away from a different place similar, but entirely distinct, property from that referred to in the indictment.

2. The trial judge erred in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Mitchell Blandford was convicted of larceny, and brings error. Reversed.

B. S. Miller, for plaintiff in error. S. P. Gilbert, Sol. Gen., and W. B. Short, Sol. Co. Ct., for the State.

LITTLE, J. Blandford was indicted for the offense of larceny from the house, and it was charged that he "on the 12th day of November, in the year of our Lord one thousand eight hundred and ninety seven, in the county [of Marion], did break and enter the house, the same being the cotton house of M. Hair, in said county situate, and three hundred pounds of seed cotton of the value of six dollars, of the personal goods of M. Hair, in said house then and there being found, did then and there unlawfully, fraudulently, and privately take, steal, and carry away," etc. The case was transferred to the county court of Marion county, and a trial was there had, which resulted in his conviction of the offense of simple larceny. He presented a petition for certiorari to the judge of the superior court, which was sanctioned, and on a hearing the certiorari was overruled, and the defendant excepted. The errors alleged to have been committed in the trial court are that the court erred in refusing to grant a continuance of the case, on the motion of the accused, for reasons set out in the petition; that the judge of the county court committed error in overruling a challenge to the array of jurors when the same was put on the accused; and that the trial judge also erred in admitting certain evidence over the objection of the accused, and also refused to rule out the same. It is also averred in the petition that the verdict rendered in the county court was contrary to law and the evidence, and without evidence to support it.

Inasmuch as we reverse the judgment overruling the certiorari, and base that reversal on the ground that the verdict was contrary

to the evidence in the case, we do not deem it necessary to formally consider and pass on the other grounds of error assigned in the petition, as the occurrences complained of are not likely to take place on another trial, and a discussion of the points made in the other grounds would serve no good purpose in determining the merits of the case presented by the record. That ground of the motion which complains of the rejection of evidence is necessarily involved and passed upon in the ruling which we make,—that the verdict rendered was contrary to the evidence. It will be observed that the bill of indictment charged the plaintiff in error with the offense of larceny from the house, and the specification of this charge is that he wrongfully, fraudulently, and privately took and carried away from a certain cotton house of Hair a quantity of cotton belonging to Hair, and of a named value. There was no evidence which either sustained this charge or tended to show that the accused was guilty of the charge made. Substantially, the evidence showed that there was no cotton in this house at the time the offense was charged to have been committed; that previously cotton belonging to a tenant of Hair had been stored in this house; but that it had been taken out by the tenant, and carried away to be ginned. The prosecutor himself testified that he could not say that the accused took and carried away any cotton from that house. The evidence, however, established the fact that at a point very near a public road, distant about a mile from the cotton house, the tenants and laborers of the prosecutor had placed a large pile of cotton which they had gathered from the adjacent field; that this cotton belonged to the prosecutor; and it is claimed that the evidence is amply sufficient to show that the accused did take and carry away from this pile a quantity of cotton with intent to steal the same. The solicitor general, who prosecuted the case, makes this point in his brief: "The facts show that the accused was charged with stealing certain cotton from a cotton house, and the evidence shows that the accused did steal said cotton on the 'place' of the same owner, but not in the cotton house. The evidence amply warrants the verdict of simple larceny, [and] it is not an open question as to whether a verdict for simple larceny can legally be returned under a charge of larceny from the house." So the question presented is whether one who has been charged with the larceny of particular property from a house can be legally convicted of stealing other property, of a similar kind, not in a house, and at a place distant from the house described in the indictment.

One of the elementary principles relating to criminal evidence is that the corpus delicti as laid in the indictment must be satisfactorily established by evidence either positive or circumstantial. If the position contended

¶ 1. See Indictment and Information, vol. 27, Cont. Dig. §§ 573, 594.

ior by the state's counsel be a sound one, it would, when carried to a legitimate conclusion, establish the proposition that a man might be indicted for the larceny of one piece of property, and lawfully convicted under that indictment for stealing an altogether different piece of property. We are cited to the case of *Brown v. State*, 90 Ga. 454, 16 S. E. 204, as authority for the position taken. It was ruled in that case simply that under an accusation which charges, in terms of the statute, larceny, from the house, of certain hens and a rooster, a conviction might be had for simple larceny. The offense charged by the indictment in that case was the stealing from the henhouse of Churchill five black hens and one black rooster. Our present chief justice, in delivering the opinion in that case, said that "the larceny as charged consisted of a simple larceny and an aggravating fact, to wit, the taking from the house. The evidence established the simple larceny, but failed to establish the aggravating fact; the proof showing that the property was taken from the owner's premises, but not showing that it was taken from the house. The larceny proved, and for which the conviction was had, contained no element that was not included in the larceny as charged, and was a lesser offense." The conviction of simple larceny was upheld in that case, but there is no similarity between the principle ruled in the *Brown* Case and that contended for in the present case. In the former, *Brown* was convicted of simple larceny because the evidence showed that he stole the chickens described in the indictment. He could not have been convicted of larceny from the house, because the evidence failed to show that these chickens were stolen by him from the house; but he could not have been convicted of simple larceny unless the evidence had showed that the particular property which it was charged that he stole from the house was in fact stolen by him. The evidence in the present case entirely failed to show that there was any cotton in the cotton house which could have been the subject-matter of the larceny. Not only so, but it is conceded that, if the defendant stole any cotton at all, it was not the cotton which had been stored in the cotton house, and while it is a sound proposition that, under a bill of indictment charging larceny from the house, one can be convicted of simple larceny if the proof authorize it, necessarily that proposition is only sound when the subject of the larceny is the particular property named in the indictment, alleged to have been stolen from the house. See *Roberts v. State*, 83 Ga. 369, 9 S. E. 675; 1 Rosc. Cr. Ev. 521; *Lavender v. State*, 107 Ga. 707, 33 S. E. 420. In the present case, assuming that the evidence was sufficient to show that the accused was guilty of a larceny of the cotton piled on the side of the road a mile distant from the house in which it was alleged that the cotton he stole was contained, it was nevertheless a totally dif-

ferent and distinct transaction from that charged in the indictment. If the evidence had shown a theft of the cotton which was stored in the cotton house, but failed to show that it was taken under such circumstances as would have made it larceny from the house, then a conviction of simple larceny might be upheld, because the proof would then have referred to that particular cotton which was designated in the indictment as having been stolen. But neither under an indictment for larceny from the house, nor for any other kind of a larceny, can the accused be lawfully convicted on proof of the commission of another distinct offense.

For these reasons, the trial judge erred in overruling the certiorari, and his judgment is reversed; all the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 842)

OREBAUGH v. EQUITY LIFE ASS'N.

(Supreme Court of Georgia. July 18, 1902.)

INSURANCE COMPANY—ACTION—VENUE—MAINTAINING AGENCY.

1. It does not necessarily follow that because an insurance company has an agent who resides and has an office in a given county, and therein transacts the business of soliciting insurance, the company itself has in that county "an agency or place of doing business." When, therefore, an action is brought against such a company in a county other than that in which its principal office is located, the jurisdiction of the court is not shown by proving merely that, at the time the contract out of which the suit arose was made, the defendant had in the county a resident agent, and that he had therein an office of his own. In such a case it should further appear that the company had established and was maintaining, either in the office occupied by the agent or elsewhere in the county, an agency of its own, and under its own control and management, for the transaction of its business.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. Janes, Judge.

Action by E. W. Orebaugh, administrator of John A. Orebaugh, against the Equity Life Association. Judgment for defendant, and plaintiff brings error. Affirmed.

Felder & Mundy, for plaintiff in error. Blance, Wright & Tison, for defendant in error.

LUMPKIN, P. J. This was an action in the superior court of Polk county, by E. W. Orebaugh, as administrator upon the estate of John A. Orebaugh, against the Equity Life Association, upon a policy of insurance dated August 24, 1898.

The defendant filed a plea to the jurisdiction, in which it alleged that "neither at the time of the making of said contract of insurance, nor when said cause of action accrued, nor at the time of the filing of said suit," did it have any "agency or place of doing business in said county." The case went to trial upon this plea to the jurisdiction; and, after

the testimony was closed, the court directed a verdict sustaining the plea, and entered a judgment dismissing the action. To this the plaintiff duly excepted. It affirmatively appeared that the defendant did not have an agency or place of doing business in Polk county, either at the time the cause of action arose, or upon any date subsequent thereto. So the only question really at issue was whether or not the association had an agency or place of doing business in that county at the time the contract of insurance was entered into. There was no testimony tending to show that it had except that of one Morris, who testified, in substance, as follows: He wrote the policy of insurance sued on. At the time of so doing, he was the agent of the defendant association, and represented it in Polk and other counties. He had a private office in Cedartown, the rent of which he himself paid. It was his place of doing business. While he did make a statement to the effect that the defendant had established an agency in Cedartown, on his cross-examination the fact was developed that this statement amounted to no more than a bare conclusion upon his part; for he swore positively that the defendant merely appointed him its agent for the territory above indicated, leaving him free to make his headquarters at any point he might choose. He certainly did not testify that the defendant had ever required him to open an office in Cedartown or anywhere else; and he stated no fact from which it could fairly be inferred that the association ever intended to authorize him to establish and conduct in its behalf an agency or place of doing business in Polk county. Indeed, the sum and substance of his testimony was that he was simply employed to act as an agent of the company in soliciting insurance within a designated territory, and that under the terms of his contract with the association he was at liberty to have, or not to have, an office of his own, as might suit his pleasure and convenience; the same to be located, if at all, at such point as he might select. Upon this state of facts, we are quite clear that the trial judge did not err in directing the verdict to which exception is taken. The law of the case is to be considered as finally settled by the decision of this court in *Accident Ass'n v. Bragg*, 102 Ga. 748, 29 S. E. 706, in which section 2145 of the Civil Code, which provides for service upon insurance companies, was under consideration, and was given what the court then regarded and still regards as its proper construction. The case in hand differs in a very material particular from that of *Telegraph Co. v. Bailey* (Ga.) 42 S. E. 89, for in the same it distinctly appeared from the plaintiff's allegations of fact, which the defendant, by its demurrer, admitted to be true, that the company had not only an agent in the county, but also an office of its own therein; and this office was, we think, properly treated as its agency or place of doing business.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 230)

WALLACE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 8, 1902.)

INJURY TO SERVANT—DIRECTING VERDICT.

1. There was no material error in rejecting or in admitting testimony, but the error committed in directing a verdict requires a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Josephine Wallace against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hoke Smith and H. C. Peeples, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

LUMPKIN, P. J. The plaintiff in error, Mrs. Josephine Wallace, brought against the Central of Georgia Railway Company an action for the homicide of her husband, which occurred on the 1st day of August, 1898.

The undisputed facts of the case, as developed by the evidence, are substantially as follows: The deceased was an engineer in the service of the defendant, and was at the time of his death engaged in running the locomotive of an extra train which was operated between Atlanta and Hapeville. Between these points there were two main tracks, one of which was used for trains going out of the city, and the other for trains coming into it. At McPherson station, looking towards Hapeville, the right-hand main track was the one for outgoing trains, and the opposite main track was the one for incoming trains. Between these two main lines, there was a middle track, used for switching. A spur track passed from the middle track, and ran across the right-hand main line into McPherson barracks. Eason was the conductor of the train upon which Wallace was engineer. On the morning of the day on which the killing occurred, Eason, under the direction of the proper authority, had left a number of passenger cars to be loaded in the barracks with troops, and had gone to Hapeville, where he worked during the forenoon. His orders were to return to the barracks at 1 o'clock, and carry the passenger cars containing the soldiers to Atlanta. Eason's train reached McPherson on its return from Hapeville a few minutes after 1 o'clock. A passenger train, No. 33, was due to pass McPherson on the outgoing main line at 15 minutes after 1. After reaching McPherson on the incoming main line, Eason left a number of cars upon it, and then had the locomotive pulled further up this main

line, and from it backed upon the middle track, and coupled to several box cars which were standing thereon. There the locomotive and these cars remained till No. 33 had passed. Eason then ordered Wallace to back the box cars attached to his locomotive across the outgoing main line, and had these cars coupled to the passenger cars which had been left in the barracks. After this coupling had been made, and the train had come to a standstill, a portion of the locomotive occupied the rails of the outgoing main line. In this situation of affairs, and while the soldiers were getting aboard the passenger cars, a freight train, known as No. 42, coming from Atlanta, collided with the locomotive of Eason's train, and, as a result, Wallace was killed.

Numerous rules of the company were introduced in evidence. Such of them as require special consideration will be hereinafter noticed. There was much conflict in the testimony as to various matters other than those mentioned above; and, after both sides had closed, the court directed a verdict for the defendant. Mrs. Wallace made a motion for a new trial, which was overruled, and she excepted. We will first dispose of the minor points, and then pass upon the main question, which is whether or not the court erred in not submitting the case to the jury.

The plaintiff's counsel offered certain testimony to which counsel for the defendant objected. The court intimated that the testimony was inadmissible, and after some discussion the counsel first mentioned remarked to the court: "I will not insist upon it at the present." This was certainly sufficient to warrant the inference that the offer to introduce this testimony was withdrawn, and the judge certifies that this was his understanding of the matter. It was on the trial below contended that the plaintiff's husband was, while engaged in switching and moving his train at McPherson, under the protection of certain rules of the company which provided for the operation of what is called the "Block System." Counsel for the company insisted that these particular rules were not applicable in such a case as the present. The plaintiff's counsel introduced testimony tending to show that, under a custom or practice which had prevailed, the block system had been relied on for the protection of train crews while engaged in switching at stations within the territory covered by the system. To meet this, the defendant's counsel were permitted to introduce, over objection, the testimony of several witnesses who had been employed by the company in the running of trains, to the effect that, so far as they knew, no such custom or practice had ever prevailed. Some of this testimony was irrelevant because it related to a period subsequent to the date of the homicide, and some of it was probably so because it related to a period long anterior to that date, when the rules of the company were not the same as those in

force when Wallace was killed. The judge certifies that he ruled repeatedly and distinctly that "evidence of any custom subsequent to August, 1898, was inadmissible." With this restriction, and the further qualification that it was not permissible to show what the custom was under different rules, the testimony in question was proper. The rules pertaining to the block system were not luminously clear as to whether or not it was applicable to a situation like that involved in the case in hand. The plaintiff undertook to show that it was, by some of the company's servants, treated as being so, and the defendant was allowed to show that, by others of them, it was not so treated. As will appear before we conclude, this is not really a matter of much importance, for we will endeavor to show that the block system does not cut a substantial figure in this case. The plaintiff also excepted to other rulings made by the court in admitting and in rejecting testimony. With these we will not undertake to deal specifically, for they are, in view of what we regard as the controlling issue upon which the case should be made to turn, of but trivial moment.

The action of the court in directing a verdict for the defendant can be sustained only upon the theory that, viewing the testimony and all legitimate inferences therefrom most favorably for the plaintiff, she was not entitled to recover. As a reviewing court, we must treat as established in her behalf every contention of fact insisted upon by her which the jury would have been warranted in sustaining. There was ample evidence to show negligence on the part of the defendant, and the real issue in controversy was whether or not the deceased was guilty of contributory negligence. If he was, his widow has no right of action. If he was not, she has. If the deceased relied exclusively upon the supposed protection afforded by the block system as a justification for leaving his locomotive in its exposed condition upon the outgoing main line, he was negligent. One of the general rules of the company, No. 399, provides that "when a train stops or is delayed, under circumstances in which it may be overtaken by a following train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail, when the conditions require it. The front of a train must be protected in the same way, when necessary, by the fireman." General rule No. 402 reads as follows: "When it is necessary for a train on double track to cross over to the opposite track, a flagman must be sent out with danger signals, as provided in rule No. 399." Rule No. 10 in the joint timetable declares that: "Flagmen will not, under any circumstances, depend upon the block signals to protect their trains, but must go back with signals, as required by the general rules." It will

not do to say that this rule is binding upon flagmen only. It is, under other rules introduced in evidence, but which need not be set forth, incumbent upon conductors to see to it that flagmen perform their duties; and, as has been seen, if the front of a train is exposed to danger, the fireman must act as flagman "when necessary." If, upon such a necessity arising, the fireman did not so act, and the engineer knew this to be so, he would surely be unwarranted in assuming that protection from threatened danger would come from some other source. Interpreting the special rule last quoted in the light of the others, its plain meaning is that no person connected with the running of a train has the right to rely absolutely for protection upon the block system. For this reason, we have not deemed it necessary to go into further detail as to what the record discloses with regard to the nature of this system, or to discuss the particular rules relating to it; and for the same reason we now dismiss it from further consideration.

Under the rules above copied, and others in evidence regulating the duties of conductors and engineers, the contents of which are not here essential, it was the duty of Eason, before placing his train in the position it occupied when the collision took place, to send a flagman towards Atlanta to intercept train No. 42. It was the duty of Wallace, if he knew that the conductor had neglected to take this precaution, to send the fireman forward on this mission. Under such circumstances, it would have been "necessary" for the engineer to take this step. The evidence on these vital matters, taking it most favorably for the plaintiff, and giving her the benefit of the strongest legitimate inferences which could be drawn therefrom in her favor, would have warranted a finding that Eason, before causing the box cars to be backed into the barracks, did order Griggs, a flagman, to go forward and flag No. 42; that he started out as if to obey this order, and that Wallace was in a position where he could have heard and seen what occurred. In point of fact, Griggs did not flag No. 42; and he, as a witness, denied having been ordered to do so at all. Indeed, we wish to state just here in the plainest terms that we are not undertaking to say what was the truth as to any feature of the case, or to intimate what the verdict should have been. The testimony was, as already stated, conflicting at every issuable point, and we are dealing with it merely from the standpoint that it was the plaintiff's right to have the jury pass upon her contentions, and to obtain the benefit of that result which would properly ensue from their finding that the same were well founded in fact. If the truth was as above outlined, Wallace was not negligent in failing to send the fireman forward to flag No. 42. Whether, upon the assumption that he neither heard Eason order Griggs to flag that train nor saw Griggs

make any movement towards doing so, he would have been negligent in not sending out the fireman, we do not now decide, but leave this question open for determination, if need be, at the next hearing. Nor did the evidence demand a finding that Wallace was negligent in not himself looking towards Atlanta, and discovering the approach of No. 42 in time to get his train out of its way. Nor were the jury by any means bound to find that Wallace was negligent in not backing far enough into the barracks to clear the main line of his locomotive at the time the box cars were coupled to the passenger cars, or that it was his duty, after this coupling had been made, to then push the entire train further back into the barracks so as to leave the main line open. On all these and many other strenuously contested questions, there was much oral testimony pro and con, and many pertinent rules of the company were introduced. We do not deem it essential to enter upon a detailed discussion of these various matters. Enough has been said, we think, to enable the clear-headed and most-capable judge of the trial court to apprehend upon what lines the case should be submitted to the jury, and we are quite confident that he will do so in the able and satisfactory manner with which he usually conducts the business of his court.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 288)

BLANTON et al. v. MERRY, Mayor, et al.
(Supreme Court of Georgia. Aug. 9, 1902.)
INJUNCTION—ULTRA VIRES—MUNICIPAL ACT.

1. A court of equity will not, at the instance of a taxpayer as such, enjoin an ultra vires municipal act the doing of which can in no wise injuriously affect him.

(Syllabus by the Court.)

Error from superior court, Mitchell county; W. N. Spence, Judge.

Action by S. R. Blanton and others against H. H. Merry, Mayor, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. D. McKenzie and W. A. Covington, for plaintiffs in error. Sam. S. Bennet, for defendants in error.

FISH, J. S. R. Blanton and five other citizens of the town of Pelham sought to enjoin H. H. Merry, the mayor, and the four aldermen of the town, from operating a dispensary therein. The petition alleged that the defendants were operating such a dispensary, in pursuance of an ordinance adopted by them, as mayor and council of the town, in February, 1902; that they had no power or authority, under the charter of the town, or under any law, to pass such ordinance, or "to embark said municipality in the business of buying and selling such liquors, or contract-

ing debts" for the same which would be binding on the town, and that all their acts in relation thereto were therefore void, and "that said acts are against public policy and morals, and involve the useless and unlawful use [and] jeopardy of the funds and credit of the said town."

The interlocutory hearing was had on an agreed statement of facts, from which we extract as material the following: The ordinance in question provides for the election by the mayor and council of three dispensary commissioners to superintend the operation of the dispensary; that the commissioners shall elect one of their number as treasurer, who shall give bond payable to the board of education of the town; that the commissioners shall elect a dispensary manager, who shall be subject to their orders, rules, and regulations for the operation of the dispensary; that the manager, under the directions of the commissioners, shall establish and maintain in the town a dispensary for the sale of intoxicating liquors, the funds from the sales thereof to be daily deposited with the treasurer; that the dispensary shall be maintained and operated from the profits of the sales of liquors; and in order to pay taxes, and to purchase the first stock therefor, and to meet other expenses incurred in the establishment and maintenance of the dispensary, the manager may, under the direction of the commissioners or otherwise, incur debts, and pledge the future profits of the dispensary to secure the payment thereof, but shall contract for such payment in no other way whatever; that all bills incurred in the establishment and maintenance of the dispensary shall be paid out of the profits thereof; that no liquor shall be drunk in the building or on the premises where the dispensary shall be located; and that the dispensary shall not be opened before sunrise, and shall be closed by six o'clock p. m., during the months of October, November, December, January, and February, and at sunset during the other months of the year; that the liquors shall be sold in sealed packages only; that the manager shall make a monthly report to the commissioners, and to the board of education, showing the financial condition of the dispensary; that the books of accounts and all other papers connected with the dispensary shall at all times be open to the inspection of the public; that the commissioners shall quarterly or monthly set aside as profits all money in the hands of the treasurer that can be taken from the business without embarrassing its continuance, and file with the treasurer a certificate showing the amount of such profits thus set aside, and the treasurer shall thereupon pay such profits to the chairman of the board of education of the town, and such board shall use one-half, or so much of the profits as may be necessary, to pay the salaries of the teachers in the public schools of the town, and the remainder of the profits shall be set aside, and used for

the erection of suitable school buildings, for the repair and maintenance of the same, and to provide furniture, fuel, lights, maps, globes, etc., for such public schools. All the officers provided for in the ordinance were elected, and qualified as therein required. A supply of spirituous and intoxicating liquors was purchased, a storeroom rented, and a dispensary opened, which was being operated in the town, in accordance with the ordinance, at the time of the filing of the petition. The liquors were bought on credit, to be paid for, as all other debts incurred in the operation and maintenance of the dispensary, only out of the profits arising from the sale of said liquors; and none of the funds of the town of Pelham have been appropriated or used in the establishment or maintenance of such dispensary, or for the buying or selling of any of such liquors, or for the renting of any storeroom, or for the employment of any salesman or agent for the conduct of the dispensary, or for said sale, or for anything connected with the dispensary; nor has any such use of the funds or credit of the town of Pelham been authorized or threatened. The court refused to grant an interlocutory injunction, and the plaintiffs excepted.

1. There was no error in refusing the injunction; for, granting, as the plaintiffs claimed, that the defendants, as the mayor and councilmen of the town of Pelham, had no power, under the charter of the town or under any law, to adopt the ordinance in question, or to legally operate the dispensary in the town, the plaintiffs, in their capacity as citizens and taxpayers, were not entitled to the injunction sought, for the reason that it was not shown that they would sustain any damage in consequence of the operation of the dispensary. *Reid v. Mayor, etc.*, 80 Ga. 755, 6 S. E. 602; *Peoples v. Byrd*, 98 Ga. 696, 25 S. E. 677, and authorities there cited. Plaintiffs admitted on the hearing, as we have seen, that the dispensary was being operated without any cost whatever to the town, and without any possibility of the town ever becoming indebted in any way for its operation.

There is nothing in the case of *City of Barnesville v. Murphey*, 113 Ga. 779, 39 S. E. 413, relied on by plaintiffs in error, in conflict with the ruling we now make, for there certain citizens and taxpayers of the city of Barnesville sought to enjoin the municipal authorities thereof, not only from operating a dispensary, but also from paying bills amounting to several thousand dollars, which divers persons claimed were due to them by the municipality for liquors sold and delivered to the city, and used in conducting the dispensary. The persons holding such claims against the city were parties defendant, and it was sought to enjoin them from collecting their claims. The plaintiffs in that case were liable, as taxpayers, to be forced to pay their proportion of these claims if they should be held to be valid and binding claims

against the city. This is the essential feature wherein that case differs from the one in hand.

2. Counsel for the plaintiffs in error contend in their brief that the sale of intoxicating liquors in the town of Pelham, as shown by the facts contained in the record, is a public nuisance, which any private citizen of the town has a right to resort to a court of equity to enjoin. We will not stop to discuss here whether this contention is sound or unsound, for a mere reading of the plaintiffs' petition will suffice to show that it was based solely upon the theory that the acts complained of were ultra vires acts by the municipal authorities, which the plaintiffs, as taxpayers of the municipality, had the right to enjoin, and that it was not predicated, either in whole or in part, upon the theory that the "dispensary," the operation of which they sought to enjoin, was a nuisance. The acts complained of are not alleged to constitute a nuisance, nor is there anything in the petition from which it can be fairly inferred that the plaintiffs, in their capacity as private citizens, were seeking to enjoin a nuisance.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 327)

LAMPKIN et al. v. PIKE.

(Supreme Court of Georgia. July 17, 1902.)

STATUTES—AMENDMENT—CITY COURT—REVIEW OF DECISIONS.

1. While the general assembly has full power to amend its legislative enactments, an amendatory act, to be valid as such, must relate to an existing statute, and not to one which, having been repealed, is wholly inoperative.

2. At the date of the passage of the act of November 30, 1897, to establish the city court of Jefferson, in Jackson county, there was in that county no incorporated city having the name of Jefferson; and consequently it was not within the power of the general assembly to provide that the judgments of that court might be reviewed by the supreme court upon a direct bill of exceptions.

(Syllabus by the Court.)

Error from city court of Jefferson; W. W. Stark, Judge.

Action between T. C. Lampkin and others and Essie Pike. From the judgment, Lampkin and others bring error. Dismissed.

Geo. C. Thomas, Brown & Randolph, and Brutus J. Clay, for plaintiffs in error. John J. Strickland, for the State.

LAMPKIN, P. J. The defendant in error moved to dismiss the writ of error in this case, "upon the ground that a bill of exceptions will not lie from the city court of Jefferson to this court, because said city court of Jefferson is not a constitutional city court."

The general assembly has in the past enacted numerous statutes relating to Jefferson.

We shall, however, in the discussion which follows, confine ourselves to those only of them which bear upon the question presented by the motion to dismiss. On August 14, 1872, an act was passed "to incorporate the town of Jefferson, in the county of Jackson, and to provide for the election of mayor and aldermen for the same, and for other purposes." This act in and of itself set forth a full and complete charter for the town. At the same session of the general assembly, on August 23, 1872, an act was passed "to incorporate the town of Jefferson, in the county of Jackson; to provide for town councilmen and intendant for the same, and for other purposes." It conferred upon the town of Jefferson corporate powers similar to those which had previously been bestowed upon "the town of Clarksville, in the county of Habersham." The latter of these acts may be found on page 210 of the Acts of 1872, and the former begins on the same page. The obvious result of the act of August 23d was to annihilate the charter of August 14th. This charter was, however, resuscitated by an act approved February 5, 1873, which by its express terms repealed the act of August 23, 1872, and re-enacted that of August 14th. See Acts 1873, p. 149. It will thus be seen that the effect of the act of 1873 was to provide a new charter for the town of Jefferson, the provisions of which were identical with those embraced in the act of August 14, 1872.

On December 23, 1896, an act was passed "to amend an act incorporating the town of Jefferson, in the county of Jackson, approved the 14th of August, 1872, and all amendments thereof, by striking out of said act, whenever it occurs, the word 'town,' and inserting in its place the word 'city,' so that said place of Jefferson will be incorporated as a city, and not as a town." See Acts 1896, p. 191. In the body of this act the general assembly undertook to enact the legislation indicated by its title. On November 30, 1897, an act was passed "to establish the city court of Jefferson, in Jackson county," whereby it was declared that "the city court of Jefferson, located in the city of Jefferson, is hereby established and created with civil and criminal jurisdiction over the whole county of Jackson." In the thirty-third section of that act the general assembly also undertook to provide that "a writ of error shall be direct from said city court to the supreme court of this state, upon a bill of exceptions filed under the same rules and regulations as govern and control the issuing of writs of error and filing of bills of exceptions in the superior courts of this state." See Acts 1897, pp. 485, 498.

In view of the above-recited legislation, the vital and controlling question now for decision is whether or not there was, on the date of the act last mentioned, an incorporated city in the county of Jackson having the name of Jefferson. We are constrained to hold there was not. The act of August 14,

1872, after its repeal by that of August 23, 1872, was no longer a living statute capable of being amended or modified as such. As a legislative enactment, it had simply become a dead letter, and could not properly be treated and dealt with as having any force or vitality. "The legislature has general power to amend statutes, but an amendatory act, to be valid as such, must relate to an existing statute, and not to one which is nonexistent, or has been repealed." 23 Am. & Eng. Enc. Law, 276, 277. To the same effect, see *State v. Benton*, 38 Neb. 823, 833, 51 N. W. 140; *Draper v. Falley*, 83 Ind. 465; *Blakemore v. Dolan*, 50 Ind. 194; *Board v. Smith*, 52 Ind. 420; *Ford v. Booker*, 53 Ind. 395; *Clare v. State*, 68 Ind. 17; *Brokaw v. Board*, 73 Ind. 543; *Lawson v. De Bolt*, 78 Ind. 563; *McIntyre v. Marine*, 93 Ind. 199; *Feibleman v. State*, 96 Ind. 518; *Hall v. Craig*, 125 Ind. 529, 25 N. E. 538; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. 469; *Stingle v. Nevel*, 9 Or. 62. Consequently, when the general assembly, in 1896, undertook to amend the act of August 14, 1872, by striking therefrom the word "town" wherever it occurred, and inserting in its stead the word "city," the lawmaking power really accomplished nothing. To all intents and purposes, this act of 1872 had, in the year 1896, no more vitality as a legislative enactment than if it had never in fact appeared upon the statute book. At that time the only act of incorporation which was capable of being amended was that of February 5, 1873, whereby a new charter was granted to the town of Jefferson, to take the place of that granted August 23, 1872. That act did not recognize as operative, or attempt to amend, the act of August 14, 1872, which, by necessary implication, had been repealed by the act of August 23d, passed in that year. On the contrary, the act last referred to was recognized as being of force, and as having superseded the act of August 14th. Indeed, the act of 1873 contains the following express recital as to its intent, and the purpose thereby sought to be accomplished: "Whereas at the last session of this general assembly, two acts were passed incorporating the town of Jefferson, in the county of Jackson; and whereas, the act approved August 23, 1872, repeals the act of August 14, 1872, which is contrary to the wishes of the people of said town of Jefferson," be it enacted, etc., that the act "approved August 23, 1872, be and the same is hereby repealed; and the act incorporating said town, approved August 14, 1872, is hereby re-enacted." The legislative will is thus clearly shown to have been to get rid of an existing statute, and, by express enactment, to adopt the provisions of a pre-existing act which, contrary to the wishes of the good people of Jefferson, had been rendered inoperative by ill-advised and superfluous legislation. To in this manner re-enact the provisions of a statute recognized as no longer having vitality is not only eminently proper, but is quite a different thing from

totally ignoring a statute of force, and attempting to amend an act which was thereby, either expressly or by necessary implication, repealed.

In view of what has just been said, the conclusion is, we think, irresistible, that the above-mentioned act of 1896 should be treated as a mere nullity. That act, it is true, both in its title and in the body thereof, proposed to amend all amendments of the act of August 14, 1872; but in point of fact no attempt was made to do more than to strike from the act of August 14th the word "town" wherever it occurred in that act, and to substitute therefor the word "city." In other words, the general assembly, wholly ignoring the act of February 5, 1873, simply undertook to amend an act, previously passed, which no longer had any existence, force, or effect. It necessarily follows that, when the act of 1897 to establish the city court was passed, there was, though this act declared that this tribunal should be located in the "city of Jefferson," no incorporated city of that name in Jackson county. The mere fact that the act declared that the court should be located in "the city of Jefferson" did not, of course, have the effect of incorporating Jefferson as a city; and while it was within the constitutional power of the general assembly to create the court established by this act, and style the same a "city" court, it was without power to provide for a direct bill of exceptions from that court to the supreme court. *Railway Co. v. Jordan*, 113 Ga. 687, 39 S. E. 511. Accordingly, we are without jurisdiction to entertain the present writ of error. It is proper to add that when this court had under consideration the case of *Welborne v. State*, 114 Ga. 793, 40 S. E. 857, and the other cases mentioned on page 793, 114 Ga., pages 858, 859, 40 S. E. (including the case now before us), and was undertaking to deal with the question of its jurisdiction over writs of error from the courts in which those cases originated, its attention was not called to the confused state of the legislation respecting the incorporation of Jefferson. Had this been done, the city court of Jefferson would not have been classed among those whose judgments can be properly reviewed by this court upon a direct bill of exceptions.

Writ of error dismissed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 857)

SUTTON et al. v. HANCOCK.

(Supreme Court of Georgia. July 18, 1902.)

WILL—REVOCATION.

1. A testator having children at the date of his will gave to his wife in fee simple all of his property, real and personal, stating in the will that this disposition of his property was made because he knew his wife would protect his name by the prompt payment of his debts, "and that she will take every care of our children, and do what is just and right by each

of them." Subsequently to the execution of the will, a child was born to the testator and his wife. *Held*, that the birth of the child revoked the will, there being therein no provision "made in contemplation of such event." (Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between Maud Sutton and others and L. M. Hancock, executrix. From the judgment, Sutton and others bring error. Reversed.

Spencer R. Atkinson and J. A. Perry, for plaintiffs in error. Anderson, Anderson & Thomas and W. O. Wilson, for defendant in error.

COBB, J. On June 19, 1890, Joseph Smith made a will in which he provided, among other things, as follows: "I give, bequeath, and devise to my beloved wife, Lilly May Smith, all my estate, real and personal, in possession, reversion, or remainder, to be hers in fee simple forever, knowing full well that she will protect my name by the prompt payment of my just debts, and that she will take every care of our children, and do what is just and right by each of them. I therefore name her as well my sole executrix as my sole devisee and legatee." On January 6, 1893, the testator added a codicil to this will, relieving his wife of the necessity of giving bond and making returns, and empowering her to sell, in any way she saw proper, any or all of the property devised, giving her as complete control over the property as the testator had while in life. At the time the will was made, the testator had several children then in life. Long after the execution of the will and the codicil thereto, but before the death of the testator, another child was born to the testator and his wife, who was in life at the date of the testator's death, which occurred on October 5, 1890. The only question involved in the present case is whether the birth of this child had the effect of revoking the will.

Under the common law, neither the subsequent marriage alone of a testator, nor the subsequent birth of a child to him, operated as a revocation of a will previously made by him; but both of these events combined did have such effect. 1 Jarm. Wills, 271; 1 Underhill, Wills, § 239; Page, Wills, §§ 282, 283, 287; Pritch. Wills, § 292. The Roman law did, however, provide that the subsequent birth of a child should alone operate as a revocation of a will. 1 Underhill, Wills, § 240. The common law was of force in Georgia until 1834, when an act was passed which provided that, "in all cases when a person after having made a will, shall marry or have born a child or children, and no provision shall be made in said will for the wife after married, or child or children after born, and shall depart this life without revoking said will, or altering it subsequent to said after marriage, or subse-

quent to the birth of said after-born child or children, the justices of the inferior court of the county, while sitting as a court of ordinary, having jurisdiction of the case, shall pass an order declaring that such person died intestate, and his estate shall be distributed under the laws of this state regulating the distribution of intestates' estates." Prince's Dig. 254; Cobb's Dig. 347. This act remained of force until the adoption of the Code of 1863, in which was incorporated the following provision: "In all cases the marriage of the testator, or the birth of a child to him, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will." Code 1863, § 2445. This statute has, without any alteration whatever, been the law of this state from the Code of 1863 to the present time. See Civ. Code, § 3347. It is important to ascertain what was the proper construction to be placed upon the act of 1834, and what change was intended to be made by the Code section above quoted. The act of 1834 required the testator to make some positive, beneficial provision for an after-born child. So, in *Holloman v. Copeland*, 10 Ga. 79, it was ruled that where "no positive provision" was made for an unborn child, "the testator must be considered as having died intestate, notwithstanding such after-born child might be entitled to some portion of the testator's estate under the will, on the happening of certain contingencies mentioned therein, under the general description of 'children.'" Judge Warner in the opinion said: "The statute contemplates the present or probable existence of the after-born child in the mind of the testator when he makes his will, and thereby makes a positive provision for such child." It will thus be seen that under the act of 1834, unless the testator, at the time of making his will, had in mind the probable or possible birth of a child to him in the future, and unless, having this in mind, he made some positive beneficial provision for the child, the will would be revoked by the birth of a child to him subsequently to the execution of the will. The Code changed this law so as to omit altogether the requirement that the testator should make at all events a positive provision for the child to be born, and it did not even require that the testator should have had in mind the child that would be born. The requirement of the Code is that provision shall be made in contemplation of the event.

What is the meaning and object of this provision? We quote the following from the opinion of Mr. Chief Justice Bleckley in *Ellis v. Darden*, 86 Ga. 371, 12 S. E. 652, 11 L. R. A. 51, where it was ruled that the marriage of a woman revoked a will made by her in which no provision was made in contemplation of that event: "At common law the woman's will was revoked, but the man's

was not. The act of 1834 put a man's will, in this respect, upon the footing of a woman's, with an implied saving in favor of wills in which provision was made for the prospective wife. It also made the birth of a child operate as a revocation of any prior will in which the child was not provided for. Then came the Code of 1863, and, after varying the phraseology of the act of 1834 so as to make it wider and more general, incorporated its principle of revocation into the legal system of wills, with an implied saving in favor of wills in which, not the wife or the child, but the event of marriage, or the birth of a child, was provided for." The learned chief justice further said, in referring to the Code: "The object of the provision is to secure a specific moral influence upon the testamentary act, the moral influence of having before the mind a contingent event so momentous as marriage or the birth of a child, and so deserving of consideration in framing a testamentary scheme." When, therefore, a person has made a will in this state, and thereafter marries, or has a child born to him, the will stands revoked upon the happening of either contingency, unless it appears that when the will was executed the testator had in contemplation the event of marriage or the birth of a child. And the evidence that the testator did have the event in contemplation must be in the will itself, taken in connection with the circumstances which existed at the time the will was executed, and this can be shown only by means of a provision in the will which appears to have been made in contemplation of the event. There can be no question that this is the plain meaning of the statute. It makes the subsequent birth of a child operate as a revocation of a will, with the sole exception that a revocation will not result when "provision is made in the will in contemplation of such event." Hence it was held in *Ellis v. Darden*, supra, that parol evidence was inadmissible to show that a will was executed in contemplation of marriage. The question whether the testator had in contemplation the event which subsequently took place is a matter of legal inference, or a presumption of law from the language of the will and the circumstances existing at the time of its execution. It is not a question as to what was the testator's intention, save as that intention can be gathered from the sources above indicated.

In the *Deupree Will Case*, 45 Ga. 415, the majority of the court held that "the marriage of a testator, or the birth of a child to him, subsequent to the making of a will in which no provision is made in contemplation of such an event, is, by presumption of law, a revocation of the will," which presumption could not be rebutted by extraneous evidence. Judge McCay stated his views as follows: "The revocation is, by these words, made to turn, not upon any provision made for the wife or child, but upon whether the testator

by his will has made provision for such an event. If by his will he has done so, the will is not revoked; if he has not, it is revoked. It is immaterial whether this provision for the event is a provision for the benefit of the wife or child or not; it is enough if it is for the event. If the provisions of the will meet the requirements of the statute, it is not revoked; if they do not, it is revoked. Whether the wife or child is provided for in some other way has nothing to do with it; the law by its express positive terms makes it turn upon the provisions of the will. The only questions to be asked are: First. Was the marriage or birth subsequent to the making of the will? Second. Does the will make a provision for the event? If the first question must be answered in the affirmative, and the second in the negative, the will must stand revoked, unless the court has power to say that it will alter or modify the law to meet a case that it may think a hard one." Judge Warner, while dissenting from the judgment of reversal entered in that case, took the same view of this question as Judge McCay did. He said: "The acts of a testator in regard to the revocation of his will, and what was his intention in the performance of those acts, is one thing; the declared will of the supreme power of the state as to what shall constitute the revocation of a testator's will is another and quite a different thing; the one is controlled by the testator's intention; the other is controlled by the law of the state, without any regard to the testator's intention. The intention of testators cannot override the law, or repeal it." Mr. Schouler says that under the common law the question of revocation by the subsequent marriage and birth of a child was "one of legal inference, independently altogether of what the party himself might have intended." Schouler, *Wills* (3d Ed.) § 425. The ecclesiastical courts seemed to have held otherwise, but the author last cited says that, so far as the American statutes on the subject are concerned, resort must be had to the peculiar wording of each statute to ascertain which of the above-mentioned rules of construction is applicable. See section 426. Mr. Page says the law annexed a condition in such a case that the will would be revoked. Page, *Wills*, § 283, p. 323. See, also, Pritch. *Wills*, § 293.

Keeping these rules in mind, it will be seen that there is nothing in the will involved in the present case, or, so far as the record discloses, in the will taken in connection with the circumstances existing at the time of its execution, which shows that the testator had in mind the event of the future birth of a child, or made any provision in contemplation of that event. There were, at the time the will was made, children of the testator then in life; and therefore the case is wholly different from that of *Freeman v. Layton*, 41 Ga. 58, where a testator who had no children provided in his

will that, if he should die leaving a child or children, his property was to be equally divided between them if there was more than one, or given to one if there was only one. In that case it was held that the will was not revoked. It was argued that the child born subsequently to the making of the will involved in the present case would fall within the general class designated in the will by the word "children," and that, as the testator evidently manifested an intention to disinherit his children then in life, the child subsequently born would also be disinherited; that, unless a contrary intention be shown, the word "children," appearing in a will, refers to the children living at the death of the testator. Counsel for the defendant in error rested their argument mainly upon the proposition just above stated. The general rule undoubtedly is that, where a bequest or devise is made in a will to "children," the word refers to those living at the date of the death of the testator. But it does not follow that an unborn child could be disinherited by the mere use of the general word "children." "An heir cannot be disinherited except by express devise or necessary implication, and the implication to effect this must amount to such a strong probability that an intention to the contrary cannot be supposed." *McMichael v. Pye*, 75 Ga. 191. See, also, *Wilder v. Holland*, 102 Ga. 45, 29 S. E. 134, and cases cited. Mr. Underhill says: "But our law, while it permits the father to disinherit his child altogether without looking closely into the reasons which prompted him, protects the interests of a child born subsequent to the execution of the will, and who is not mentioned in it, upon the very reasonable assumption that the silence of the parent as to a testamentary provision for that child was the result of accident or inadvertence, and not of a deliberate intention to disinherit one against whom, at least when the will was made, the testator could have had no reason to discriminate." 1 Underhill, Wills, § 240, p. 328. See, also, section 242. See, also, in this connection, *Page*, Wills, § 292; *In re Stevens' Estate* (Cal.) 28 Pac. 379; *Barnes v. Barker* (Wash.) 81 Pac. 976; *Lurie v. Radnitz* (Ill.) 46 N. E. 1116, 57 Am. St. Rep. 157. It is, however, unnecessary to pursue this line of argument further, or to enter upon a consideration of the question whether the language of the will involved in the present case might not create a precatory trust for the benefit of all the children of the testator living at his death.

Whatever opinion may be entertained upon either of the foregoing propositions, it would not, in our judgment, affect the conclusion which we have reached,—that the will was revoked. Even under the act of 1834, which required that some positive beneficial provision should be made for the child, it was held that the fact that the after-born child might, upon the happening of certain con-

tingencies, take a beneficial interest in the estate, under the general description of children used in the will, would not constitute such a provision for the child as was contemplated by the statute. *Holloman v. Copeland*, 10 Ga. 79. Much less could a general expression in a will which operated to disinherit all the children of the testator living at his death be said to indicate that provision was made in the will in contemplation of the event of the birth of a child which came into being long after the will was made. It makes no difference that under the rules of law the after-born child may be comprehended within some general term used in the will, whether that term was intended to provide a beneficial interest for it in the testator's estate, or whether it was intended to disinherit the child altogether. The law is clear and explicit. The will must show that the testator had in contemplation the event,—that is to say, the probable or possible future birth of a child,—and must have made some provision in the will in contemplation of such event. Not that this provision must be of a beneficial interest in the testator's property, but the will must refer to the contingent event in some way, and provide for it, either by unequivocally making a beneficial provision for the child, or by disinheriting it altogether in such clear and unmistakable terms as to leave no doubt that the testator had the event in mind. The law intends that the probable or possible contingent event shall be present in the testator's mind, and exerting a moral influence upon the testamentary scheme; that he shall carefully weigh the effect which such an event ought to have upon the disposition to be made of his bounty; and that he shall give evidence in his will that he has considered the possible happening of the event; and the will must in clear and unmistakable terms contain a provision which shows that it was made at a time when the testator had the event in mind, and in contemplation of that event. It is impossible to tell what influence the contemplation of such an event as the future birth of a child would have had upon the mind of the testator who signed the will upon the validity of which we are now called upon to pass. It is altogether possible that it might have altered the whole testamentary scheme by suggesting a different train of thought. It may be that the contemplation of the helpless condition of the infant might have suggested the propriety of making some provision for it as well as for his other children. Be this as it may, the case is not to be decided upon speculative inferences, but upon the presumption which the law draws from the will itself. The fact that the testator may have lived some time after the birth of the child, and failed to make any change in his will, can make no difference. The will was void immediately upon the birth of the child, and nothing the testator might do or fail to do

could give it life. It was dead as completely as if he had destroyed it by burning, or by any other means known to the law. We hold, therefore, that the will of Joseph Smith was revoked by the birth of a child to him subsequently to the execution of that will, and that the court erred in deciding the contrary.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 847)

BALLARD v. HAINES.

(Supreme Court of Georgia. July 18, 1902.)

BOUNDARIES—PROCESSIONING LAND—APPLICATION.

1. The phrase, "shall apply to the processioners," as used in Civ. Code, § 3244, authorizing proceedings for the processioning of land, necessarily refers to an application in writing, and it follows that without such an application there can be no lawful proceedings under that section.

2. As there was in the present case no written application, the trial court did not err in sustaining a motion to dismiss "the case," based on the ground, among others, of the "insufficiency of the proceedings."

(Syllabus by the Court.)

Error from superior court, Laurens county; D. M. Roberts, Judge.

Action by E. D. Ballard against M. W. Haines. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. B. Sanders, for plaintiff in error. J. M. Stubbs and P. L. Wade, for defendant in error.

PER OURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 926)

ELLIOTT et al. v. BANKS.

(Supreme Court of Georgia. July 19, 1902.)

APPEAL—HARMLESS ERROR—NEW TRIAL—WITNESS—COMPETENCY—PURCHASE—MONEY NOTE—PAYMENT.

1. Refusing to allow a witness to answer a particular question, even if erroneous, is not cause for a new trial, when it appears that the witness did testify to all the facts within her knowledge relating to the subject-matter of her examination. *White v. Iron Works Co.*, 38 S. E. 944, 113 Ga. 577; *Doggett v. Bank*, 39 S. E. 506, 113 Ga. 950.

2. Nor will a new trial be granted for excluding testimony which, even if relevant, was of such slight probative value that it was not in the least degree probable that admitting the same would have affected the result.

3. The widow of an intestate, whose administrator is the defendant to an action for land, brought April 24, 1900, by the heirs at law of another intestate, is not, though interested in the result of the suit, disqualified from testifying as to a transaction with respect to the land, which occurred between her deceased husband and the plaintiff.

4. Though it is the usual and natural course for the purchaser of land, on paying a purchase-money note given therefor, to take up the note, and, if it be for the full balance due

on such purchase, to also take a deed to the land, it is not, in the trial of an issue as to whether or not the purchaser of the land in controversy had paid therefor, improper to refuse to charge the jury, in effect, that a failure on his part to take up the purchase-money note for such balance, or to obtain a deed, raised a presumption of law and of fact that the land had not been paid for. While such failure would be a strong circumstance tending to show nonpayment, it does not go to the extent of raising such a presumption as that indicated.

5. The evidence warranted the verdict, and the newly discovered evidence was not of such a character as to require a reversal of the judgment denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by R. D. Elliott and others against James Banks, administrator. Judgment for defendant, and plaintiffs bring error. Affirmed.

Simmons & Pettigrew, for plaintiffs in error. Arnold & Arnold and L. Z. Rosser, for defendant in error.

PER OURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 934)

DE LAY v. SOUTHERN RY. CO.

(Supreme Court of Georgia. July 19, 1902.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES—NONSUIT.

1. Though there was evidence showing that the plaintiff was injured by reason of a defect in the implement furnished him with which to work by his master, the defendant, yet, as it did not appear that the latter either knew, or, in the exercise of ordinary care and diligence, ought to have known, of such defect, and it did appear from the plaintiff's own testimony that he had equal means with the master of ascertaining the existence of the defect, the judgment of nonsuit was right. Civ. Code, §§ 2611, 2612.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by R. J. De Lay against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Green & McKinney, for plaintiff in error. Dorsey, Brewster & Howell and Sanders McDaniel, for defendant in error.

PER OURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 935)

EAST v. GERMANIA LOAN & BANKING CO.

(Supreme Court of Georgia. July 19, 1902.)

PLEADING—AMENDMENT.

1. The petition, with or without the offered amendment, set out no cause of action against the defendant, and the trial judge did not err

in refusing to allow the amendment, or in dismissing the petition.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by W. B. Rast against the Germania Loan & Banking Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank A. Arnold, for plaintiff in error. Goodwin, Anderson & Hallman, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 934)

McLENDON v. WESTERN & A. R. CO.
(Supreme Court of Georgia. July 19, 1902.)
NONSUIT.

1. Under the evidence introduced by the plaintiff, there was no error in granting a nonsuit.
(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Andy McLendon against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Anderson, Anderson & Thomas, for plaintiff in error. Payne & Tye, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 929)

ROWE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 19, 1902.)

ACCIDENT AT CROSSING—NEGLIGENCE—
DIRECTING VERDICT.

1. Assuming that the negligence of the defendant was shown, there was no error in granting a nonsuit, for the evidence required a finding that the deceased was not exercising that degree of care which the law requires of even a youth of his years and experience, under the circumstances existing at the time of the collision which resulted in his death.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Miley Rowe against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. S. Howard and Westmoreland Bros., for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 928)

ROUSS v. McCLURE TEN CENT CO.
(Supreme Court of Georgia. July 19, 1902.)

APPEAL—REVIEW.

1. There was no error of law of which complaint was made, and the evidence was sufficient to support the verdict. The trial judge did not, therefore, err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between the McClure Ten Cent Company and W. W. Rouss, executor. From the judgment the executor brings error. Affirmed.

H. W. Dent, for plaintiff in error. Hugh M. Dorsey, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 926)

CAUDLE v. MADDUX et al.
(Supreme Court of Georgia. July 19, 1902.)
EXECUTION—CLAIM OF THIRD PERSON—NEW TRIAL.

1. When, on the trial of an issue raised by a levy on property, and the interposition of a claim to the property by a third person, it was made to appear that the defendant in *fi. fa.* had theretofore traversed the return of service on the defendant made by an officer in the original suit, and that a judgment had been had sustaining the traverse, the levy in the claim case should have been dismissed. When, however, on a motion for a new trial in the claim case, it was further made to appear that the verdict sustaining the traverse had been set aside, and a new trial granted in that proceeding, the trial judge committed no error in granting a new trial in the claim case.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Trial of right to property levied on under execution between Ella Caudle and J. J. and J. E. Maddux. From an order granting a new trial, Caudle brings error. Affirmed.

Thos. L. Bishop, for plaintiff in error. W. H. Terrell, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 950)

ARCHER et al. v. ARCHER et al.
(Supreme Court of Georgia. July 19, 1902.)
JUDGMENT—RES JUDICATA—PARTIES.

1. Where a life tenant and the remaindermen file an equitable petition against a trustee, seeking his removal, and the judge refers the petition to an auditor, and, before the auditor reports, the same parties file a similar petition for the same purpose, and by agreement the trustee is discharged under the last petition, and subsequently the auditor files his report recommending the removal of the trustee, and the report is confirmed by the judge, and de-

cree had thereon, the plaintiffs, having been parties, and participating in the hearing on the auditor's report, resulting in a decree in their favor, are bound by that decree, and cannot in the other proceeding attack it as having been void, for the reason that the trustee had been removed before the making and confirming of the auditor's report.

2. If in such a proceeding a mother represents her minor children as their next friend, they become parties, and are bound by the decree, although no guardian ad litem is appointed for them.

(Syllabus by the Court.)

Error from superior court, Clayton county; John S. Candler, Judge.

Action between Marietta Archer and others and W. P. Archer, trustee, and others. From the judgment Marietta Archer and others bring error. Affirmed.

F. E. Callaway and J. D. Brackwell, for plaintiffs in error. W. M. Wright and W. L. Watterson, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 890)

SOUTHERN RY. CO. v. GILMORE

(Supreme Court of Georgia. July 18, 1902.)
OBJECTION TO EVIDENCE—KILLING STOCK.

1. Where the testimony of a witness relating to a particular matter is in part material and pertinent, though in part irrelevant, a general objection to the whole of this testimony is not well taken, since the inadmissible part should be distinctly pointed out, and specific objection thereto made. *Maynard v. Association*, 37 S. E. 741, 112 Ga. 443, 447, and cases cited; and see *Chambers v. Wesley*, 38 S. E. 848, 113 Ga. 843.

2. The evidence, though conflicting, was sufficient to support a finding that the killing of some of the plaintiff's stock was caused by the negligence of the defendant company, and the amount named in the verdict was not greater than the proved value of such stock.

(Syllabus by the Court.)

Error from superior court, Washington county; H. M. Holden, Judge.

Action by George Gilmore against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Evans & Evans, for plaintiff in error. Rawlings & Howard and T. W. Hardwick, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 858)

IVESTER v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 18, 1902.)
DEFECT IN STREET—LIABILITY OF CITY.

1. A municipal corporation is under no duty to erect barriers or to maintain lights to prevent injury to persons seeking to enter a street from private land at a point at which there is no traveled way either public or private, and

at which there is nothing to put the municipality on notice that an entrance is likely to be attempted.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by J. W. Ivester against the city of Atlanta. Judgment for defendant. Plaintiff brings error. Affirmed.

Spencer R. Atkinson, Jas. A. Anderson, and E. Winn Burn, for plaintiff in error. Jas. L. Mayson and Wm. P. Hill, for defendant in error.

SIMMONS, C. J. Suit was brought by Ivester against the city of Atlanta for damages on account of personal injuries alleged to have been occasioned him by the negligence of the municipal authorities. The allegations on which he predicated his action were in substance that on a certain night he walked on Gullatt street until it intersected with Glenwood avenue, when he discovered that beyond the intersection the roadway of Gullatt street was in an unfinished condition, and that there was no paved sidewalk; that at the point of intersection there was a path, much used by pedestrians, running for a short distance along the line of Gullatt street, and then diagonally across an unclosed lot to Cherokee avenue; that, being unacquainted with the locality and supposing the path was the sidewalk used by pedestrians in passing, he stepped into the path and continued on his way; that in a few moments, on account of the darkness, he lost the pathway, and in endeavoring to regain Gullatt street went in an opposite direction, and unintentionally fell into an excavation made by the city in grading Cherokee avenue; that at the point where he fell Cherokee avenue had been graded six to nine feet below the level of the lot from which he fell, and there was no light at the intersection of Gullatt street and Glenwood avenue, and no light, barricade, or railing at the point at which he fell. He alleged that the city authorities were negligent in so constructing the street and failing to safeguard the public against its dangers; in leaving the excavation unprotected by railing or barricade; in failing to light the street so that persons approaching might see the danger and avoid it; and in not taking measures to warn the public of such danger. Counsel for the city demurred to the declaration on the ground that it showed no negligence on the part of the city, and set out no cause of action against the city. The demurrer was sustained, and the plaintiff excepted.

Under the facts alleged in the declaration there was no error in sustaining the demurrer. Whilst a municipality is bound to keep its streets and sidewalks in such condition as to allow vehicles and foot passengers to pass over safely, there is no duty resting upon it to maintain lights, erect railings, or

use other precautions to prevent persons from stepping off of a private lot into a graded street at a point at which it could not be reasonably anticipated that any one would attempt to descend. Plaintiff in error undertook to follow a path over an uninclosed private lot. The path had been used by other foot passengers. Plaintiff in error lost his way, and in attempting to regain the street which he had left he inadvertently went in the other direction, and fell into another street at a point at which it does not appear that any other person had ever entered. We are unaware of the existence of any law or decision under which the city could be held liable. The able and distinguished counsel for the plaintiff in error relied upon the cases of *Burnham v. City of Boston*, 10 Allen, 290, and *Orme v. City of Richmond*, 79 Va. 86, 5 Am. & Eng. Corp. Cas. 605. Along the same line is also *O'Malley v. Borough of Parsons* (Pa.) 43 Atl. 384, 71 Am. St. Rep. 778. This last case followed the two first-mentioned ones, and the *Orme* Case followed the *Burnham* Case, without, apparently, noticing that that case was predicated upon the peculiar New England statutes in regard to streets and roads. In 2 Dill Mun. Corp. (4th Ed.) § 1005, the fact that the *Burnham* Case was founded upon a construction of the New England statutes is stated. These statutes provide for the working of the roads and for the erection of barriers and railings in certain places, and impose upon townships liabilities peculiar to that section of the country, and not common to the other states of the Union. Even, however, if we admit the soundness of the three cases above cited, as applied to all municipalities, whether in New England or elsewhere, still we think the demurrer in the present case was properly sustained. In *Burnham v. City of Boston* an excavation had been made by a railroad company in one of the streets of the city and across a private way which for a long time had been commonly traveled by the public. A passenger in a carriage, not knowing of the excavation, undertook to drive upon this private way, pursuing the regular route, and for want of barriers the horse and carriage were precipitated in the cut and the passenger was injured. The city was held liable. In the *Orme* Case a private way had been in use for a long space of time. It led into the intersection of two streets. The city lowered the grade at this intersection, and erected barriers at the ends of the streets, but failed to erect any barriers at the end of the private way. A woman passing along the private way at night and attempting to pass into the street was injured. The court held the city liable. In the *O'Malley* Case a private way had existed for a long time, leading from certain houses to the public street. The city graded the street and made an excavation without giving the public notice or erecting barriers at the point where the private way entered

the street. A physician, after attending a patient at one of the houses, attempted, at night, to enter the street by the usual way, and was injured. These cases might have been applicable to the present one had the plaintiff followed the path to the point at which it entered Cherokee avenue, and been injured in attempting to enter the street at that point. Plaintiff, however, did not fall at that point but at a point at which, so far as appears, no one had ever before entered the avenue, and at which the city could not reasonably have anticipated that any one would ever attempt to enter, especially on a dark night. For these reasons the cases cited and relied upon do not apply. We think the city was under no duty to protect the plaintiff under the facts alleged, and that there was no error in sustaining the demurrer to the plaintiff's petition.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 954)

CITY TRANSFER CO. v. DRAPER.

(Supreme Court of Georgia. July 19, 1902.)

CARRIERS—LOSS OF BAGGAGE—CONTINUANCE—EVIDENCE.

1. If a transfer company, for a given fare charged and paid, undertakes to transport a passenger and his baggage, it is, in a contest over the company's liability for the loss of the baggage, immaterial whether or not it was the general custom of the company simply to carry passengers, and not to hold itself out as offering to carry their baggage without extra compensation.

2. In view of the facts brought to light on the trial of this case, the denial of the defendant's motion to continue affords no cause for ordering a new trial.

3. There being ample evidence to show that the plaintiff's hand baggage, for the loss of which the action was brought, had been by him intrusted to the exclusive custody and control of the defendant, which was an incorporated city transfer company, engaged in the transportation for hire of passengers and their baggage, and the evidence demanding a finding that he was not guilty of any negligence, and that the defendant company did not exercise ordinary diligence in taking care of his baggage, a charge to the effect that the liability of the defendant was that of an insurer, even if inapplicable (as to which no ruling is now made), was not harmful to the company.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by R. D. Draper against the City Transfer Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Boykin Wright and Geo. T. Jackson, for plaintiff in error. Wm. H. Barrett, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 1519, 1544.

(115 Ga. 851)

CLEMENTS v. McCORMICK HARVESTING MACH. CO.

(Supreme Court of Georgia. July 18, 1902.)

CERTIORARI—DISMISSAL—ASSIGNMENTS OF ERROR.

1. It is erroneous to overrule a motion to dismiss a certiorari when it appears that the petition for the writ contains no assignment of error to either the judgment which is sought to be set aside or to any rulings made in the trial court.

(Syllabus by the Court.)

Error from superior court, Montgomery county; D. M. Roberts, Judge.

Action by the McCormick Harvesting Machine Company against T. M. Clements. Judgment for plaintiff. On levy of execution, J. K. Clements filed a claim. Verdict for claimant, and plaintiff brought certiorari. On refusal to dismiss, claimant brings error. Reversed.

Geo. Bright, for plaintiff in error. J. H. Mobley, for defendant in error.

LITTLE, J. The plaintiff in error filed a claim to the levy of an execution issued from a justice's court in favor of the defendant in error against T. M. Clements. The magistrate rendered judgment in favor of the claimant, the plaintiff appealed to a jury in the justice's court, and a verdict in favor of the claimant was returned. The plaintiff then sued out a writ of certiorari. When the certiorari case was called in the superior court the defendant moved to dismiss the petition, "because there was no assignment of error therein, no complaint made therein of the verdict of the jury, and no error alleged therein to have been committed by the court or jury in the trial in the justice's court." This motion was overruled, and the court, on consideration of the petition and the answer of the magistrate, sustained the certiorari, and remanded the case for another trial. To the overruling of his motion to dismiss, and to the judgment sustaining the certiorari, the plaintiff in error excepted.

In the view we take of this case, it is only necessary to consider that assignment of error which complains of the refusal of the court below to dismiss the certiorari. The only language in the petition, in the nature of a complaint of the proceedings in the justice's court, is in the following words: "Wherefore your petitioner, being dissatisfied, sets forth and complains of the following errors: (1) That the will in its recital states that if J. F. Clements cannot act as executor; that Jas. R. Clements shall act, and not T. M. Clements. (2) That an executor cannot transfer his trust to an agent so as to defraud creditors. (3) That T. M. Clements, having bought the mule in his own name, having given his own individual note

for same, and he being of age, and of sound mind and discretion, could not later set forth the fact that he was acting as agent for the executor, there being no written evidence of agency, nor sale of said property to principal, no receipts of bill sale having been taken whereby the executor could show the transaction of his trust." While it is evident that the plaintiff in certiorari was here attempting to set forth in his petition certain legal propositions which he believed to be applicable to his case, it is equally certain that the language quoted is in no sense a compliance with the requirement of Civ. Code, § 4637, that in petitions for certiorari the errors complained of shall be "plainly and distinctly set forth." Indeed, the petition does not specify any ruling of the magistrate as being erroneous, and does not complain of anything that took place upon the trial before that officer. "The plaintiff in certiorari must allege error so distinctly that a reviewing court may understand the ground of error relied on." *Hayden v. State*, 69 Ga. 731 (2). See, also, *Fleming v. State*, 67 Ga. 767. The petition for certiorari in the present case contained no assignment of error of any character, and the court below should have sustained the motion to dismiss.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 823)

HERRINGTON v. FLANDERS, Sheriff.

(Supreme Court of Georgia. July 17, 1902.)

CRIMINAL LAW—CONVICTION—COSTS.

1. Under section 1079 of the Penal Code, it is manifestly unlawful to charge the accused in a criminal case, upon his conviction, with "the costs of any witness of the state, unless such witness was subpoenaed, sworn, and examined on the trial." The prohibition in that section against charging the accused, except as therein indicated, with the costs of "more than two witnesses to the same point," relates, of course, only to witnesses who have actually been "subpoenaed, sworn, and examined."

2. Under the law above announced, the superior court erred in not sustaining the certiorari.

(Syllabus by the Court.)

Error from superior court, Emanuel county; B. D. Evans, Judge.

Action between G. F. Flanders, sheriff, and Rowan Herrington. From the judgment Herrington brought certiorari, and from an order dismissing the writ he brings error. Reversed.

A. Herrington and S. H. Saffold, for plaintiff in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

¶ 1. See *Certiorari*, vol. 2, Cent. Dig. §§ 70, 150.

¶ 1. See *Costs*, vol. 12, Cent. Dig. § 1173.

(115 Ga. 848)

PRYOR v. BRADY.

(Supreme Court of Georgia. July 18, 1902.)

PLEADING—GENERAL DEMURRER.

1. When the petition in an action of trover embraces three paragraphs, each of which is, in substance, a separate count, for the recovery of personalty therein described, and two of these counts are bad, and one good in law, a general demurrer relating to the entire petition affords no ground for striking either one of the defective counts. These can be reached only by an appropriate special demurrer, directly attacking such counts, and pointing out their defects.

(Syllabus by the Court.)

Error from city court of Americus; O. R. Crisp, Judge.

Action by R. S. Pryor against E. E. Brady. Judgment for defendant, and plaintiff brings error. Reversed.

Lane & Maynard, for plaintiff in error. H. B. Simmons, J. H. Lumpkin, and J. A. Hixon, for defendant in error.

LITTLE, J. Prior instituted an action of trover against Brady in the city court of Americus. He alleged in his petition that during the year 1900 Brady rented from him certain land situated in Lee county; that in September of that year, Brady having failed to pay the stipulated rent, petitioner sued out a distress warrant and had same levied for the purpose of recovering such rent; that afterwards, in October of that year, petitioner and Brady came to an agreement under which the distress warrant was settled. Among other things, it was stipulated that Brady should turn over and deliver to petitioner all of the crops which had been grown on the land during the year 1900; that the same should be gathered, harvested, and sold by petitioner, and the proceeds applied to the liquidation of the amount which Brady was due petitioner; and, in the event such proceeds were greater in amount than was sufficient to pay off such indebtedness, that the balance should be turned over to Brady. Acting under this agreement, petitioner employed Brady for stipulated wages to assist him in gathering the crop. It is alleged that under this agreement title to the crops so made was vested in petitioner for the purpose indicated. It is further alleged that petitioner paid defendant the amount agreed on for his services in aiding to harvest the crop, but that, contrary to the agreement, Brady secretly and fraudulently carried away from said place, and from the possession of petitioner, and without his knowledge or consent, two bales of cotton, which were grown in 1900 on said land, which in the petition are described by definite marks, and alleged to have been of the value of \$100, and worth \$1 per month as hire. It is further alleged that demand for this cotton was duly made and refused. In another paragraph it was alleged that in October, 1900, petitioner gave to the defendant three \$20 bills of United States money, for

the purpose of using \$25 of the same to pay the expenses of harvesting the crop of petitioner's place, and the remaining \$35 was to be paid to one Hancock for ginning cotton and paying off hands for picking the cotton. Petitioner alleged that Brady converted the money to his own use, and did not pay the sum of \$35 to Hancock. It is also alleged that when Brady entered on the land under his contract of rent petitioner furnished him a large quantity of cotton seed, to be used by Brady in planting his crop, as a fertilizer for the same; that Brady agreed to return to petitioner at the end of the year the same number of bushels of cotton seed that petitioner had furnished him, but he secretly and fraudulently converted the cotton seed to his own use, by sale or otherwise, to the injury of petitioner; and that Brady did not return to petitioner at the end of the year the number of bushels of cotton seed which he had been furnished. The defendant demurred to the petition on several grounds: First, because no cause of action was set out; second, because under the petition the action of trover was not a proper remedy; third, because, if liable at all, the defendant was only so in an action of debt; fourth, because there was no sufficient allegation that the title to the property was in the plaintiff at the time of the institution of the suit, nor that the same had been converted by the defendant; fifth, because there is no identification of the property sought to be recovered in paragraph 8 of the petition, and that the allegations made therein showed that the plaintiff was seeking to recover in an action of trover for a simple indebtedness from defendant to plaintiff. The petition was amended in certain respects not here necessary to be set out. The trial judge sustained the demurrer, and dismissed the petition, and thereupon the plaintiff excepted.

This demurrer, when properly construed, must be taken as a general demurrer to the whole petition, and a special demurrer to paragraph 8. An examination of the petition shows that the part of the petition which relates to the two bales of cotton was good, in substance, as an action of trover to recover the cotton. In such an action it was only incumbent on petitioner to prove his title, the value of the property, its conversion by the defendant, and the demand and refusal before the institution of the suit. In reference to title, the petitioner set out the terms of an agreement which vested in him title of the cotton for which he sued. It is true that under the allegations the proceeds were to be devoted by the petitioner to a particular purpose, but in order to accomplish that purpose title to the cotton was vested. The conversion is distinctly alleged, as is also the demand and refusal to deliver. So far, then, as the petition seeks to recover the two bales of cotton, it was good, and was not subject to be dismissed on any of the grounds of the demurrer. There being one good

count in the petition, a general demurrer to it as a whole should have been overruled. The seventh paragraph seeks to recover "three \$20 bills of United States money." The allegations in reference to the conversion are that Brady was to use \$25 "of said sum" to pay the expenses of harvesting the crop, and the remaining \$35 was by said Brady to be paid to one Hancock for ginning, "and said money was so intrusted to said Brady for the purpose of paying off hands for picking cotton," and that Brady "did fraudulently and wrongfully convert said money to his own use," and did not pay the sum of \$35 to Hancock, but as to the \$25 "petitioner is not advised whether the said money was used as directed or not." Under these allegations, the plaintiff was not entitled to recover these three particular \$20 bills. The count is entirely defective, has no place in an action of trover, and under no circumstances could be anything except a demand against Brady in an action for money had and received to the extent of \$35. The demurrer, being general, could not reach the defects in this paragraph. Had the defendant desired to have it stricken, he should have filed a special demurrer pointing out its defects, but it was erroneous to dismiss this count of the petition on a general demurrer. Paragraph 8 is also defective, and the allegations made in relation to the cotton seed amount to no more than that Brady was indebted to petitioner in the sum of \$120, being the value of 600 bushels of cotton seed. There was, however, a special demurrer to this count on the ground that there was no identification of the property sought to be recovered, and that the allegations show that the plaintiff is seeking to recover in an action of trover for a simple indebtedness to plaintiff by defendant. This was a good demurrer to that paragraph, and it was properly stricken by the trial judge. Inasmuch, however, as the first count in the petition in relation to the cotton was good, and there was no special demurrer to the seventh paragraph in relation to the three \$20 bills, the court erred in sustaining the general demurrer and dismissing the petition as a whole.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 831)

PONDER v. STATE.

(Supreme Court of Georgia. July 18, 1902.)
DISORDERLY HOUSE—EVIDENCE—NEW TRIAL.

1. The evidence warranted the verdict, and none of the grounds of the motion for a new trial which were argued in the brief of counsel for the plaintiff in error contain any sufficient reason for reversing the judgment of the trial judge refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Brunswick; J. D. Sparks, Judge.

George Ponder was convicted of keeping a disorderly house, and brings error. Affirmed.

Ira E. Smith and Orovatt & Whitfield, for plaintiff in error. J. T. Colson, for the State.

COBB, J. The plaintiff in error was convicted of the offense of keeping and maintaining a lewd house. He excepted to the judgment of the trial court refusing to grant him a new trial. The defense of the accused was that he was merely the servant, employed at a stipulated salary, of the person who maintained and kept the house mentioned in the indictment. There was evidence, however, warranting a finding that he was jointly interested with his alleged employer in the business being carried on in the house. There was evidence that the accused lived in the house, collected the rent from the inmates, and exercised acts of ownership in and about the building. All these things might, however, be consistent with the theory of the accused; but there was direct evidence that the accused had, previously to the trial, stated that he was in copartnership with the other person above referred to, and that on one occasion he stated to one of the inmates that he had as much right to put her out of the building as Williams, the other person interested in the business. In view of all this testimony, it cannot be said that the verdict was wholly unsupported by evidence.

The motion for a new trial contains several grounds. Some of them were not argued in the brief of counsel for the plaintiff in error. Those argued do not present any sufficient reasons for ordering a new trial. One of these grounds complains that the court erred in admitting in evidence a contract for the sale of a certain piano, dated June 17, 1901, and signed by G. Williams, by "his x mark," and by George Ponder, the accused. The contents of the contract are not set out, either literally or in substance, nor is a copy attached to the motion. It is therefore impossible to tell from the motion whether the objection to the admission of the contract, that it was irrelevant to the issue on trial, was well taken or not. Under a well-settled rule of practice, this ground of the motion presents no sufficient assignment of error.

Complaint is made in several grounds of the motion that the court failed to instruct the jury on the law of circumstantial evidence. The judge in his charge to the jury stated that they might convict on circumstantial evidence, and then instructed them that if they believed certain facts, which afforded evidence solely of a circumstantial nature, they might convict. The judge might very properly have given the abstract rules of law applicable to circumstantial evidence, but his failure to do so in this case will not, in the absence of a pertinent written request so to do, afford any cause for a new trial. There was no error, for the reasons assigned,

in any of the extracts from the charge to which exceptions were taken.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 344)

DAVISON v. McWHORTER.

(Supreme Court of Georgia. July 18, 1902.)

ACTION ON CONTRACT—EVIDENCE.

1. As the only evidence tending to establish the amount of the plaintiff's demand was a writing upon which he relied as constituting an admission by the defendant of liability for the sum sued for, and as the latter met this evidence with an explanation which, if true, completely overcame its force and effect, a finding in his favor was fully warranted.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Action by James Davison against R. L. McWhorter. Judgment for defendant before a justice, and plaintiff brought certiorari. From an order overruling the petition, plaintiff brings error. Affirmed.

Jas. Davison, for plaintiff in error. Hamilton McWhorter, for defendant in error.

LUMPKIN, P. J. A suit for \$19 was instituted in a justice's court by Davison against McWhorter, the action being based on a contract signed by the latter, of which the following is a copy: "Greensboro, Ga., Sept. 28, 1897. I hereby promise to pay Jas. Davison or bearer the sum that shall become due Gilbert Champion for labor performed for me to the amount of \$25.00, said sum being due said Jas. Davison by said Champion for services in the cases of the State v. Gilbert Champion, charged with 'escape' and with 'aiding to escape.' This promise is limited to the amount of my indebtedness to Gilbert Champion." On a trial before a jury in the magistrate's court, the plaintiff introduced in evidence the contract sued on, and also a "written statement admitted by defendant to have been given Gilbert Champion," which purported to show how accounts stood between them. In this statement Champion was charged with \$35.67, and credited with \$26.66, as his "wages to April 10, '98." Upon this evidence the plaintiff rested his case. The defendant, as a witness in his own behalf, testified, in substance, as follows: The understanding was that he was to take Champion "and work him, and try to help Mr. Davison get his money." Champion worked for McWhorter from September to the end of the year 1897, at \$5 per month, and at Christmas he owed Champion \$6 "on settlement," which amount was paid to Davison. On April 10, 1898, Champion "quit work." The item of \$26.66 with which he was credited in the above-mentioned statement of account, represented "his wages from January 1st to April 10th," 1898. He

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"lost a great deal of time, which is charged in the account against him, as shown in the statement given him. Sometimes he lost as many as 12 days at once, which is charged to him in the account at the rate of 40 cents per day. The balance of his account is for supplies furnished and medical bills paid for him while he was sick. His wages did not amount to as much as the account he made while working for" the defendant, and for this reason the latter declined to pay the plaintiff's demand. This testimony on the part of the defendant was corroborated by a witness sworn in his behalf, who testified "that, as superintendent for Maj. McWhorter, he was familiar with his business at the time Gilbert Champion was there, and that said Champion lost a great deal of time from sickness and otherwise,—as much as twelve days at a time,—which was charged to Champion at the rate of 40 cents per day." The plaintiff then offered himself as a witness, and testified in rebuttal as follows: "Maj. McWhorter took Gilbert Champion, whom I had defended in two cases, to work him and pay me my fee. If the negro had left before he worked any, I did not expect Maj. McWhorter to pay me anything; but our contract was that Maj. McWhorter was to pay me whatever amount the negro's wages came to, and this is what was intended to be expressed in the contract sued on. I was entitled to the negro's services, and, if I had understood that Maj. McWhorter should make these advances to Gilbert Champion without consulting me, I never would have put Champion to work with him. Maj. McWhorter made these advances to the negro without my knowledge or sanction." The trial in the justice's court resulted in a finding in favor of the defendant, and Davison presented to the superior court a petition for certiorari, in which he complained that the verdict was contrary to law and the evidence, "because, under the undisputed evidence, defendant became indebted to Gilbert Champion during the time specified by the contract sued on for even more than \$25, and this made the defendant liable to plaintiff regardless of whether or not Gilbert Champion was indebted to defendant at the same time, said contract not specifying or referring to any net balance which might be due Gilbert Champion on settlement between defendant and said Champion." The petition for certiorari was overruled, and Davison excepted.

Giving to the contract sued on the construction which he places upon it, we are satisfied he made out a prima facie case by introducing in evidence this contract and the statement of account which the defendant admitted he had made out and given to Champion. This is so for the reason that this statement purported to be an admission on the part of McWhorter that the wages earned by Champion up to April 10, 1898, amounted to \$26.66. But this seeming admission against interest was open to explanation

by McWhorter, and he successfully overcame it by his testimony to the effect that he had credited Champion with the full amount of wages he would have earned had he worked continuously from January 1, 1898, to April 10th of that year, and that in the account rendered against him, amounting to \$35.67, he had been charged, at the rate of 40 cents per day, with the time he had lost on account of sickness, etc. McWhorter did not, it is true, undertake to say how much time Champion had lost, or when he was absent from work, or upon what basis the settlement between them at Christmas, 1897, was had. On the contrary, all that McWhorter endeavored by his testimony to show was that in point of fact the item of \$26.66 with which Champion was credited in the statement of account furnished him did not correctly represent the amount of money actually earned by him as wages up to April 10, 1898. This was all it was necessary for McWhorter to establish in order to destroy the evidentiary value of the writing upon which the plaintiff relied as constituting an admission that on the date last mentioned the former owed to Champion, for work performed by him, the sum of \$26.66. Without the aid of such an admission, no case was made out which entitled the plaintiff to recover any specified amount; for he made no attempt to prove for what length of time Champion actually worked or what compensation he was to receive for his services. The jury, as they had a right to do, accepted as true the explanation offered by McWhorter as to how he came to credit Champion with an amount which he had not actually earned as wages. The defendant's testimony fully warranted a finding that Champion had earned a much larger sum than \$6, the amount paid over to Davison, but there was no evidence before the jury as to this matter which would have authorized them to return a verdict in his favor for any definite sum. He simply failed to show, otherwise than by the paper relied on by him as an admission, but which the jury declined to regard as such, that McWhorter owed him the amount for which he brought suit, or any other specific amount. The burden was on him to prove his alleged claim. He might have succeeded in doing so by a proper cross-examination of McWhorter while he was on the stand as a witness. No attempt to have him state explicitly how much Champion actually earned as wages appears to have been made, however, nor was the latter introduced as a witness, or any testimony offered for the purpose of establishing the real truth in regard to this very important matter. This being so, Davison is clearly not in a position where he can justly complain, either that the jury in the magistrate's court did not return a verdict in his favor, or that the judge of the superior court differed with him in opinion as to the merits of his petition for certiorari.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 809)

COLLIER v. STATE.

(Supreme Court of Georgia. July 17, 1902.)

CRIMINAL LAW—IMPARTIAL TRIAL—DEMONSTRATION IN COURT ROOM.

1. The plaintiff in error did not have a fair and impartial trial in the manner contemplated by law, which is guarantied to him by the constitution of this state; and, whether the verdict was or was not supported by the evidence, it must for this reason be set aside. The trial judge erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Bill Collier was convicted of crime, and brings error. Reversed.

See 41 S. E. 261.

W. C. Martin and W. M. Jones, for plaintiff in error. Sam. P. Maddox, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

LITTLE, J. Collier, the plaintiff in error, was indicted, at a special term of Whitfield superior court, for the offense of rape, and was tried and convicted at the same term. He made a motion for a new trial, which was overruled, and he excepted.

This motion contains a number of grounds. These, it is not necessary that we should consider and pass on seriatim, for the reason that we have arrived at the conclusion that, for the reasons hereafter given, the accused did not have a fair and impartial trial as guarantied to him by the constitution and laws of this state, and that, without regard to the evidence which was produced on the trial, the verdict must be set aside, and a new trial granted. We therefore confine ourselves to a consideration of those grounds of the motion which present the reasons why the trial which resulted in his conviction cannot be sanctioned by the law. These are two. One of them specifies that during the trial, and while the person said to have been assaulted was testifying in rebuttal to the evidence introduced by the defendant, she became very much excited, and began upbraiding the defendant, and the husband of the witness took hold of a chair in a threatening manner as if to strike the defendant with it, but was seized by an officer, and forced to take his seat. At this point the crowd in the courthouse became very much excited,—got upon the seats,—looking and moving towards where the defendant was sitting. They were commanded by the trial judge to be seated, and this command was, after a little while, obeyed. Subsequently, counsel for the accused moved the court to declare a mistrial on account of this dema-

enstration, and error is assigned on the judge's refusal so to do. Another ground of the motion states, as a reason why a new trial should be granted, that, while the jury was in its room considering the case, a large number of men collected in the courtroom and courthouse yard, swearing, and using threatening language towards the jury, such as: "If the jury does not hang him, we will;" and "We will give the jury until ten o'clock to convict him; and if they don't, we will take him out and hang him."

The first of these grounds was allowed, and approved by the presiding judge. As to the last, the judge stated that he knew nothing of the facts therein stated, but at the hearing of the motion a number of affidavits, on the part of both the state and the accused, were introduced, and read in evidence. Some of these referred to the demonstration which occurred in the courtroom during the trial, and others to the demonstrations which occurred in the courthouse building, and in the yard of the courthouse, during the time the jury had the case under consideration. It is not necessary that the contents of all these affidavits should be set forth. As to the demonstration which occurred in the courtroom during the trial (as to the meaning of which the affiants differ), and as explanatory of its nature, we have selected, and here present, the substance of two,—one made by Mr. McCamy, of counsel for the defendant, the other by Mr. Maddox, the solicitor general, who had charge of the case for the state. In the affidavit of the former the following statement is made: "Deponent was present in court when the lady alleged to have been outraged was put upon the stand in rebuttal of the testimony introduced by the defendant. During the time she was thus on the stand, she grew very much excited, denouncing the defendant very fiercely, turning to him, saying, 'You know you are guilty.' At this time a large portion of the audience, perhaps 200 in number, became very much excited, and, as it seemed to deponent, all, or nearly so, came pouring over the benches in a very excited manner, and, it seemed to the deponent, to where the defendant was, and seemed their intention was to then and there lynch the defendant. The judge commanded the crowd to sit down, and rose to his feet and commanded the sheriff to keep order. But if the crowd was reprimanded for their conduct, deponent does not remember. And if the judge said anything to the jury about the demonstration at the time, or any other time, deponent did not hear it." The solicitor general gives his understanding of the matter in the following language: "During the progress of the trial, the husband of Mrs. Georgia McPherson, who is alleged to have been raped, was sitting very near deponent. When Mrs. McPherson became excited, and was denouncing the defendant, using the language which appears in the brief of evi-

dence and in the motion for a new trial, the crowd in the courthouse did not make any demonstration while she was testifying, and until she ceased to testify; and when her husband caught hold of a chair, and was seized by the officer, and made to take his seat, was when the crowd arose, got upon the benches, and made the demonstration complained of. In the opinion of deponent, the demonstration was not against the defendant, and would not have been made but for the conduct of the husband of the state's witness, and it is the opinion of deponent that it was curiosity on the part of the crowd to see what was going on between the officer and the witness, and not a demonstration towards the defendant. When the judge arose, and commanded the crowd two or three times to take their seats, they immediately did so, and as soon as the officers succeeded in seating the husband of the witness. It is the opinion of deponent that if the husband of witness had remained in his seat, and had not made the demonstration towards defendant that he did, and if the officer had not taken hold of him, that there would have been no demonstration from the crowd." Each of the statements of the two gentlemen named is, of course, to be accepted as giving the facts as each respectively understood them; and, so treating them, it is obliged to be conceded that a demonstration on the part of a very large body, for some reason, occurred in the courtroom during the progress of the trial, and that this demonstration was made at a time when the husband of the witness was seeking to do violence to the person of the accused, in the presence of the court and jury. These gentlemen and other affiants differ in opinion as to what the demonstration meant. In referring to that ground of the motion which was based upon the conduct of the crowd in the courtroom, and in the courthouse yard after the trial of the case had been completed, and after the jury had retired to their room in the courthouse building, quite a number of affidavits, including those of the jurors who tried the case, were submitted. We refer to such of them as we deem necessary to illustrate the rulings which we make. The bailiff, in whose charge the jury had been placed, testified that he carried the jury to the jury room, and locked them up; that he remained at the door of the jury room during their deliberations; that no one had access to the jury, nor the jury to any one; that around the courthouse yard there were some noisy demonstrations, and some talking in the courthouse, but he does not believe that the jury could have heard and distinguished what was said; that, in the opinion of this witness, the crowd remained at the courthouse as a matter of curiosity, awaiting the verdict; that it dispersed about 2 o'clock in the morning, and the jury did not make and return a verdict until between 7 and 8 o'clock on the morning after the trial. Two

other bailiffs of the court, who were present during the trial, used this language in affidavits they made: "They were watchful to see that no trouble occurred in the way of lynching; that they were listening, and they heard but one pistol shot; they made mention of it at the time, and the pistol shot was not in the courthouse yard, or near the courthouse, but was some distance away."

Each one of the jurors who tried the case also testified by affidavit. They all agreed in the statement that they were not influenced by any demonstration; that the noise in the courthouse yard had no effect upon them as jurors; and that they were controlled alone by the evidence in the case, and endeavored to return a proper verdict, and they continued of the opinion that they had done so. Some of the jurors also testified that while the jury had the case under consideration there were some noisy demonstrations in the courthouse yard, but they could not distinguish what was said, nor did they believe that the demonstrations were meant to apply to the jury. Another testified that he could hear the crowd, but not what they said; nor did he pay any attention to this crowd; and nothing said by them had any influence on him. Still another juror, Mr. Foster, testified as follows: "That he was not influenced, in the verdict he rendered, by any demonstration made by anybody on the outside, and not connected with the case; that while confined in the jury room he heard considerable noise in the courthouse yard. 'I heard some one say, "If they don't make a verdict in 35 minutes, we will;" this is all I understood. This was about eleven o'clock p. m.;' that the noises in the courthouse yard had no effect upon him as a juror in the least; that he was controlled alone by the evidence in the case, and endeavored from the evidence to return what he thought and now thinks was a proper verdict. The jury had the case under consideration all night. The noise in the courthouse yard ceased about 2 o'clock in the morning, and the verdict was not reported and returned into court until between 7 and 8 o'clock in the morning." Among other affidavits submitted, was one from L. H. Crawford, to the following effect: "That he was at the courthouse in Dalton, Ga., from about ten to about one o'clock on the night while the jury was out in the case of the state against Bill Collier, tried for rape; and deponent swears that while he was at said courthouse there was a bolsterous crowd of from 50 to 75 people in and around the courthouse. Deponent says occasionally a portion of the crowd would line up in courthouse hall for the purpose of going to the jail, and a time or two they started to the jail, and got as far as the well in the courthouse yard. All the demonstration was in the hearing of the jury, and deponent believes the jury heard it. Deponent says that, while he was at the courthouse on said

night, he heard a number of pistol shots which seemed to be between the courthouse and the jail." Another witness, G. M. Cannon, Jr., said that "he saw the demonstration in the courtroom; saw and heard a pistol shot in the yard or near by; heard loud and bolsterous talk like this: 'If the jury does not hang him we will,' or something to that effect. Crowd remained around courthouse until probably 2 o'clock a. m."

This evidence clearly established that a second demonstration was made by the crowd,—that is to say that after the jury had been charged, and had retired to consider their verdict, a very considerable number of people assembled in the courtroom, near to which was the jury room, and in the yard of the courthouse, and acted in a very bolsterous manner. It cannot be doubted, from the evidence, that this demonstration was made against the accused, and it is more than inferable that the purpose of the demonstration was to secure from the jury a verdict of conviction. It would be mere idle talk to say that the jurors did not understand that the demonstration was against the prisoner on trial. It is true that each of the jurors testified that the noise and demonstration made by this crowd did not affect his verdict. Indeed, all of them but one testified that, while they heard the noises, they could not understand what was said. One of them did clearly understand that some persons in the crowd threatened violence to the prisoner if the jury did not return a verdict of guilty. It is a little significant that the two bailiffs who were in attendance on the court testified that they were watchful to see that no trouble occurred in the way of lynching, showing, evidently, that there was a fear that the prisoner would be lynched; and it is fair to assume that these fears were occasioned by the demonstrations of the crowd. We have no reason to, and do not, doubt that each member of the jury who testified was sincere and honest in his belief that his verdict was in no way affected by the demonstration during the progress of the trial, or by that which subsequently occurred while the jury were considering their verdict. But the question is not whether, in fact, the jurors were influenced by these demonstrations, but were the demonstrations calculated to influence the jurors in their action? In the case of *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724, our present chief justice, who delivered the opinion in that case, referring to a demonstration made by some one in the courtroom, who, during the progress of the trial, cried out in an excited and angry tone, "Hang him! Hang him! Hang him!" said: "All the jurors make affidavit that these things had no influence upon their minds. * * * But can any man say with certainty that such things have no influence upon him? Can any of us know how far our minds are influenced

by applause or excitement of a crowd which surrounds us? Can any of us say, even in this court, that this or that piece of testimony, or this or that argument of counsel, has not influenced our minds? Can any of us say that, on the trial of one of the most heinous crimes ever committed in this state or any other, the applause of the crowd, the fierce cries of "Hang him! Hang him!" from members of the crowd, followed later on by a repetition of the same cry, would have no influence upon our minds? Our minds are so constituted that it is impossible to say what impression scenes of this kind would make upon us, unless we had determined beforehand that the prisoner was guilty or innocent. The question here is, not what effect these things did have upon the minds of the jury, but what effect they were calculated to produce." In the case of *Smith v. Lovejoy*, 62 Ga. 372, Mr. Justice Jackson said: "The juror's mind might have been influenced by the version given to the case by the plaintiff, though he did not recognize the influence himself; therefore, what he swore, he might believe, yet impressions may have been made favorable to plaintiff, and against defendant." Chief Justice Warner, in delivering the opinion of this court in the case of *Daniel v. State*, 56 Ga. 653, said: "The policy of the law is to protect jurors from all such influences and temptations in the trial of criminal cases, as well as defendants who may be injured thereby." So, therefore, in determining whether the plaintiff in error has any cause of complaint on account of the demonstrations made in the courtroom during the trial, and subsequently both in the courtroom and courthouse yard while the jury were considering the case, the inquiry is not to be confined to the effect that such demonstrations actually had on the minds of the jurors, but the question to be determined is whether the demonstrations referred to were of such a nature as that they were calculated prejudicially to affect the jurors trying the case. Tested by this rule, it is apparent that the defendant did not have a fair and impartial trial, which the law guarantees to him, and to which he is entitled be he guilty or innocent. The heinousness of the crime with which he was charged must not and cannot be allowed to affect the manner of his trial; and only by a fair and legal trial can his guilt be so established as to make him subject to the punishment which the law visits on offenders in such a case. Without any reference to the correctness or incorrectness of the verdict rendered in the case, under the evidence which was submitted we must, in deference to the obligations which we have assumed, as we understand them, reverse the judgment of the court below, because the defendant's guilt has not been established by a fair and impartial trial in the manner contemplated by law.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 13)

CENTRAL OF GEORGIA RY. CO. v. McKINNEY.

(Supreme Court of Georgia. July 23, 1902.)

CARRIERS—INJURIES TO PASSENGER—EVIDENCE—NEGLIGENCE—QUESTION FOR JURY.

1. Evidence of particular acts of the defendant at the time at which it was alleged that plaintiff sustained injuries by alighting from a train is admissible, when such evidence tends to illustrate the manner in which the plaintiff claimed he was injured, although a statement of these acts is not set out in detail in the petition.

2. Whether the commission of, or omission to do, particular acts by a railroad company, was negligence as to one who has been injured by the running and operation of a train of cars, must, as a general rule, be determined by a jury; and it is error for the judge, on the trial of a case brought to recover damages for such injuries, to charge the jury that the omission to do a certain act was negligence, when not expressly made so by law.

3. The charge complained of in the fourth ground of the amended motion for a new trial was not erroneous for any of the reasons assigned.

(Syllabus by the Court.)

Error from superior court, Clayton county; Jno. S. Candler, Judge.

Action by L. T. D. McKinney against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. L. Berner and Hall & Cleveland, for plaintiff in error. Arnold & Arnold, for defendant in error.

LITTLE, J. An action was instituted against the railway company by McKinney, to recover damages for personal injuries which the plaintiff alleged he sustained by reason of the negligence of the agents of the company in the running and operation of its cars.

It appears that the plaintiff was a passenger on one of the cars of the defendant, for the purpose of being transported to Lovejoy, and it is alleged that he was injured in attempting to alight from the train after it had arrived at that place. The specific acts of negligence with which the defendant was charged were that it negligently failed to stop the train a sufficient time for the plaintiff to alight safely; that it negligently started the train while the plaintiff was in the act of alighting; and before he had completely and safely reached the ground the car was negligently started with a sudden jerk. The evidence in relation to the manner and circumstances under which the plaintiff alighted from the car was in direct conflict. The plaintiff himself testified, among other things, that "when the train got to Lovejoy they were running very rapidly.

They ran through the station, and went past the regular depot some distance, and I went to get out of the train, and stepped on the step like, and the conductor told me to make haste. The track is on a fill there like, and I couldn't reach the ground hardly, and I slid down with this hand holding the hand brake, and had an umbrella in that hand, and I kinder sat down on the lower step, and slid off, and caught on the ground; couldn't touch it by stepping down, one foot up here and the other one on the ground; just kinder sat down on the step like; and as I slid off the train snatched off, and jerked me back, and some part of it struck me out a piece from the train." He further testified that when the conductor called out the station he was sitting about the middle of the coach; that he got up and walked to the front end of the car, and stepped out; that the train was slowing up, and the conductor called to him to make haste, and as he stepped down on the steps the conductor was standing on the opposite side of the platform; that he hurried as much as he could; that the train stopped only a little while,—merely stopped, and then commenced running again; that when he first went to get off it had stopped, but by the time he got his foot on the ground it had started off, and did not stop long enough for him to get to the ground. It was a dark, cloudy, rainy night, and there was a fill at the place where he got off. There was other evidence which, in some measure at least, tended to corroborate a part of the evidence of the plaintiff. On the other hand, the conductor testified that the stop at Lovejoy was from 2 to 2½ minutes; that there were other passengers for the station, and they got off; that ample time was given, and the plaintiff was the last one to get off; that he had called the attention of the plaintiff to the fact when he got to Lovejoy, and everybody got out of the car but him; that plaintiff stood for some time, after they had got to Lovejoy, talking to a lady; that he kept calling the station, and, seeing that plaintiff was making no start to get off, he started his train; that when plaintiff came to the door he ran to him, and put his hand on his shoulder, and told him to hold on, and let him stop the train; that, just as he did that, the plaintiff jumped off the platform to the ground, etc. There was much other evidence tending to corroborate the conductor as to the manner in which the plaintiff left the car. The plaintiff also introduced evidence as to the extent of his injuries. Other evidence was also introduced, but it is not necessary that it be reported here in order that the points made and decided shall be understood. The case was submitted to the jury, and a verdict in favor of the plaintiff for \$1,500 was rendered. The defendant submitted a motion for a new trial, which was overruled, and it excepted. The motion complains that the verdict was contrary to law, to the evi-

dence, and without evidence to support it; and that the verdict was against certain distinct portions of the charge of the court. As the case is to be tried again, it would be profitless to separately consider those grounds which alleged that the verdict was contrary to the charge of the court in certain particulars, as these grounds mean nothing more than that the verdict was contrary to law. It is to be presumed that the court charged the jury on all the theories which arose from the evidence in the case; and the fact, if it be one, that the verdict was not in accord with the instructions given under one theory, affords no reason that it was not properly returned under another portion of the charge, given under a different theory of the case as made by the evidence. With this reference to these grounds of the motion, we take up the others in the order in which they are set out.

1. Complaint is made that the court erred in admitting the following evidence of the plaintiff: "When the train got to Lovejoy, they were running very rapidly. They ran through the station, and went past the regular depot some distance." The objections were that there was nothing in the petition alleging that the train ran beyond the regular stopping place, and put the plaintiff off at the wrong place; that this evidence sought to charge the defendant company with negligence in running past the depot; that it did not illustrate the issues raised by the pleadings; and that it tended to prejudice the jury against the defendant. None of the objections are, in our opinion, good, and we think that the evidence was properly admitted. The plaintiff had charged that he was injured while alighting from the train at Lovejoy, and we do not understand this evidence to mean that he was injured in attempting to alight from the train at any other place than Lovejoy. It was not necessary, in order for this evidence to have been admissible, that the petition should have alleged that he attempted to alight at any particular place at Lovejoy. The evidence related to mere matters of description, and having alleged injury sustained by alighting from the train at Lovejoy, and that this injury was occasioned by the negligence of the defendant, evidence of any act tending to show how, and the manner in which, the negligence injured him, was admissible.

2. It is alleged that the court erred, after charging the jury, in effect, that it was a disputed question of fact, in the case, whether or not the train was stopped long enough at Lovejoy to allow the passenger to have alighted safely, and that question was one for the jury to determine, in further charging as follows: "If you believe the train did not stop long enough to allow this passenger to alight in safety, that would be, upon the part of the company, negligence." The specific ground of error assigned is that the court charged that a certain act was negligence,

which it had no right to do. We are constrained to rule that this ground of the motion was well taken. The question is not an open one in this state. If it were, so far as I am concerned, the ruling on this point would be different. In the case of *Railroad Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350, it was ruled that "it is error for the judge, on the trial of an action to recover damages against a railroad company for personal injuries occasioned by the running and operation of its trains, to charge the jury that acts not falling within the class below indicated constitute negligence. Only the commission of those acts which are prohibited by the statute, or the omission of those things which are prescribed by statute, constitutes, under such circumstances, negligence per se. Whether the commission of acts other than those so inhibited, or the omission to perform those required, constitutes negligence, is a question of fact, and must be determined by the jury, and not by the judge;" for which proposition the following authorities are cited: *Wright v. Banking Co.*, 34 Ga. 830; *Railroad Co. v. Wyly*, 65 Ga. 120; *Harris v. Railroad Co.*, 78 Ga. 525, 3 S. E. 355; *Railroad Co. v. Mozely*, 79 Ga. 463, 4 S. E. 324; *Railroad Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; *Railroad Co. v. Bussey*, 95 Ga. 584, 23 S. E. 207; *City of Columbus v. Ogletree*, 96 Ga. 177, 22 S. E. 709; *Railroad Co. v. Gibson*, 97 Ga. 489, 25 S. E. 484. For a complete collection of the cases in which the same ruling has been made by this court, see *Hopk. Pers. Inj.* §§ 25, 26. The instruction in this case was that, if the train did not stop long enough to allow the plaintiff to alight in safety, the failure to do so would be negligence upon the part of the company. We know of no law which prescribes that a train shall stop at a station any given time, nor are we aware of any statute which declares that an omission on the part of the company to stop at a station any particular length of time, or for any purpose, is negligence. Hence the rule above stated is controlling on this point; and under these authorities the question to be submitted to the jury on this particular point was whether the railroad company was, under the evidence, guilty of negligence in not stopping at Lovejoy a sufficient length of time to allow the plaintiff to safely alight.

3. Complaint is made that the judge erred in certain charges made as explanatory of the provisions of the law incorporated in Civ. Code, § 2322. In effect, these explanations were that if the company had been guilty of slight negligence towards the complainant, and if he also, in the opinion of the jury, had been guilty of negligence, and negligence which would not amount to a lack of ordinary care on his part, then he might recover, but the jury must fix the proportion; that they could see how much negligence one was guilty of, and how much the other, and apportion the damages as they might apportion the neg-

ligence. In other words, if the plaintiff was not guilty of such negligence as would bar his recovery, then the jury should apportion his damages, just as they apportion the amount of negligence each had been guilty of, to reduce the amount of damages that plaintiff would otherwise be entitled to recover. The objections made to this charge are that it does not state the law of contributory negligence correctly; that the rule of law does not apportion the damages as the jury apportions the negligence; that it was not proper to charge the jury the principle that the plaintiff could not recover if the injury was the result of his negligence, in connection with the law of contributory negligence, as such charge was calculated to confuse the minds of the jury in their application of the facts to the different principles of the case. Substantially, the charge was correct as far as it went. The principle of law which was being discussed by the judge in this portion of the charge might have been extended further, in this: that, if the railroad company and the petitioner were equally at fault, there could be no recovery. But the want of such extension is not complained of. Looking to the objections urged by the movant to this charge, we are of opinion that such objections are without merit. Each of the propositions of law which were charged is contained in the same section of the Code. Each of them was applicable to the contentions and evidence in the present case. That they were joined in the same portion of the charge is not, in our opinion, objectionable; and, as stated, the proposition that the damages should be proportioned as the negligence had been apportioned by the jury, conceding that each of the parties had been guilty of negligence, does not seem to be erroneous. The judgment of the trial judge is reversed because of the error in charging as set out in the second division of this opinion.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 810)

KINNEY v. MAYOR, ETC., OF BLACKSHEAR.

(Supreme Court of Georgia. July 17, 1902.)

DISORDERLY CONDUCT—EVIDENCE—VIOLATION OF CITY ORDINANCE.

1. Under the facts set forth in the petition for certiorari it was error to refuse to sanction the same, the ground thereof that the judgment of conviction was not supported by the evidence being well founded.

2. The mayor and council of Blackshear have authority, under the charter of that town, to require a person convicted of a violation of a town ordinance to labor a specified number of days, not exceeding 20, upon the public streets, without first giving such person an opportunity to pay a fine. There is nothing in Pol. Code, § 712, which prohibits the exercise of such authority.

(Syllabus by the Court.)

Error from superior court, Pierce county; Jos. W. Bennet, Judge.

Joe Kinney was convicted of disorderly conduct. From an order refusing a writ of certiorari, defendant brings error. Reversed.

Jno. T. Myers, for plaintiff in error. John W. Bennett, Sol. Gen., for defendant in error.

COBB, J. Joe Kinney presented to the judge of the superior courts of the Brunswick circuit his petition praying that a writ of certiorari might issue, directed to the mayor and council of Blackshear. The petition alleged that Kinney was tried by the mayor and council of Blackshear "for the offense of disorderly conduct," and that he was convicted, and was sentenced to work on the public streets for a period of 20 days. The assignments of error in the petition were that the judgment of conviction was without evidence to support it, and that the sentence was illegal and void, it not being provided therein that the defendant might discharge the same by the payment of a fine. The judge refused to sanction the certiorari, and the petitioner excepted.

1. The evidence in behalf of the mayor and council, as set out in the petition, was, in brief, that the accused on a named day, about 9:30 o'clock at night, shot a slingshot and hit something which was supposed to be a church, and that something was heard to rattle which sounded like a window had been hit; that there was no disorder or any other disturbance, except as above stated. We think the judge should have sanctioned the petition. The ordinance under which the accused was arraigned is not set out in full in the petition, but it is distinctly alleged that the accused was charged with "the offense of disorderly conduct," and it must be inferred from this allegation that the ordinance under which the accused was prosecuted was the familiar municipal ordinance simply declaring that "disorderly conduct" is an offense against the municipality. Such being the case, the evidence did not authorize a conviction. However reprehensible the shooting of slingshots in towns and cities may be, the mere shooting of a slingshot is not disorderly conduct, unless the act tends to create disorder or disturb the public peace and tranquillity. The testimony relied on for a conviction in this case was very unsatisfactory; but, even conceding that it showed that the accused shot a slingshot and hit a church, it was not shown that the church was occupied at the time by a congregation engaged in divine worship, or that the act was attended with anything likely to create any public disturbance. We conclude, therefore, that the petition made out a prima facie case for a reversal of the judgment of the mayor and council, on the ground that that judgment was unsupported by evidence.

2. As to the point that the mayor and

council of Blackshear have no authority to impose a sentence of labor upon the public streets of the town, without giving the person convicted an opportunity to discharge the same by the payment of a fine, we are of opinion that they have such authority under the act of September 15, 1881, reincorporating the town of Blackshear. See Acts 1880-81, p. 452. Section 9 of that act confers upon the mayor and council power "to prescribe, impose, and enact reasonable fines, penalties and imprisonments in the county jail of the county, or such other place as the corporate authorities may provide"; and also that "it shall be lawful, for the purpose of enforcing said ordinances of said town, in lieu of fine or imprisonment, said penalty may be to work on the streets, not to exceed twenty days at any one time, for one penalty." We think it clear from this act that, even if it does not confer upon the mayor and council authority to imprison in the county jail without first having given the person convicted an opportunity to pay a fine, power is given to impose a sentence of not exceeding 20 days' work on the public streets of the town, without the imposition of the alternative penalty of a fine. It is contended, however, that the mayor and council could have no such authority in view of the provisions of Pol. Code, § 712. That section is as follows: "All police courts of this state, having authority to try offenses against the laws of the cities, towns and villages in which such courts are located, shall have power and authority to impose fines upon persons convicted of said offenses, with the alternative of other punishment allowed by law, in case said fines are not paid." This section merely provides that the police courts of the state shall have power to impose fines upon persons convicted in those courts, and provide, in the sentence imposed in a given case, that if the fine is not paid some other punishment allowed by law shall be imposed. In other words, the section simply means that the police courts of the state shall have authority to impose alternative sentences, and not that they shall be required to do so. There is nothing in this section which would prohibit those courts from imposing as a sentence in a given case a fine alone, or any other form of punishment alone which is prescribed by law. In *Papworth v. City of Fitzgerald*, 106 Ga. 378, 382, 32 S. E. 363, the court held simply that the municipal court of Fitzgerald had no authority, under a given section of the charter of that city, to impose a sentence consisting of both a fine and a term of imprisonment. The section of the Code quoted above is referred to in the opinion, with the simple statement that had the sentence been imposed under its provisions a different question would have arisen.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 556)

SAPPINGTON et al. v. BELL.

(Supreme Court of Georgia. July 18, 1902.)

CREDIBILITY OF WITNESSES—TRIAL INSTRUCTIONS—ALTERNATIVE RELIEF.

1. A jury, in arriving at a conclusion upon disputed issues of fact, may believe a part of the testimony of a witness or witnesses, and reject another part thereof; it being their duty to ascertain the truth of the case from the opinion they entertain of all the evidence submitted for their consideration.

2. Where a petition sets up separate and distinct demands against the defendant, and embraces prayers for alternative relief, it is not prejudicial to the plaintiff for the court to frame its instructions accordingly; and the more especially is this so when the plaintiff insists that both demands be submitted to and passed upon by the jury.

3. There was in the present case evidence warranting a finding against the petitioners for the specific relief sought, and in favor of the petitioners for a recovery in money.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by T. H. Sappington and others against Lucy M. Bell. From the judgment plaintiffs bring error. Affirmed.

A. H. Cox, for plaintiffs in error. P. F. Smith, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 948)

SATZKY v. KING.

(Supreme Court of Georgia. July 19, 1902.)

APPEAL BOND—AMENDMENT—CONSENT OF SURETY.

1. If an appeal bond for the "eventual condemnation money" contains language limiting the liability of the parties thereto to a less sum, it is amendable so as to make their liability fully as great as that which the law requires; but such a bond cannot be so amended without the assent of the surety. The appeal bond filed in the present case was open to the objection indicated above, and required amendment.

2. There was, however, no error on the part of the magistrate in refusing to allow the needed amendment to be made, it not appearing that the surety was present and offering to assent thereto. It follows that the superior court erred in not sustaining the certiorari.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by A. Satzky against J. C. King before a justice. An appeal to jury was dismissed, and defendant brought certiorari. From an order sustaining the certiorari, plaintiff brings error. Reversed.

H. Weber, for plaintiff in error. W. S. Howard and Kilpatrick & Moore, for defendant in error.

FISH, J. A. Satzky sued J. C. King in a justice's court. The magistrate rendered

judgment against the defendant for \$45 principal, \$3.10 interest, and \$2.25 costs; whereupon the defendant sought to appeal to a jury in that court. When the case came on for trial before a jury, the plaintiff moved to dismiss what purported to be an appeal entered by King, upon the ground that no bond had been given as provided by the statute for an appeal. The paper relied on by King as an appeal bond was in the usual form of such a bond, except that after the words, "for the eventual condemnation money in said cause," the surety had added the words, "of forty-five dollars." King moved to amend the bond by striking therefrom the words, "of forty-five dollars." The magistrate declined to allow the amendment, on the ground that the bond could not be so amended unless the surety were present and consenting thereto, and dismissed the appeal. King carried the case to the superior court by certiorari, alleging, in his petition therefor, error upon the refusal of the magistrate to allow the amendment to the bond, and upon the dismissal of the appeal. The judge of the superior court sustained the certiorari, and directed that the case be reinstated in the justice's court. To this judgment, Satzky excepted.

In order to obtain an appeal, the party desiring to do so must, in the absence of an affidavit in forma pauperis, give bond and security for the eventual condemnation money. Civ. Code, § 4458. No such bond was given in the present case, as the paper purporting to be an appeal bond limited the liability of the parties thereto to the sum of \$45. This sum was not even sufficient to cover the condemnation money embraced in the judgment from which the appeal was taken. It is evident that the surety, in inserting the words, "of forty-five dollars," in the bond, intended to limit his liability to that sum; and, as already indicated, we think such was their legal effect. These words cannot be held to be superfluous, for they must have been inserted for a purpose, and the cardinal rule in construing contracts is to ascertain the intention of the parties, and to give effect to the whole contract, and every part thereof, so far as consistent with the rules of law. In the connection in which the words under consideration are used, their effect is that the parties executing the bond bind themselves therein, for the payment of the eventual condemnation money, to the extent of \$45, and no further. It is true that, under Civ. Code, § 5123, an appeal bond may be amended, and new security may be given, if necessary, but an appeal bond cannot be so amended as to increase the amount for which the existing surety thereon may be held liable, unless such surety consents thereto. Such a change in the bond cannot be made in the absence of the surety, and without the production of any authority from him legally authorizing it to be made. Here the surety was not present when it was proposed to strike from the bond the words which limited his

*1. See Appeal and Error, vol. 2, Cent. Dig. § 2064.

liability thereon, and which he himself had inserted for this purpose, and did not consent that the bond should be so amended. If the amendment proposed had been allowed under such circumstances, the surety would not have been bound for the eventual condemnation money in the case. In our opinion, the magistrate did not err in refusing to allow the amendment, nor in dismissing the appeal, and the judge of the superior court did err in sustaining the certiorari. Even if there be anything in the decision rendered in *Railroad Co. v. Gammage*, 63 Ga. 604, in conflict with what we here rule, that decision is not binding authority, as it was rendered by only two justices.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 337)

GEORGIA RAILROAD & BANKING CO. v. RAYFORD.

(Supreme Court of Georgia. July 19, 1902.)
INJURY TO EMPLOYE—PETITION.

1. The petition being in substance sufficient, there was no error in overruling a general demurrer thereto.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by George Rayford against the Georgia Railroad & Banking Company. Demurrer to petition was overruled, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Sanders McDaniel, for plaintiff in error. Fred Burrows and P. F. Smith, for defendant in error.

FISH, J. George Rayford sued the Georgia Railroad & Banking Company, and the case is here upon exceptions to the overruling of a general demurrer to the petition. The allegations of the petition, material to the consideration of the attack made upon it, are that the petitioner and several other laborers, all in the employment of the defendant company, and under the charge and direct supervision of one Asbury, an agent of the defendant, were engaged in moving certain steel rails from one car to another; that Asbury pointed out a certain rail, and directed petitioner to assist in moving it; that petitioner complied with such direction, and when the rail was lifted, the moving of it caused one of the other rails in the pile to roll down on the petitioner's foot, crushing it, causing him great pain, and rendering him unable to work for several months; that his injuries were due to no negligence or carelessness on his part, but were caused by the carelessness and recklessness of Asbury; that "Asbury, by exercising the slightest care or caution, could have seen that it was dangerous for petitioner to lift the rail as ordered, and . . . he could have prevented petitioner from getting injured, but . . .

it was impossible for petitioner to see, from his position, that it was not safe to obey the order given him." The contentions of the plaintiff in error are that the petition shows the work which petitioner was directed to perform was such as the most ordinary intelligence could comprehend; that one man, as well as another, could see the danger of disturbing the equilibrium of the pile of rails by moving one of them; that if the foreman, by the slightest care or caution, could have seen that it was dangerous for petitioner to lift the rail, the petitioner could certainly have done likewise, and, if he could not, he should have plainly and distinctly alleged sufficient reason to excuse himself from not knowing what could be so easily seen; that the general statement that petitioner could not see the danger "from his position" was not sufficient; and that the sufficiency of the petition should not be determined by an isolated allegation, but all parts should be construed together. The answer to these contentions is that the petition alleged "It was impossible for petitioner to see, from his position, that it was not safe to obey the order given him." This allegation, though general, surely assigned a sufficient reason, in substance, why the petitioner could not comprehend the danger which was so apparent to the foreman. The general demurrer went to the substance only of the petition, making the point that the petition was essentially insufficient in law, and not that it was merely formally defective. If the railroad company desired more specific information as to the position of the petitioner when he was injured, and the reasons in detail why, from his position, he could not see the danger, it should have specially demurred. The petition, we think, was sufficient in substance; the test of this being whether the defendant could admit all that was alleged and escape liability. There was no error in overruling the demurrer. Some of the decisions of this court which support the ruling now made are *Manufacturing Co. v. Welch*, 61 Ga. 444; *Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 364; *Telegraph Co. v. Jenkins*, 92 Ga. 398, 17 S. E. 620; *Bank v. O'Neal*, 101 Ga. 673, 28 S. E. 973; *Blackstone v. Railway Co.*, 105 Ga. 380, 31 S. E. 90; *South Carolina & G. R. Co. v. Augusta Southern R. Co.*, 111 Ga. 420, 36 S. E. 593.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 955)

PARSONS et al. v. PREY.

(Supreme Court of Georgia. July 19, 1902.)
OYSTER LANDS—LEASE BY COUNTY COMMISSIONERS—OBJECTIONS.

1. Section 1696 of the Political Code does not authorize any person, in his capacity as a private citizen, to object to the granting of a lease of territory for planting and cultivating oysters, on the ground that the applicant for the lease has not taken the proper prelimi-

nary steps for obtaining the same; nor does that section confer, upon one claiming as owner, the right to set up, in resistance to the granting of the lease, the contention that the territory in question is not, because of its being his private property, a proper subject-matter of the lease applied for.

2. The evidence in the present case fully warranted a finding that the caveator, who claimed that he had planted the territory in controversy before the lease was applied for, had not in fact done so.

(Syllabus by the Court.)

Error from superior court, Chatham county; P. E. Seabrook, Judge.

Application of Emanuel Prey for lease of certain oyster lands. George Parsons and others file a caveat. Judgment for petitioner, and Parsons and others bring error. Affirmed.

W. W. Gordon, Jr., and Osborne & Lawrence, for plaintiffs in error. Geo. W. Beckett and Geo. T. Cann, for defendant in error.

LUMPKIN, P. J. The defendant in error, Emanuel Prey, presented to the commissioners of Chatham county an application for a lease of certain territory upon which to plant and cultivate oysters. This application was based upon section 1696 et seq. of the Political Code. George Parsons appeared before the commissioners, and filed a caveat to the granting of Prey's application. Subsequently, Augustus Oemler united with Parsons in filing an amendment to his original caveat. In this amendment it was alleged that "the said George Parsons has already planted such ground within said county and state, and, if any lease is granted at all, he is entitled to a preference in obtaining the lease of such ground, and he hereby applies for such lease." A hearing was had before the commissioners, at which much evidence was introduced on both sides, and at the conclusion thereof the commissioners passed an order granting Prey's application for a lease. Thereupon Parsons and Oemler presented to the superior court a petition for certiorari, which was overruled, and they excepted.

1. In the pleadings filed by Parsons and Oemler, they set forth divers reasons why Prey's application should not be granted, one of which was that he had not complied with the provisions of the statute with respect to staking off the territory he sought to lease. They also relied on certain allegations of fact which, if true, showed that this territory was not, under the law, subject to lease. Among these allegations was one to the effect that this territory was the private property of Parsons, which he had leased for a term of years to Oemler. Section 1696 of the Political Code reads as follows: "The county commissioners in any county, or where there is no board of county commissioners, the ordinary for said county, upon the application of any person for certain territory in any of the navigable waters of this state, and with-

in a distance of one thousand feet from the shore at ordinary mean tide, upon satisfactory proof, on hearing had before the county commissioners or the ordinary, that said territory had been duly staked off at the line of ordinary mean high water where the leased ground is opposite the public marshes of this state, and in all other cases at the line of low water, except where the consent of the adjacent landowners is obtained for the staking off at said line of high tide, for a period of thirty days before the hearing of such application shall execute a lease for twenty years, with a privilege of renewal for thirty years more, to such applicant as may first apply for such territory, where there are no natural beds as evidenced by the survey referred to in section 1700. Any person who has already planted any ground within said county shall have the preference in obtaining the lease of such grounds, and upon application of any other person for said territory, the proper authorities for executing such leases shall give thirty days notice of such application, by posting a notice at the court house door; and if the person who has planted oysters thereon shall make application therefor before the expiration of said thirty days, it shall be leased to him, but otherwise to the aforesaid applicant: provided, that the provisions of this section shall not apply to oyster-beds staked out under laws heretofore existing, nor to territory within one hundred and twenty feet of the line of ordinary mean low tide in front of and adjoining habitable high land returned for taxation." The notice provided for by this section was evidently designed to afford an opportunity to "any person who has already planted" territory applied for by another to resist his application for a lease thereof, and to establish by proof the former's right to "the preference in obtaining the lease" to which the statute refers. It was not, we think, in legislative contemplation that there should be, under the provisions of this section, any contest before the county authorities with respect to the granting of leases to oyster lands, save only in the event an application for a lease should be met by a counter application filed by one claiming that he had already planted the territory covered by the pending application therefor. While the statute does declare that the county authorities shall act "upon satisfactory proof, on hearing had before" them, it embraces no provision, save as above indicated, for permitting persons objecting to the granting of a lease to appear before the county authorities, and contest with an applicant his right to the lease he seeks to obtain. That is to say, the law as written does not confer upon any person, in his capacity as a private citizen, the right to object to the granting of a lease on the ground that the applicant has not taken the proper preliminary steps for obtaining the same; nor upon one claiming as owner the

right to set up the contention that the territory in question is not, because of its being his private property, the proper subject-matter of the lease applied for. Beyond doubt, it was never contemplated that questions involving the title to realty should be tried and adjudicated by the tribunal created for the purpose of leasing oyster lands belonging to the state. To construe the statute as authorizing such questions to be thus passed upon would be to render it unconstitutional; for it is not within the power of the general assembly to deprive the superior court of its exclusive jurisdiction over issues of this nature. It follows, of course, that in the present case the county commissioners were without jurisdiction to try Parsons' alleged claim of ownership to the territory sought to be leased; and therefore neither he nor Oemler is bound by any adjudication in regard thereto which the county commissioners undertook to make. In view of what is said above, we do not feel called upon to discuss any of the questions presented by the pleadings and evidence in this case, except the one with which we shall briefly deal in the next division of this opinion, it being the only one which was properly before the county commissioners for determination.

2. As has been seen, no person is entitled to a preference over an applicant for a lease, save one "who has already planted" the territory sought to be leased. It was therefore incumbent upon Parsons, in order to establish his alleged preference over Prey, to show affirmatively that he (Parsons) had in fact planted the grounds in controversy prior to the filing of Prey's application. This, Parsons signally failed to do. The testimony disclosed that he had never himself planted, or caused to be planted, any oysters upon these grounds. Oemler testified, in general terms, as follows: "I had actual charge when the Oemler Company leased the ground in 1892, and have continued in charge ever since. At that time, in behalf of Mr. Parsons, we staked this very ground, and I had twelve or fourteen men employed for three months planting this particular territory. I have planted those grounds for the last ten years." In view of other facts appearing in the record before us, it is quite probable that this witness meant to be understood as saying merely that the lessee company, acting through its agents, "staked this very ground," in order that the precise location of the leased territory might, without expense to Parsons, be definitely settled as between him and the company, for their mutual protection and benefit. The lease from Parsons to that company, which was introduced in evidence, negatives the idea that he was to have any interest in the oysters which the lessee might plant and cultivate during the term of years specified in that instrument. This being so, it is hardly likely that Oemler meant to say the oysters were planted "in behalf of Mr. Parsons"; but, granting

that the testimony of this witness is susceptible of this construction, the statement made by him in this connection amounted to no more than a bare conclusion on his part, based, most probably, upon the idea that Parsons, as the owner of the grounds planted by the lessee company, would, at the termination of its lease, be entitled to any unmarketable oysters which that company might leave in the beds, and thus the planting would ultimately inure to his benefit. However this may be, the county commissioners were fully warranted in finding that, in point of fact, Parsons never planted, either in person or by agent or employé, any oysters whatever on the grounds in controversy; for the only other witness testifying as to this matter was one who was introduced in behalf of Parsons, and who stated positively and unequivocally that he "never planted any oysters there, but Mr. Oemler did"; the facts as to what occurred being that Parsons "leased these lands to the Oemler Oyster Company for five years from May 3d, 1892, and gave them the exclusive right to the oysters in the creeks, on the marshes and shores," warranting "his title to the company"; and that "on January 1st, 1896 [he], made a lease directly to Capt. Oemler," covering the grounds in dispute, for a period of ten years. This lease, which was admitted in evidence, purported to give to Oemler "the exclusive right to plant and gather oysters" within the territory therein specified; so it is only fair to presume that such planting as was done subsequently to the date last mentioned was for Oemler's exclusive benefit, as lessee, and not "in behalf of Mr. Parsons," the lessor. Indeed, we are decidedly of the opinion that the evidence bearing on this branch of the controversy between Prey and Parsons demanded a finding that the latter was not, as he alleged, entitled to a preference because he had already planted the territory covered by the former's application prior to the time it was filed. Accordingly, we hold that the judge of the superior court properly overruled the petition for certiorari.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 798)

SOVEREIGN CAMP WOODMEN OF THE WORLD v. THORNTON.

(Supreme Court of Georgia. April 25, 1902.)

FRATERNAL INSURANCE—BY-LAWS—CONSTRUCTION.

1. By-laws enacted by a fraternal insurance order will, in the absence of a clearly expressed intention to the contrary, be construed to have a prospective operation.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by M. H. Thornton against the Sov-

¶ 1. See Insurance, vol. 23, Cent. Dig. § 1853.

oreign Camp, Woodmen of the World. Judgment for plaintiff, and defendant brings error. Affirmed.

Rosser & Carter and J. L. Hopkins & Sons, for plaintiff in error. King & Spalding, for defendant in error.

SIMMONS, C. J. The plaintiff in error, a mutual fraternal benefit association, issued to J. A. Thornton, on May 31, 1893, a certificate for \$3,000, payable at his death, on certain conditions, to his wife as beneficiary. This certificate contained, among others, the following stipulation: "This certificate is issued and accepted subject to all the conditions on the back hereof, and named in the sovereign constitution, fundamental laws, and by-laws of this fraternity, and liable to forfeiture if said sovereign [member] shall not comply with said conditions, constitution, fundamental laws, and such by-laws and rules as are or may be adopted by the sovereign camp, head camp, or the camp of the jurisdiction of which he is a member at the date of his death." Among the conditions referred to, and which were made a part of the certificate, was the following: "If the member holding this certificate * * * shall die * * * by his own hand [except that it be shown that he was at the time insane], * * * then * * * this certificate shall be null and void." In 1897 the following by-laws were enacted: "If the member holding this certificate * * * should die by his own hand or act, whether sane or insane, * * * or if any of the statements or declarations in the application for membership, and upon the faith of which this certificate was issued, shall be found in any respect untrue, this certificate shall be null and void and of no effect." "It [the sovereign camp] shall enact laws for its own government and for conducting the business of the order generally, provide penalties for violation thereof, have power to prescribe and finally determine the rights, privileges, duties, and responsibilities of itself and its camps and the membership of the order." In 1899, prior to the death of Thornton, a by-law known as section 59 was enacted, as follows: "The following conditions shall be made a part of every beneficiary certificate, and shall be binding on both member and order." "If the member holding this certificate * * * should die * * * by his own hand or act, whether sane or insane * * *; or if any of the statements or declarations in the application for membership, and upon the faith of which this certificate was issued, shall be found in any respect untrue, this certificate shall be null and void, and of no effect." At the same time another by-law, known as section 65, was adopted, reading as follows: "If any member of this order * * * should die * * * by his own hand or act, whether sane or insane, * * * or if the statements or declarations

in his application for membership shall be in any respect untrue, his certificate shall be null and void, and of no effect;" and also, at the same time, a by-law known as section 68, as follows: "Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws. The constitution and laws of the sovereign camp of the woodmen of the world now in force, or which may be hereafter enacted, by-laws of the camp now in force, or which may be hereafter enacted, the application and certificate, shall constitute a part of the beneficiary contract between the order and the member." There were other by-laws adopted in 1899, which are shown in the brief of evidence, but the view that we take of the case renders it unnecessary to set them forth here, as they would not be illustrative of the questions to be decided.

Thornton died after the adoption of the by-laws which we have quoted. He was insane at the time of his death, and died by his own hand. Notice and proofs of death were duly submitted to the insurance society, but payment of the amount of the certificate was refused. Mrs. Thornton, the beneficiary, thereupon brought her action upon the certificate in the city court of Atlanta. The evidence introduced on the trial consisted of the extracts from the constitution and by-laws of the defendant society which have been quoted above, together with others which it is not necessary to specifically enumerate, and a statement of facts agreed upon by counsel for both parties. After argument, the court directed a verdict for the plaintiff for the full amount of the policy, to which ruling the defendant excepted. This case has been twice argued by brief by the able and learned counsel for the plaintiff and the defendant in error. Numerous cases have been cited by both sides upon the question of the power of an association of the character of the plaintiff in error, under such stipulations in the certificate as are above set out, to enact by-laws which will become a part of the contract between the association and the member, without expressly declaring that the by-law shall have a retroactive operation. A great many of the cases cited and relied on by counsel for the plaintiff in error do not discuss this question, but assume without argument that the by-laws under consideration are retroactive, whether made so by the by-laws themselves or not. Some cases hold that the simple adoption of a by-law makes it a part of the contract evidenced by the certificate containing stipulations similar to those in the certificate now under consideration, while still other cases hold that under such stipulations, in order to make a by-law retroactive in its effect, the by-law itself must declare, or at least manifest a clear intent, that it shall have such an operation. This is not the first time that this court has had this question under consideration. It

was squarely presented for determination in the case of *Ancient Order v. Brown*, 112 Ga. 545, 37 S. E. 890, and, after full argument and careful consideration, we adopted the view of the class of cases last mentioned, and decided in effect that a by-law of a mutual benefit society, enacted subsequently to the issuance of a certificate of insurance, should be given a prospective operation, in the absence of a clear intent that it should act retrospectively. Leave was given counsel for the plaintiff in error to review the *Brown Case*, but, after careful consideration and much reflection, we have come to the conclusion that that decision is sound, and more in consonance with common sense and reason than those cases which take a contrary view. None of the other cases cited by counsel on either side are binding upon us, and we decided to follow those cases which, in our opinion, were most in conformity with law and reason, and therefore adopted the rule announced in the *Brown Case*, *supra*.

The charter of a corporation of this character is of a dual nature. It is a contract between the corporation and the state or other power granting the charter, and it is also a contract between the corporation and its members. Whenever a corporation makes a contract with one of its members, that contract stands on the same footing as if he were a stranger; and this is true although none but a member can make a contract with it under its charter and by-laws. Being on the same basis as a stranger or third party in making the contract, that contract should be construed and regulated as any other agreement would be between different parties. The member has the right to rely upon the same rules for the construction of his contract as are applicable to other contracts. While a member, in making a contract, may agree with the corporation that he will be bound by the constitution and by-laws of the organization existing at the time the agreement is made, and any other law that may be thereafter legally adopted, he is entitled to rely upon the contract and conditions as made until the lawmaking power enacts legislation which by its terms applies to his contract.

Mr. Niblack, in his work on *Benefit Societies* (2d Ed.) 62, in discussing this subject, says: "It is a recognized rule in the construction of statutes that they shall be so construed as to give them a prospective operation only, and that they shall be permitted to operate retrospectively only where the intention to have them so operate is clear and undoubted. The same canon of construction should be applied to amendments and alterations of the by-laws of a society. They should not apply to or set aside acts already done under the sanction of the by-laws, unless it clearly and unmistakably appears that the authority adopting them intended that they should do so. It will be presumed that an amendment to the by-laws was not intended to affect a contract of insurance previous-

ly issued by the society." In speaking of the certificate of membership, on page 273 of the same work, the author says: "Of course, he may consent that they shall modify it, but in that case they become effective by reason of his consent, not by reason of their enactment. It will be presumed that an amendment to the by-laws was not intended to affect a contract of insurance previously issued by the society, and it will be so construed as to give it a retroactive force only when the intention to have it so operate is clear and undoubted." This is no new doctrine in law. It applies to acts passed by the legislature of a state as well as to laws enacted by a benefit society. It is a reasonable and just rule of construction for such acts. While a member may agree in his contract that laws thereafter passed shall bind him, such a law, in order to have that effect, must show clearly the intention of the lawmaking power that it shall become a part of the contract. The member is then put upon notice that his contract has been changed, and he can either acquiesce in the change, or leave the association. The new law should not be ambiguous, or leave him in doubt as to whether or not it applies to his contract, for otherwise the member might well believe his contract to be unaffected by the new legislation, and continue his membership for years, with the result that at his death, owing to the violation by him of a doubtful law, the contract could be set aside by the association, and his widow and children made to lose not only the amount of the insurance, but all the money paid by him as premiums.

Applying these rules to the case at bar, we find that, at the time Thornton made his contract with the association, no forfeiture was prescribed in case he should die by his own hand while insane. Four years later the association enacted a law providing for a forfeiture in cases where the insured should die by his own hand, whether sane or insane. Two years thereafter, in 1899, other legislation to the same effect was enacted; one of the by-laws then passed declaring that if any member of the order should die by his own hand or act, whether sane or insane, his certificate should be forfeited. Construing all the by-laws adopted in 1899 together, it seems to us that they were intended to have a prospective operation. The language used does not make it "clear and undoubted" that they were intended to act retrospectively. There is not one of them contained in the brief of evidence that manifestly and unmistakably applies to any certificate issued prior to the time of their adoption. None of them, except by mere implication, refers to the holders of certificates already issued. It, therefore, not being "clear and undoubted" that they were intended to apply to certificates then existing, under the rules of construction above laid down they must be held to affect only those certificates which were thereafter issued.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 863)

CARTER v. BRUNSWICK & W. R. CO.
(Supreme Court of Georgia. July 18, 1902.)
INJURY TO EMPLOYE—RELEASE OF DAMAGES—RIGHT OF ACTION.

1. As to the questions of law raised in the present record, save that dealt with in the next headnote, this case is controlled by the decision of this court in the case of *Petty v. Railroad Co.*, 35 S. E. 82, 109 Ga. 886.

2. A stipulation manifestly designed for the benefit of the company, to the effect that a beneficiary would not be paid under the relief and hospital system unless the employe first filed with the proper officers of this department satisfactory releases, does not authorize one who has received benefits at the hands of this department, in accordance with his terms of membership therein, to prosecute his claim for damages merely because he has failed or refused to execute such a release.

(Syllabus by the Court.)

Error from city court of Waycross; J. S. Williams, Judge.

Action by Lum Carter against the Brunswick & Western Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

W. F. Crawley, J. L. Crawley, and L. A. Wilson, for plaintiff in error. W. E. Kay and J. O. McDonald, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 913)

SHEALY v. WAMMOCK et al.
(Supreme Court of Georgia. July 17, 1902.)
DEED—CONSTRUCTION—ESTATE CONVEYED.

1. A deed of land made in 1878, to an unmarried woman "and her heirs from her body, if any, if she have no heirs of her body, then to the heirs of the grantor at the death of the grantee, which deed, while expressly conveying a fee-simple estate, reserved to the grantor the use and control of the land during his life, created, in legal effect, an estate in the grantor for life, with remainder to the grantee in fee, subject to be divested upon her death without children. The grantee having subsequently married, and having died after the grantor without ever having had a child, the fee to the land passed, under the terms of the deed, to the grantor's heirs.

(Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

Action by Caroline Wammock and others against Wilson Shealy. Judgment for plaintiffs, and defendant brings error. Affirmed.

Daley & Walker, for plaintiff in error. Hardwick & Hymen and Rawlings & Howard, for defendants in error.

SIMMONS, C. J. This was an action of ejectment. The case was submitted to the

judge of the court below, without the intervention of a jury, upon an agreed statement of facts, the material portion of which is, in substance, as follows: In 1878, the premises in dispute were conveyed by a deed which contained substantially the following recitals: "Georgia, Washington county. This indenture, made this October 9, 1878, between Allan Jackson, of the first part, and Elizabeth Jackson, of the second part, both of said county, witnesseth that, for and in consideration of my natural love and affection for the said party of the second part, the party of the first part hath granted, sold, and conveyed unto the said party of the second part, and the heirs from her body, if any,—if she shall have no heirs of her body, then to my lawful heirs at the death of the said party of the second part,—all that tract of land [describing the premises in dispute]. To have and to hold the above-described premises, with all the rights and profits in any way thereto belonging, to herself, her heirs as above stated, and assigns, in fee simple, forever. Reserving to myself, however, the use and control of the above-described premises for and during my natural life." In June, 1879, the maker of this instrument died intestate, leaving as his heirs at law the plaintiffs. At the date of the execution of the deed above referred to, Elizabeth Jackson, the grantee therein, was unmarried, and had no children. She afterwards married the defendant, Shealy, but died intestate in June, 1900, never having had any children, and leaving Shealy as her sole heir at law. At the date of her death, the plaintiffs in this suit were the heirs at law of Allan Jackson. The court, after hearing arguments, rendered judgment in favor of the plaintiffs for the premises in dispute, and for mesne profits. To this judgment the defendant excepted.

The legal effect of the deed in this case was to create an estate in the donor for his natural life, with remainder to the grantee and her heirs from her body, if any, and a limitation over, at the death of the grantee without heirs from her body, to the lawful heirs of the donor. The general rule is that "where there is a gift of a particular interest in the same property, antecedent to the gift to the person whose death is spoken of, the death, in the absence of all indications of a contrary intent, is construed to be a death in the lifetime of the first taker," so that the estate becomes absolute in the remainderman upon his surviving the life tenant. *Smith, Exec. Interests*, § 658; *Sumter v. Carter* (decided at this term) 42 S. E. 324. The case at bar, however, does not fall within this rule. The donor himself being the life tenant, and his lawful heirs being the ulterior donees at the death of the named remainderman without heirs from her body, two contingencies are provided for: First, the death of the donor and life tenant before the named remainderman, leaving lawful heirs; and

second, the remainderman's death without heirs from her body. See *Outland v. Bowen* (Ind.) 17 N. E. 281, 7 Am. St. Rep. 423, 424. If the deed contained no limitation over, the conveyance in remainder to the grantee and her heirs from her body alone would have given the grantee an estate tail (*Chewning v. Shumate*, 106 Ga. 751, 32 S. E. 544; *Ellis v. Gray*, 110 Ga. 612, 614, 36 S. E. 97), which would have been converted into an absolute fee by our act of December 21, 1821. Id. And such estate would be unaffected by the limitation over at the death of the grantee without heirs from her body, if such words meant an indefinite failure of issue. But since our act of February 17, 1854, these and equivalent terms in limitation over, which theretofore meant an indefinite failure of issue, are defined to mean a definite failure of issue. The legal effect of this in a case like the one at bar, where the named grantee in remainder had no children, is to change the estate under the preceding clause, and give the grantee a qualified or determinable fee, which is divested upon her death without leaving children. Such a grant is legal, as a fee may be limited upon a fee by deed in this state. Civ. Code, § 3082. It therefore follows that, as the named grantee married, and died years after the donor and life tenant without leaving or having a child, the lawful heirs of the donor, who are the defendants in error, are entitled to the fee in the property under said deed.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 873)

PARR v. ERICKSON et al.

(Supreme Court of Georgia. July 18, 1902.)

ACTION ON NOTE—DEFENSES—BONA FIDE PURCHASER—EVIDENCE—CONSIDERATION—SALE OF PATENT RIGHT.

1. A bona fide holder of a negotiable promissory note, purchased for value and before maturity, is protected against a defense that the note was without consideration.

2. Where a negotiable note payable at a future date was indorsed by the payee to the plaintiff, in the absence of proof to the contrary the law will presume that the plaintiff took before maturity, for the value, and without notice. *Hatcher v. Bank*, 5 S. E. 109, 79 Ga. 542; *Walters v. Palmer*, 38 S. E. 79, 110 Ga. 776.

3. Where, in defense to a suit upon a note, the defendant pleads that the plaintiff purchased after maturity, and there is no evidence to sustain the plea, a verdict in favor of the defendant is contrary to law.

4. A note given for a patent right, but not expressing upon its face its consideration, is not void under the act of 1897 (*Van Epps' Code Supp.* § 8650 et seq.), and the principles above announced as to bona fide purchasers are applicable to such a note. *Smith v. Wood*, 36 S. E. 649, 111 Ga. 221. It is only where the consideration is expressed in the note that the indorsee before maturity and for value takes it subject to all defenses.

(Syllabus by the Court.)

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 963.

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by S. C. Parr against C. G. Erickson and others. Judgment for defendants, and plaintiff brings error. Reversed.

T. J. Ripley and A. M. Cunningham, for plaintiff in error. W. L. Calhoun and S. J. Hall, for defendants in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 42)

BUSH v. MATTOX.

(Supreme Court of Georgia. July 23, 1902.)

CONTRACT—CONSTRUCTION—ACTION FOR BREACH.

1. Where a lessee of convicts, who has a right to sublet them to other persons, employs another to assist him in procuring some one to sublet them, and agrees in writing to pay to the person so employed, for his services, all excess over \$14 per month for each convict sublet, and with the assistance of the intermediary the original lessee makes a contract subletting the convicts at \$16 per month, and subsequently, without the knowledge of the intermediary, releases the sublessee, and voluntarily reduces the amount from \$16 to \$14, the intermediary is entitled to recover on his contract.

2. The declaration in the present case, properly construed, constitutes a suit upon the contract for damages for the failure to enforce the sublease as made, and collect the full amount due thereon, and turn over to the plaintiff his share of the proceeds.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. M. Holden, Judge.

Action by E. B. Bush against R. C. Mattox, administratrix. Judgment for defendant, and plaintiff brings error. Reversed.

W. D. Tutt & Son, for plaintiff in error. Jos. N. Worley, for defendant in error.

SIMMONS, C. J. The state of Georgia leased 50 convicts to Mattox, who wished to sublet them. He went to Miller county, where Dr. Bush resided, and asked Bush to assist him in subletting these convicts; telling Bush that he wished to get \$14 per month for each of them, and agreeing in writing to pay Bush "all above fourteen dollars per month,—that is, paid Mattox for said fifty convicts," the consideration being that Bush should assist him in hiring out the convicts, and should keep a general watch over them and the financial standing of the person to whom they were hired. Sharpe was the owner of a turpentine business, and desired to hire some convicts. Bush introduced him to Mattox, and he agreed to hire the convicts provided his attorney advised him that the contract would be legal. The price of \$16 per month was agreed upon, Bush taking part in the conversation which led up to this agreement. Then Bush, Mattox, and Sharpe went to Bainbridge, in Decatur county,

where Sharpe was informed by his counsel that the contract would be legal, but would have to be approved by the state prison commission. Sharpe and Mattox then entered into a written contract whereby Sharpe agreed to pay Mattox \$18 per capita per month for the hire of the 50 convicts. Sharpe appointed one of his attorneys at law, Nussbaum, his attorney in fact, to accompany Mattox to Atlanta to get the prison commission to approve the contract. For some reason, the original contract was not presented to the commission. The evidence shows that the chairman of the commission had, in a conversation with the parties, remarked that the commission did not favor putting convicts on turpentine farms, on account of the increase in the expense for guards. Nussbaum suggested that Sharpe would pay the increased expense, and the chairman then said that the commission would probably approve the contract. A new contract was entered into between Mattox and Nussbaum, the latter acting for Sharpe, whereby the price to be paid was reduced to \$14.50. The original contract was never presented to the commission, but this new contract was presented, and received the approval of the commission. Subsequently Mattox voluntarily released Sharpe from a portion of this obligation, by reducing the agreed price from \$14.50 to \$14. All of this was done without the consent or knowledge of Bush. Under the contract between Bush and Mattox, Bush was not only to assist in hiring out the convicts, but was to keep watch over them, and keep informed as to the financial standing and credit of the sublessee. The evidence shows that Bush did this. It also appears that Sharpe paid Mattox \$14 per month for each convict. When the payment became due, Bush demanded of Mattox that the latter pay him \$2 per capita per month, claiming that this was the excess over \$14. Mattox refused to pay him anything, replying that the prison commission had refused to approve the contract at \$18, and that he had to reduce it. The evidence shows that this was untrue. The chairman of the commission testified that the commission was not concerned in the amount paid, and, in his opinion, would as readily have approved the contract for \$18 as they did the one for \$14.50; that the concern of the commission was to see that the increased cost for guards did not fall upon the state. Bush brought suit against Mattox for the amount he claimed to be due him, predicated his right on the contract between him and Mattox. The defendant filed an answer which, on account of his death before the trial, was in part unsupported by evidence. The defendant below seems to have contended that, under the contract, he was to pay Bush only such amount in excess of \$14 per capita per month as was actually paid him, and that, inasmuch as he had collected but \$14, he was not liable to Bush in any sum whatever.

The court directed a verdict for the defendant. Bush moved for a new trial, and, when his motion was overruled, excepted.

1. Under the facts above stated, was Mattox liable to Bush in any amount upon the contract? If he was, then the court erred in directing a verdict for the defendant. We think that the direction of the verdict was error. Mattox went to Bush, and requested his assistance in hiring out his 50 convicts, agreeing to pay him all over \$14 per capita per month he should receive for them. Bush introduced Mattox to Sharpe, who hired the convicts at an agreed price of \$18. Bush not only introduced the parties, but took part in the conversation leading up to the fixing of the price, and then went with them to another county to ascertain whether the contract would be legal. He also appears to have been present when the written contract was entered into between Mattox and Sharpe. So far as appears from the record, Sharpe is perfectly solvent, and Mattox could have collected from him the full amount stipulated for in the contract. It is true that this contract had, under the law, to be approved by the prison commission, but the testimony tends to show that this would have been as readily approved as the contract which was presented to the commission for approval. Bush brought the parties together, and by his services assisted Mattox in making the contract with Sharpe. His services were in the nature of the services of a broker, and it is well settled that where the owner of real estate puts his property in the hands of a real estate broker for sale, and the broker brings the owner and a purchaser together, and by reason of this a contract of sale is made, the broker is entitled to his compensation. *Gresham v. Connally*, 114 Ga. 906, 41 S. E. 42. The contract between Mattox and Sharpe appears to have been legal and binding. If Mattox voluntarily reduced the contract price from \$18 to \$14 without the consent of Bush, he is liable to the latter. He had agreed to pay Bush all over \$14 that was paid him, and when Bush assisted him to make a contract for \$18 he had no right to reduce it. But it was said that as he did reduce it, and as the contract gave Bush only such excess as Mattox actually collected, Bush cannot recover on the contract. We think that this is not true. In the first place, we think that this is not a fair construction of the contract. While a strict and literal construction might lead to such a result, we think the clear meaning of the contract was that Bush should receive such excess as Mattox contracted for and was able to collect, or could by due diligence have collected. Mattox could have collected the full amount of \$18, with possibly some reduction on account of Sharpe's having to assume part of the cost of guarding the convicts. Certainly he could have collected more than \$14; and, if he voluntarily reduced the price to that amount,

It was his loss, and not that of Bush. Mattox had no right voluntarily to give away Bush's interest in the convict hire. Being entitled to collect more than \$14, when he received that amount in full satisfaction of what he could have collected it was the same, relatively to Bush, as though Mattox had actually received the full amount. If Mattox had so desired, he could have released Sharpe altogether from paying for the convicts, but he could not thereby release himself from his obligation to Bush. He could give away what was his, but not what belonged to Bush. When he released Sharpe from paying the excess over \$14, and then refused to pay Bush his demands, he committed a breach of the contract. Conceding, for the sake of the argument, that the prison commission would not have approved the original contract, and that Mattox was entitled to collect from Sharpe no more than the amount stipulated in the contract which was approved, still the direction of the verdict was erroneous; for the commission did approve a contract for more than \$14, and Bush is entitled to the excess.

2. In the court below some question arose as to the nature of the present suit. The plaintiff claimed that his declaration sounded in tort. The judge held to the contrary. After a careful reading of the declaration, we think the judge was correct. The allegations of the declaration make the suit one on a contract.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 836)

SAVANNAH, F. & W. RY. CO. v. BOYLE.
BOYLE v. SAVANNAH, F. & W. RY. CO.
(Supreme Court of Georgia. July 18, 1902.)

**CARRIERS—ASSAULT ON PASSENGER—
LIABILITIES.**

1. Whenever a carrier, through its agents and servants, knows, or has opportunity to know, of a threatened injury to a passenger from a third person, whether such person is a passenger or not, or when the circumstances are such that injury to a passenger from such a source might reasonably be anticipated, and proper precautions are not taken to prevent the injury, the carrier is liable for damages resulting therefrom.

2. The presence upon a train of two negro tramps, secreted and stealing a ride thereon, would not alone be sufficient to cause the employees in charge of the train to suspect that such tramps were armed with deadly weapons, and to anticipate that when brought into the train under arrest they might endeavor to escape, and while an employé was attempting to prevent the escape make a murderous assault with such weapons upon one to whom the railroad company owed the duty of protection, and who was taking no part in the effort to prevent the escape.

(Syllabus by the Court.)

Error from superior court, Liberty county;
P. Seabrook, Judge.

¶1. See Carriers, vol. 9, Cent. Dig. § 1125.

Action by L. L. Boyle against the Savannah, Florida & Western Railway Company. From the judgment both parties bring error. Judgment on one bill of exceptions reversed, and on the other reversed with directions.

W. L. Clay, Shelby Myrick, and W. G. Charlton, for defendant. Twigg & Oliver, for plaintiff.

COBB, J. Boyle sued the railway company, alleging in his petition substantially the following facts: The plaintiff was an express messenger, and his duties required him to ride upon the train of the defendant, and the defendant received him upon its train in that capacity. On a day named, two negro tramps secreted themselves on the front platform of the car in which plaintiff was riding in the discharge of his duties, and, being discovered by the conductor, were taken in charge by him and the baggage master, and placed in that portion of the coach set apart for the use of the express company, where the plaintiff was attending to his duties as messenger. The conductor and baggage master did not search the tramps, did not place a guard over them, and did not securely bind them, but attempted to detain them in the coach by negligently and carelessly tying one of the two ends of a short rope around one wrist of each tramp, leaving a play of about four feet between them, thus permitting the free use of their entire bodies. The tramps attempted to escape from the train by jumping from the side door of the car, and were resisted and restrained by the baggage master, who happened to be passing at the time. In the struggle which resulted, both tramps drew revolvers, which they had secreted about their clothing, and one of them discharged his revolver at plaintiff, who was six feet away; the ball striking plaintiff in the left knee joint, he at the time taking no part in the struggle between the tramps and the baggage master. During the struggle, the baggage master and both tramps fell to the floor, and one of the tramps raised on his knees, and fired again at plaintiff, but the ball did not strike plaintiff, but went through the top of the car. As a result of the wound in the knee joint, plaintiff suffered great pain and agony, was prevented from attending to his regular duties for a period of some weeks, and was forced to incur large expense in medical attention, etc. It is alleged that the injuries resulting to plaintiff "were due entirely to the gross and inexcusable negligence and want of caution and foresight" on the part of the defendant, its servants and employes in charge of the train, in placing the tramps in the car, in failing to search and take from them the revolvers concealed in their clothing, in failing to securely bind them, and in failing to extend to plaintiff such other and further protection as was necessary to prevent the injuries;

all of which, it is alleged, it was the duty of the defendant to have done. It is also alleged that the plaintiff did not in any way consent to or contribute to his injuries, by participating in the struggle between the baggage master and the tramps, or otherwise. To this petition, the defendant interposed a general demurrer, to the overruling of which it excepted. The case subsequently proceeded to trial, and upon motion of the defendant the judge granted a nonsuit. To this judgment, the plaintiff excepted. The exception which complains of the overruling of the demurrer will be first disposed of.

There does not seem to be any serious controversy between counsel as to what is the law of this case. It is conceded that the duty which the railway company owed to the plaintiff was the same duty which it would owe to a passenger under similar circumstances. It is the duty of a railway company to protect its passengers from insult or injury at the hands of fellow passengers, or of third persons, when the circumstances are such that a person in the exercise of that degree of diligence known to the law as extraordinary care would see, or should apprehend, that the passenger was in danger of insult or injury; and when the circumstances are such that the employés in charge of the train, in the exercise of the degree of diligence above referred to, should have foreseen that an insult or injury was to be reasonably apprehended, and failed or refused to use the means at hand to protect the passenger therefrom, the railway company is liable to the passenger for any damages he sustains as a consequence of such failure or refusal. "The general rule," says the *American & English Encyclopædia of Law* [volume 5 (2d Ed.)] 553, "would seem to be that whenever a carrier, through its agents or servants, knows or has opportunity to know of a threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precautions, or to use proper means, to prevent or mitigate such injury, the carrier is liable." Mr. Elliott in his work on *Railroads* (volume 4, § 1639), in referring to the duty of protection against third persons or other passengers which railroad companies owe to their passengers, says: "It is their duty to use proper care and vigilance to protect them from injuries by such persons, that might reasonably have been foreseen and anticipated." Mr. Fetter, in referring to the subject now under consideration, says: "Knowledge of the passenger's danger, or of facts and circumstances from which that danger may reasonably be inferred, is necessary to fix the carrier's liability in this class of cases." 1 *Fet. Carr.* § 98. Mr. Hutchinson says: "The law now seems to be well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety

against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable." *Hutch. Carr.* § 596. See, also: *Spohn v. Railroad Co.* (Mo.) 26 Am. & Eng. R. Cas. 252; *Felton v. Railroad Co.* (Iowa) 27 Am. & Eng. R. Cas. 229; *Sira v. Railroad Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 886; *Id.*, 58 Am. & Eng. R. Cas. 538; *Railroad Co. v. McEwan* (Ky.) 2 Am. & Eng. R. Cas. (N. S.) 438; *Packet Co. v. White* (Tenn.) 41 S. W. 583, 38 L. R. A. 427; *Railroad Co. v. Jefferson*, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 87.

This is not a case where the passenger claims damages for the reason that the conductor and other employés in charge of the train failed or refused to protect him after it became apparent that the injury might result to him from the presence upon the train of a third person; but the plaintiff's case depends upon whether the circumstances alleged in the petition were such that the employés in charge of the train, in the exercise of extraordinary care for his protection,—that is, using the utmost vigilance and care, or that extreme care and caution which very prudent persons exercise,—should have foreseen that the tramps who had been arrested by them, and brought into that part of the coach in which the plaintiff's duty required him to ride, were armed with deadly weapons, and would attempt to escape, and, while making their attempt, would discharge the deadly weapons at one who was taking no part in the efforts made by an employé to prevent such escape. If an extremely prudent employé would have foreseen that this would have probably happened, then it was the duty of the employés on the train to take all reasonable precautions to prevent such an occurrence, and it would have been their duty to search the tramps to see if they were armed, and to have securely bound them. If there was nothing in the circumstances under which the tramps were arrested, or in their manner when brought into the train, to cause an extremely prudent person to apprehend that they were dangerous characters, and would probably resort to violence in order to escape from the train, and nothing to indicate to such a person that they were probably armed with deadly weapons, then a failure to search the persons of the tramps, and to securely bind them, would not be such negligence on the part of the employés in charge of the train as to render the company liable to the plaintiff. There is nothing alleged in the petition as to the character of these tramps. It does not appear whether they were known or unknown to the employés in charge of the train. There is nothing in the allegations showing that the employés should, on account of their knowledge or past experience, as extremely prudent persons, have known

or apprehended that tramps engaged in stealing a ride upon the train at the place where, and the circumstances under which, these were discovered, were probably dangerous characters, and their presence a menace to passengers and others to whom the railway company owed the duty of protection. The allegations are simply that the persons were negroes, that they were tramps, and that they were engaged in stealing a ride upon the train. Is even an extremely prudent person bound to presume that a negro tramp stealing a ride upon a train is such a dangerous person that he should not be permitted to stay upon the train unsearched and unbound? Simply because a person is a negro, he is not to be necessarily deemed dangerous. On the contrary, experience has demonstrated that as a rule negroes are not dangerous persons. Is a tramp necessarily a dangerous person? The word "tramp" indicates "a foot traveler; a tramp; often used in a bad sense for a vagrant, or wandering vagabond." *Webst. Int. Dict.* It is defined by the *Standard Dictionary* to be "an idle wanderer; itinerant beggar; vagrant; vagabond." Because a man is a tramp, he is not necessarily dangerous. The idea conveyed to the mind by the word is that simply of an idle, worthless fellow who wanders about the country seeking to secure a living without toll. Simply because these men were negro tramps, it was not to be inferred, even by an extremely prudent person, that they were characters so dangerous as to make it altogether unsafe for any person to be lodged in the same car with them. But it is said that these negro tramps were violating the law. This is true. To steal a ride upon a train is a crime in this state, but it is only a misdemeanor. While it may be that even an ordinarily prudent person would have reason to apprehend that negro tramps under arrest for a misdemeanor would escape, if afforded a reasonable opportunity, still an extremely careful person could not reasonably apprehend that in making such an attempt they would, in order to effectuate it, make a murderous assault with a deadly weapon either upon one who made an effort to thwart this attempt, or upon another who was taking no part in such effort. It is true that the petition alleges in general terms that the defendant was guilty of negligence, but it also sets forth what is claimed by the pleader to be the act of negligence, and the only act of negligence alleged is the failure of the company's servants to search the tramps for weapons, and to securely bind them, or place a guard over them. The conclusion of the pleader that this is negligence does not prevent the court from passing upon the question as to whether the facts alleged show the company to have been negligent. There is nothing in the allegations of the petition from which it appears that the employees in charge of the train, in the exercise of that high degree of

care which the railway company owed to the plaintiff to protect him from injury at the hands of those who might be upon its train, with its consent or with its knowledge, could and should have foreseen that the two negro tramps would, after having been arrested and brought into the train, attempt to escape, and in so doing commit a murderous assault upon those endeavoring to prevent the escape, or upon others who were taking no part in such efforts. The petition fails to set forth a cause of action, and should have been dismissed on demurrer. The judgment overruling the demurrer will therefore be reversed.

In reference to the exception of the plaintiff that the court erred in granting a nonsuit, as it appeared that the evidence supported the averments of the petition substantially as laid, the court should not have granted a nonsuit. See *Flewellen v. Flewellen*, 114 Ga. 403, 40 S. E. 301, and cases cited; *Fleming v. Roberts*, 114 Ga. 634, 40 S. E. 792. But as the conclusion is now reached that the petition should have been dismissed on demurrer, while the judgment granting the nonsuit will be reversed, direction will be given that the effect of this reversal shall not be to reinstate the case, which will have been dismissed when the judgment of this court reversing the judgment overruling the demurrer shall have been entered in the court below.

Judgment in one case reversed; the other, reversed with direction. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 879)

ATLANTA RY. & POWER CO. v. BENNETT.

(Supreme Court of Georgia. July 18, 1902.)
INJURY TO EMPLOYE—ACTION FOR DAMAGES—INSTRUCTIONS.

1. The instructions to the jury, of which complaint is made by the defendant company in its motion for a new trial, were not, for any of the reasons therein assigned, open to criticism; and the evidence, though conflicting, fully warranted a finding in favor of the plaintiff.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by R. B. J. Bennett against the Atlanta Railway & Power Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Payne & Tye, for plaintiff in error. Arnold & Arnold, for defendant in error.

LUMPKIN, P. J. An action for damages was brought by Bennett against the Atlanta Railway & Power Company.

His petition made a case substantially as follows: He was an employé of the company in the capacity of motorman. On the 4th of October, 1900, while engaged in run-

ning one of its electric cars, it became necessary for him to absent himself therefrom in order to attend to a call of nature. He left the car in charge of the conductor, by whose direction another motorman of the company, who happened to be riding upon this particular car, ran it to the end of the line, and brought it back to the street at which the plaintiff had left it. As the car approached the point where he was awaiting its return, the conductor and this motorman saw him coming towards the track for the purpose of boarding the car and resuming the discharge of his duties. The car was "slowed up" to a perfectly safe rate of speed to enable the plaintiff to get upon the same, and he undertook to do so by stepping upon the "running board," and grasping an upright post at the front of the car; but, just as he was in the act of so doing, the motorman in charge "negligently and carelessly put on the full current of electricity, which caused the car to bound, and jump forward very violently, and plaintiff was thrown from his position upon the running board towards the front of the car, and rolled and fell partly on the track, but was partly thrown from the track by the fender of the car, which rolled him around, and enabled the front wheels to pass him. The motorman in the meantime had shut the current off, and applied his brakes, and the car was continuing to move, but slowing up in its forward motion, when the back wheels of the car reached plaintiff, and in plaintiff's having been thrown around by the fender, and in his struggling to escape, his legs were caught by the back wheels and trucks and the apparatus which surround the same, and the car began to drag him. If the car had been stopped at this point, the plaintiff would still have been saved from the loss of his legs, but at this point the motorman, instead of continuing his hold on the brake, negligently and carelessly loosed the brake, and, the grade being descending, the car started violently forward when the brake was loosed, and ran over plaintiff's legs, cutting off entirely the right leg just below the knee, and mashing and ruining for life the left leg." There was a verdict for the plaintiff, and the defendant company is here excepting to a judgment overruling its motion for a new trial. This motion is based upon alleged errors in charging the jury, and upon the general grounds that the verdict was contrary to law and to the evidence.

One of the charges complained of was as follows: "The court charges you that if you believe the car was suddenly jerked through negligence of the motorman, and by the jerk [the plaintiff] was thrown off, or jerked so as to lose his balance, and the injury was caused thereby, plaintiff would be entitled to recover, provided he could not have avoided the consequences to himself of defendant's negligence." The objections urged against this charge are: (1) That it contained an expression of opinion by the court to the effect that the act

specified was "in law negligence per se"; and (2) that it failed to embrace an instruction that the plaintiff was not entitled to recover if, by the exercise of ordinary care, he could have avoided the consequences of the defendant's negligence. We do not think the charge is open to either of these criticisms. The court did not instruct the jury that any particular act or acts would amount to negligence, but simply informed them that if, "through the negligence of the motorman," the car was suddenly jerked forward so as to injure the plaintiff, he would be entitled to recover, "provided he could not have avoided the consequences to himself of defendant's negligence." The qualification embraced in the words last quoted was really stronger against the plaintiff than was warranted, for it amounted, to an instruction that the plaintiff could not recover if, in any way or by any means whatever, he could have avoided the consequences of the defendant's negligence, whereas the true rule of law is that he was bound to exercise only ordinary care and prudence.

One of the printed rules of the company introduced in evidence provided that: "No person will be permitted to run the motor for any motorman upon any part of any route, without special permission being first obtained from the starter or superintendent. Should necessity require a motorman to leave a car upon any part of any route, he must take the controlling and reversing switch handles, and leave the car in charge of the conductor." The superintendent of the company testified that its printed rules, including that just quoted, were promulgated by himself, and that this particular rule had been modified by him before the occurrence under investigation took place. His precise testimony in regard to this matter was: "These rules were issued under my authority. I made them, and am responsible for those rules. It is my promulgation to these men. In a case of necessity, they have been so modified as to allow them to leave the car with the conductor. There is no rule covering that, but I have modified the practice. On the question, in a case of necessity, to allow the motorman to leave the car in charge of the conductor, I had that modification at this time. If a man is called off by any call of necessity, under [my] modification of the practice, he could leave the car and its motive power with the conductor, controller and all." In charging upon this branch of the case, the court instructed the jury as follows: "If you believe that the Atlanta Railway & Power Company had a rule of the company, and that rule was promulgated to Bennett, that no motorman shall leave his car in the hands of another motorman or another person without the consent of the superintendent or starter, and that Bennett did leave his car in the hands of another motorman without the consent of the superintendent or starter, and he afterwards was hurt while attempting to board the

car while it was controlled by said motor-man, he cannot recover, and you should find against Bennett, and for the Atlanta Railway & Power Company. If you find that Bennett wished to get from his car to attend a call of nature, and was allowed to do so by the express consent of the conductor, then this rule would not apply." The errors assigned upon this charge are: (1) That it did not correctly state the rule of the company relied on as a defense; and (2) that the effect of the last sentence of this charge was to abrogate the rule, and make the same non-effective, irrespective of the question whether or not the company had, by acquiescence in the frequent practice of violating it, "so treated the rule as to make it not binding." The first of these exceptions is obviously not well taken, for the court did accurately state to the jury the substance of the rule just mentioned. Nor is there any merit in the second objection relied on. Indeed, the language used by the judge in that portion of his charge to which this exception relates worked a hardship upon the plaintiff; for, according to the undisputed testimony of the superintendent of the company, the plaintiff had a right, under the rule as modified, to leave the car for a necessary purpose, without taking with him the "controlling and reversing switch handles," whether the conductor assented thereto or not. That is to say, "the express consent of the conductor" was not, as his honor below instructed the jury, necessary in order to justify the plaintiff in leaving the car, as he did, in charge of the conductor,—"controller and all."

With regard to the general grounds of the motion, it is only necessary to say that there was ample evidence to support the verdict. There was, it is true, much conflict in the testimony as to material issues; but giving full credit to the testimony of the plaintiff himself, which it was the right of the jury to do, they were authorized to find that he, while in the exercise of proper care, was injured in the manner set forth in his petition.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 874)

TRAMMELL et al. v. INMAN.

(Supreme Court of Georgia. July 18, 1902.)

TRUST DEED—VALIDITY—MARRIED WOMAN AS BENEFICIARY—MARRIAGE SETTLEMENT.

1. Prior to the adoption of the Code, a conveyance of land by A. to B., trustee for C., and to the heirs and assigns of B., for the use, benefit, and behoof in fee simple of B. and his heirs and assigns, without otherwise expressing any use or trust or remainder, and without reference to any previous or other instrument creating a trust in favor of C., did not create B. trustee for C., or give the latter any interest in the property conveyed, either under its own terms or under a previously executed instrument between C. and D., constituting B. trustee for C.

2. Even if such deed did create a trust, C. having been a married woman at the time of its execution, and having lived long after the act of 1866, the trust became executed, and her children could not recover the land in ejectment as purchasers or remaindermen under the deed.

3. A marriage settlement entered into between C. and D., wherein C. conveyed to B., as trustee for certain purposes, all her rights, interests, and expectancy in the estate of her deceased husband and in the estate of her deceased father, and also her interest in and to the property of any other person by virtue of any gift, devise, or conveyance of any kind whatsoever made to her, or to which she might at any time thereafter be entitled by law, was, as to this latter clause, ineffectual to convey any rights, as it was an attempt to convey a mere naked possibility without any present interest.

4. There was no error in excluding from evidence the application of the trustee for leave to sell, as part of the trust estate, the land conveyed by the deed above mentioned.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by John Trammell and others against S. M. Inman. Judgment for defendant, and plaintiffs bring error. Affirmed.

King & Spalding and Ulysses Lewis, for plaintiffs in error. John L. Hopkins & Sons and Gray, Brown & Randolph, for defendant in error.

SIMMONS, C. J. The children of Mrs. Lucinda A. Trammell brought an action of ejectment against Inman. They claimed title as purchasers or remaindermen under a marriage settlement entered into between their mother and father in 1846. That marriage settlement constituted Dickerson H. Walker trustee of the mother, and in it she conveyed to him all her right, title, and interest in the estate of her deceased husband and in the estate of her deceased father, with remainder after her death to her children, if any should be living. These plaintiffs are the only children or descendants of children surviving her. The marriage settlement, after conveying the interests above mentioned, also undertook to convey "the interest which the said Lucinda A. may now have or at any future time acquire * * * in and to the property of any other person or persons by virtue of any gift, devise, or conveyance of any kind whatsoever made to the said Lucinda A., or which she may at any time hereafter be entitled to by law." This marriage settlement was introduced in evidence as part of the plaintiffs' title. Plaintiffs also introduced a grant of this land from the state and a chain of deeds from the grantee to Jones. They also introduced a deed from Jones to Walker. This deed conveyed to "Dickerson H. Walker, trustee of Mrs. Lucinda A. Trammell," "his heirs and assigns," the land in dispute; "to have and to hold unto him, the said Dickerson H. Walker, trustee as aforesaid, his heirs and assigns, * * * to his and their own proper use, benefit, and behoof, forever, in fee simple." It

closed with a warranty to "the said Dickerson H. Walker, trustee as aforesaid, his heirs and assigns." The plaintiffs also offered in evidence an application of Walker, as trustee, praying for leave to sell this land, in which application Mrs. Trammell joined, and an order granted by the superior court allowing the trustee to sell. Upon objection of the defendant, this evidence was excluded. The plaintiffs closed their case, and the court, upon motion of the defendant, granted a nonsuit. The plaintiffs excepted.

1. After a careful consideration of the record and of the able and exhaustive briefs of learned counsel on both sides, we have come to the conclusion that the court did right in granting a nonsuit. Plaintiffs predicated their right to recover upon the marriage settlement and the deed from Jones to Walker, the trustee of their mother under the marriage settlement. They claimed as purchasers or remaindermen under the marriage settlement, and that the deed from Jones made the land conveyed a part of the trust estate which was controlled by the terms of the settlement; that, inasmuch as Walker was appointed and designated in the marriage settlement trustee of all the property of their mother, and as the deed from Jones was to Walker as her trustee, the deed adopted the terms of the settlement, and made plaintiffs the remaindermen of this land, as well as of the land directly conveyed by the marriage settlement. We do not agree with them in these contentions. It will be seen that the deed from Jones merely styled Walker "trustee of Mrs. Lucinda A. Trammell." The deed created no use for the benefit of Mrs. Trammell, nor were there any expressions of trust, or any limitation over to the children, or to any one else. Nor did the deed refer to the marriage settlement, or to any other paper creating Walker trustee for Mrs. Trammell. On its face it appears to have been a regular deed of bargain and sale, placing the title in Walker, his heirs and assigns. The habendum clause was to Walker, "trustee as aforesaid," his heirs and assigns, to his and their own proper use, benefit, and behoof, forever, in fee simple, and the warranty was to Walker, trustee, his heirs and assigns. This deed, having been made prior to the adoption of the first Code of this state, did not create a trust for Mrs. Trammell, but put the title in Walker as an individual, the words "trustee of Mrs. Lucinda A. Trammell" being merely descriptio personæ. The deed so made did not create in Mrs. Trammell a separate estate. *Logan v. Goodall*, 42 Ga. 95. But it is contended that, inasmuch as Walker had been made, by the marriage settlement, trustee for Mrs. Trammell as to all of the property conveyed by that settlement and such property as she might acquire, the reference in the Jones deed to Walker as trustee affected the conveyance with the terms of the settlement. Had the Jones deed mentioned the terms of

the marriage settlement, or that Walker had been appointed trustee for all the property which Mrs. Trammell had or might acquire, perhaps this contention would have been correct. But the deed does not in the remotest manner refer to the marriage settlement, or any other writing by which Walker had been made trustee. There is no intimation that he is her trustee, save by the description of him as such. Even if the deed had mentioned the appointment of Walker as trustee under the marriage settlement, this property was not owned by Mrs. Trammell at the time the settlement was made, nor had she any interest in it. It was acquired thereafter. Some authorities hold in such a case that it would be necessary for Mrs. Trammell and her husband to have taken some active step in order to place the land conveyed in the Jones deed under the marriage settlement. Of course, a recital in the Jones deed that the land should be held under the terms of the marriage settlement would have been all-sufficient, but there was no such recital. In fact, there was no allusion to the marriage settlement, and we think the proper rule is to construe the deed according to its own terms. See *Clarke v. Land Co.*, 113 Ga. 21, 38 S. E. 323 (6).

2. Conceding, for the sake of the argument, that a trust was created by the deed from Jones, then it was nothing more than a naked trust. As before remarked, no use was set out in the deed, nor was there any limitation over. The record discloses that Mrs. Trammell lived until the year 1898. The married woman's act was passed in 1866. Mrs. Trammell was in life after the passage of that act, and the trust, if one had been created, became executed, and the title vested in her. That this is true is established by numerous decisions of this court. See *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 970, and cases cited. If this was true, then the title, so far as appears from this record, remained in Mrs. Trammell until she died. These plaintiffs do not sue as her heirs at law, but claim title as purchasers under the marriage settlement and deed, and cannot recover at all unless they recover in the capacity in which they sue.

3. There is another reason, in our opinion, for sustaining the judgment of the court below. That part of the marriage articles in which Mrs. Trammell undertook to convey to a trustee such interest as she might thereafter acquire in the property of any other person by virtue of any conveyance or by law was invalid and ineffectual. She undertook to convey property which she did not possess, or have any expectation of possessing, and in which she had no present interest whatever. It was no more than a mere chance. Some one might give her property other than that mentioned expressly, or she might inherit such property, or she might purchase property, and in each case it would come within the broad terms

of this settlement. This part of the settlement was an attempt to dispose of a bare naked possibility, which, in this state, is not the subject of grant or sale. A son cannot, in law, convey to another such property as he may inherit from his father, who is in life at the time of the conveyance; and yet to do so would be to convey an interest less remote than that sought to be disposed of by the marriage settlement in the present case. Counsel for the plaintiffs in error base part of their argument on the assumption that this land was purchased by Walker with part of the money of the trust estate created by the marriage settlement; in other words, that Walker, the trustee, used trust money to pay Jones for the land. We have carefully read the record, and find therein no authority for such a position. There is nothing to indicate that any money of the trust estate went into the land. For the reasons above given, we think the plaintiffs failed to show title in themselves to the tract of land in dispute, and that the trial judge did not err in granting a nonsuit.

4. The only remaining question is as to whether the judge erred in excluding the evidence referred to in the statement of facts. This was the record of an application by Walker, as trustee, to the superior court of De Kalb county, for leave to sell this land. The application states that the trustee had authority, under the marriage settlement, to sell or dispose of any property belonging to the trust estate with Mrs. Trammell's consent. The record also showed that Mrs. Trammell consented to the sale, and that the judge of the superior court granted an order permitting it. This leave was to sell the land to a named person, who appears to be the person under whom Inman claims. Upon objection by the defendant, this evidence was excluded. The bill of exceptions complains of this ruling. In our opinion, this ruling was not hurtful to the plaintiffs. We presume it was offered for the purpose of showing that the trustee recognized this property as coming under the terms of the marriage settlement and being controlled thereby. Even had it shown this, plaintiffs would have been in no better position because of its admission. If the marriage articles empowered the trustee to sell and dispose of any property belonging to the trust estate, by and with the consent of Mrs. Trammell, and the trustee, with her consent, applied for leave to sell, and this leave was granted, and the land so sold, this was sufficient to convey the title out of the trust estate into the purchaser. *Headen v. Quillian*, 92 Ga. 220, 18 S. E. 543. If the land was not sold under the order, then the record was inadmissible as against Inman, who was in no way a party thereto or connected therewith.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 819)

DAUGHTRY v. STATE.

(Supreme Court of Georgia. July 17, 1902.)

CITY COURT—CREATION—VALIDITY—JURISDICTION.

1. The court created by the act of November 21, 1901 (Acts 1901, p. 201), as the "city court of Waynesboro," is, so far as all of the objections urged to it in the present case are concerned, a valid, statutory court, and had jurisdiction to try the accused upon an accusation charging him with the commission of a misdemeanor.

(Syllabus by the Court.)

Error from superior court, Burke county; E. L. Brinson, Judge.

Abe Daughtry was convicted of misdemeanor, and brought certiorari. From a judgment overruling the writ, defendant brings error. Affirmed.

Wm. H. Davis and Johnston & Fullbright, for plaintiff in error. J. S. Reynolds, Sol. Gen., and R. P. Jones, for the State.

COBB, J. Daughtry was arraigned in the city court of Waynesboro, charged with the commission of a misdemeanor. He objected to being tried until he had been indicted by the grand jury of Burke county. The court overruled this objection, and compelled him to go to trial. Before pleading to the merits, he objected to being tried at all in the city court of Waynesboro, for the reason that that court was not established pursuant to law, urging as grounds of objection various reasons, which will hereafter be referred to. The court overruled these objections. The accused then entered a plea of not guilty, and the trial resulted in his conviction. A motion in arrest of judgment was made upon the same grounds as those set forth in the objections entered by the accused before pleading to the merits. This motion was overruled. The case was carried by certiorari to the superior court, and at the hearing the certiorari was overruled. To this judgment the accused excepted.

The act establishing the city court of Waynesboro provides that persons arraigned in that court, charged with a violation of the criminal laws of this state, "shall not have the right to demand an indictment by the grand jury of the county of Burke." Acts 1901, p. 201. There is nothing in the constitution of this state or of the United States which guaranties to a person charged with a misdemeanor the right to demand an indictment by the grand jury. *Gordon v. State*, 102 Ga. 673, 29 S. E. 444; *Welborne v. Donaldson*, 115 Ga. 563, 41 S. E. 999. It was, therefore, competent for the general assembly, in creating the city court of Waynesboro, to provide that persons arraigned in that court for misdemeanor offenses should not have the right to demand an indictment by the grand jury of Burke county.

We will now deal with the various objections urged to the legality of the act establishing the city court of Waynesboro. It is

contended that the act is unconstitutional, for the reason that it is a special law, and that at the time of its enactment there was a general law of force in this state providing how city courts in counties having a population of 10,000 or more should be created, and the powers and jurisdiction of such courts when established; the general law referred to being that embraced in Civ. Code, § 4270 et seq. The act creating the city court of Waynesboro is said to be in conflict with this general law, for the reason that at the time of the passage of such special law the county of Burke had a population exceeding 10,000. It was held in *Thomas v. Austin*, 103 Ga. 701, 80 S. E. 627, that the law embodied in the sections of the Code above referred to was not such a general law as to prevent the general assembly from establishing by special act a city court in one of the counties of this state. Another ground of objection to the act was that the same provided that all cases should be tried by a jury of 6, by striking from a panel of 12, when the constitution provides that all cases in city courts shall be tried by juries of not less than 12. The general assembly has no power to create a city court, within the meaning of that term as it is used in the constitution, and provide that cases tried therein shall be tried by juries of less than 12 jurors; but it has, in the exercise of the power vested in it by the constitution, authority to establish courts other than those enumerated in the constitution and provide that cases in such courts shall be tried by juries composed of less than 12 jurors, but in no event to be less than 5. *Monford v. State*, 114 Ga. 528, 40 S. E. 798; *Welborne v. State*, 114 Ga. 793, 40 S. E. 857; *Lawson v. State*, 115 Ga. 212, 41 S. E. 709; *Mattox v. Donaldson*, 115 Ga. 563, 41 S. E. 909; *McFarland v. Donaldson*, 115 Ga. 567, 41 S. E. 1000. It is immaterial what such courts are called, and the general assembly may designate them by the term "city court," if it sees proper; but they will not be city courts within the meaning of the constitution, unless the act creating the court conforms in every substantial particular to the requirements of the constitution. *Telegraph Co. v. Jackson*, 98 Ga. 212, 25 S. E. 264; *Railway Co. v. Jordan*, 113 Ga. 687, 39 S. E. 511; *Monford v. State*, 114 Ga. 528, 40 S. E. 798. Although such courts may be styled "city courts," if the act establishing the same fails in any particular to make the court conform to the requirements of the constitution, such as there shall be a jury of 12 to try all cases, while the court would be a valid statutory court, it would not be a city court within the meaning of the constitution. *Welborne v. State*, supra. Another ground of objection was that under the act the defendant was not entitled to demand an indictment, as he would be under the "general law." We know of no general law in this state giving to a person charged with a misdemeanor the right to demand an indictment in any court in which he may

be arraigned. There is a law which authorizes a person to demand an indictment before being placed upon trial for a misdemeanor in the superior court, but this law applies exclusively to that court.

It is also said that the act is unconstitutional for the reason that it does not provide the method for correcting the errors committed by the court, as the method attempted to be provided by motion for a new trial and direct bill of exceptions to the supreme court is unconstitutional and void, the court not being a city court within the meaning of the constitution. The court established by the act was an "inferior judiciary," and under the constitution of this state the superior court has jurisdiction to correct the errors of all such courts by writ of certiorari. Civ. Code, § 5846. The fact that the act does not refer to this right does not deprive the superior court of its constitutional power to review by certiorari the judgments of the court in question.

A further ground of objection is that, the court not being a city court within the meaning of the constitution, and not being a city court established under the provisions of the sections of the Civil Code providing how city courts may be created in counties having a population of 10,000 or more, the court is not a city court, but is, as it has jurisdiction coextensive with the limits of the county of Burke, in fact, if not in name, a county court, and the act creating the court is void for the reason that the general assembly has no authority, under the constitution, to create a county court by a special law, there being a general law providing how county courts shall be established; and, further, that, treating the court as a county court, the act establishing it is void for the reason that there is want of uniformity, jurisdiction, procedure, etc., with the general county court act. The act providing for the establishment of county courts has been held not to be a general law within the meaning of that provision of the constitution which declares that no special law shall be enacted in any case for which provision has been made by an existing general law. *Lorentz v. Alexander*, 87 Ga. 444, 13 S. E. 632. But the court in question is not a county court, either in name or in fact. It is a court established by the general assembly in the exercise of its authority to establish courts other than those enumerated in the constitution, wherever there is a necessity for the establishment of such courts. It is a local and independent court, established for the reason that there is a peculiar need for such a court in the county in which it is established. It does not belong to any general class of courts now existing in this state, and therefore there is nothing in the constitution which requires that such a court should be uniform in jurisdiction, procedure, etc., with any other court in the state. It stands alone as an inde-

pendent local court in the locality in which it is established. As was said by Mr. Presiding Justice Lumpkin in *Welborne v. Donaldson*, supra, whenever the general assembly undertakes to establish courts "of the same grade or class," there must be uniformity in such courts; but where a new and independent single court, adapted to the needs of a particular locality, is created, it is not necessary that the jurisdiction, procedure, etc., of this court shall be uniform with those of existing courts of a different class. See, also, *Kelly v. Jackson*, 67 Ga. 274. The act creating the city court of Waynesboro was not subject to any of the objections urged against it in the present case, and, so far as these objections are concerned, the court, although not a city court within the meaning of the constitution, is a valid statutory court, and has jurisdiction of the cases, civil and criminal, which are referred to in the act creating it.

The foregoing discussion disposes of all of the questions raised in the present case, there being no assignment of error in the petition for certiorari upon any ruling made by the judge in the trial of the case upon its merits, nor any objection urged to the verdict of the jury as rendered.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 954)

GEORGIA RAILROAD & BANKING CO. v. GARDNER et al.

(Supreme Court of Georgia. July 19, 1902.)

TRESPASS—PUNITIVE DAMAGES—AGGRAVATING CIRCUMSTANCES.

1. One who enters upon and injures another's land is not, though a trespasser, liable for punitive damages, when the acts causing the injury were done in good faith, under the honest belief that the land belonged to the former, and there was nothing in the manner of doing such acts to indicate an intention to wantonly disregard the rights of the true owner. See *Minning Co. v. Irby*, 40 Ga. 479; *Carli v. Depot Co.*, 32 Minn. 101, 20 N. W. 89.

2. It was in the present case erroneous to give in charge to the jury section 3906 of the Civil Code, which authorizes the giving of such damages in cases of tort where there are aggravating circumstances.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by M. G. S. Gardner and others against the Georgia Railroad & Banking Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming, for plaintiff in error. Wm. H. Fleming, for defendants in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

¶ 1. See *Damages*, vol. 15, Cent. Dig. §§ 197, 199.

(115 Ga. 851)

STUDSTILL v. MURRELL.

(Supreme Court of Georgia. July 18, 1902.)

TRIAL—INSTRUCTIONS—EVIDENCE.

1. Considering the nature of the defense interposed to the action, and the evidence submitted to sustain it, there was no error in the charges complained of. The same are abstractly correct statements of the law, and applicable to the issues made by the pleadings.

2. The evidence was sufficient to warrant the verdict, which is not shown to be excessive, and there was no error in refusing to grant a new trial for any of the reasons assigned.

(Syllabus by the Court.)

Error from superior court, Telfair county; D. M. Roberts, Judge.

Action by F. C. Murrell against W. A. Studstill. Judgment for plaintiff, and defendant brings error. Affirmed.

E. D. Graham, Eason & McRae, and B. M. Frizzell, for plaintiff in error. D. C. McLennon, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 836)

DIGBY v. STATE.

(Supreme Court of Georgia. July 18, 1902.)

CRIMINAL LAW—REVIEW—EVIDENCE.

1. There was no error in the trial, and the evidence was sufficient to warrant the verdict. (Syllabus by the Court.)

Error from superior court, Jasper county; H. M. Holden, Judge.

Charles Digby was convicted of crime, and brings error. Affirmed.

Greene F. Johnson and J. D. Kilpatrick, for plaintiff in error. H. G. Lewis, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 823)

SHEPPARD v. STATE.

(Supreme Court of Georgia. July 17, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The evidence warranted the verdict, and, as no question of law is presented for decision, the judgment overruling the motion for a new trial will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

George Sheppard was convicted of crime, and brings error. Affirmed.

J. T. Hill, for plaintiff in error. F. A. Cooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 333)

BRANTLEY v. STATE.

(Supreme Court of Georgia. July 18, 1902.)

CRIMINAL LAW—REVIEW—EVIDENCE.

1. No error of law was complained of, and the evidence, though circumstantial, was sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Dodge county; D. M. Roberts, Judge.

Berry Brantley was convicted of crime, and brings error. Affirmed.

See 41 S. E. 695.

E. Herrman and J. P. Highsmith, for plaintiff in error. J. F. De Lacy, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 951)

HODGES et al. v. ROGERS.

(Supreme Court of Georgia. July 19, 1902.)

APPEAL FROM JUSTICE—PLEADINGS—PARTNERSHIP.

1. If the defendant in an action in a justice's court upon an unconditional contract in writing fails to make a defense at the first term, and thus loses his right to defend, the plaintiff does not, merely by contesting with the defendant at a subsequent term of the justice's court the merits of the case, and, as a consequence, losing the same, waive the right, upon the trial of an appeal, which the plaintiff himself enters to the superior court, to object to the filing therein of an answer by the defendant on the ground that it comes too late.

2. Where one person owns and operates a sawmill at his own expense, and another person, at his own cost, furnishes the mill with logs to be converted into lumber, and each is to have one-half thereof, they are not partners, but the latter is merely the customer of the former, who receives a half of the product of the logs as compensation for his services as manufacturer.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by Hodges & Daniel against W. E. Rogers. Judgment for defendant, and plaintiffs bring error. Reversed.

E. J. Giles and Jas. K. Hines, for plaintiffs in error. W. T. Burkhalter, for defendant in error.

LUMPKIN, P. J. An action upon a draft was brought by Rogers in a justice's court against Hodges & Daniel, an alleged partnership, and the individual members thereof. The case was not tried at the first term of that court, but was continued. At the next term a defense was interposed, and the magistrate rendered a judgment, with which the plaintiff was dissatisfied, and he entered an appeal to the superior court. After the case reached that court, and some time before it was tried therein, Hodges, one of the defendants, filed in the clerk's office an answer, in

which he set up a good defense to the plaintiff's action. At the trial the question arose whether or not Hodges had made any defense in the justice's court at the first term thereof; the plaintiff insisting that he had not, and Hodges asserting the contrary. Upon the issue thus formed the evidence was conflicting, and sufficient to authorize a finding either way. This issue, and that arising upon the merits of the defendant's answer, were submitted both together to the jury, who returned a verdict for the plaintiff. Thereupon Hodges made a motion for a new trial, which was overruled, and he excepted.

1. In the motion complaint is made of instructions which the court gave to the jury to the effect that, if the defendant Hodges did not appear and enter a defense at the first term in the justice's court, the written answer filed in the superior court came too late; and in that event the jury should return a verdict for the plaintiff. Exception was taken to these instructions on the grounds: (1) That there was no evidence upon which to base the same; and (2) because, after a trial on the merits in the justice's court at the second term, resulting in a judgment against the plaintiff, it was too late for him to make the point in the superior court that the defendant Hodges was not entitled to file therein the written defense on which he relied. It will be seen from the preliminary statement above that the first of these objections was not well founded, there being evidence from which the jury might have found that Hodges did not in fact enter any defense at the first term in the justice's court. Nor, in our opinion, is there any merit in the other criticism made upon the charge of the court. It is true that the plaintiff might, at the second term in the magistrate's court, have made and sustained the point that it was then too late for Hodges to enter a defense, if he had failed to do so at the first term. The fact that the plaintiff did not make this point may fairly be said to have amounted to a waiver of his right to insist on it at that time; but we do not think this waiver extended beyond the second term of the justice's court, or was binding upon the plaintiff at any subsequent stage of the case. In *Morgan v. Prior*, 110 Ga. 791, 36 S. E. 75, it was ruled that: "It is too late, on the trial of an appeal in the superior court from a judgment rendered in a justice's court upon an unconditional contract in writing, for the defendant to file a plea, when it affirmatively appears that no defense whatever was made in the lower court at or before the first term of the case." It is proper in this connection to remark that there is no exception to the charge of the court on the ground that the draft sued upon was not an unconditional contract in writing. Accordingly, whether it was or was not such an instrument it must be treated for the purposes of this case as if it were. An examination of the case just cited will show that upon its facts it is one

very similar to the case in hand. If the defendant Hodges failed to make a defense at or before the first term in the magistrate's court, he lost his right to plead in the superior court, and can claim nothing from the fact that he was, without objection, allowed to insist upon a defense at the second term of the magistrate's court.

2. It being impossible to determine how the jury found upon the issue referred to above, the error pointed out below requires a new trial. The evidence at the trial in the superior court showed that Daniel owned a saw-mill, and operated it at his own expense. Under a contract between himself and Hodges, the latter, at his expense, carried logs to the mill, which were manufactured into lumber by Daniel, and the lumber then became the joint property of these parties, each owning an undivided half interest therein. In this connection the court charged: "If you find that there was a partnership agreement, and that was this: that one was to furnish the mill and the other the logs, and the common produce was the joint property of both, then that would be a partnership, and Hodges would be liable for the debt contracted by Daniel, and Daniel would be liable for any debt contracted by Hodges, in the course of that partnership." Complaint is made that this "charge was erroneous, because there was no evidence on which to base said charge, and because the same was an incorrect statement of the law." We are of the opinion that these exceptions are well taken. As will have been seen, Daniel, under the contract, operated the mill at his own expense, while Hodges furnished the logs at his individual cost. The latter had nothing to do with operating the mill, and the former had nothing to do with furnishing the logs. It was really the simple case of a millowner converting the logs of a customer into lumber, and receiving one-half of the product as compensation for manufacturing the same. It is clear, therefore, not only that the charge complained of was not a correct statement of the law, but that, under the facts appearing, it was prejudicial to the defendant Hodges. For this reason he is entitled to a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 891)

HITCH v. BAILEY et al.

(Supreme Court of Georgia. July 18, 1902.)

EXECUTION—SALE OF MORTGAGED LANDS—INTEREST ACQUIRED—TRESPASS.

1. When land on which there exists a valid lien by mortgage unenclosed is seized and sold under a common-law judgment against the mortgagor, the lien of which is inferior to that of the mortgage, the purchaser acquires only the interest in the land which the defendant in *fi. fa.* had at the time, which is the equity of redemption. This being so, the defendant, as mortgagor, cannot, after such sale, by joining

in a consent with the mortgagee, lawfully cause the entire estate in the land to be sold and conveyed under another common-law judgment, in favor of the mortgagee, against him. His equity of redemption therein having been sold, the mortgagor afterwards held no interest in that part of the land which was so first sold.

2. The plaintiff in this case acquired no title to the south half of lot of land in controversy, by the sale last above indicated, and, as he did not allege or show that the trespass was committed on any part of the land which he owned, there was no error in adjudging that he could not maintain his action.

(Syllabus by the Court.)

Error from superior court, Ware county; Jos. W. Bennet, Judge.

Action by Simon W. Hitch against J. S. Bailey and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Simon W. Hitch, for plaintiff in error. Toomer & Reynolds and Quincey & McDonald, for defendants in error.

LITTLE, J. Hitch brought an action in trespass against Bailey, Thigpen, and Tanner, to recover damages for cutting and removing timber from lot of land No. 286, in the Sixth district of Coffee county, Ga. The defendants denied liability. The case was tried under an agreed statement of facts, in which it was conceded that, if the plaintiff held superior title to the land, he was entitled to recover \$200; and the only legal question which arises under the admitted facts is whether the plaintiff showed such a title, in himself, to the lot of land on which the alleged trespass was committed, as entitled him to recover. The case was submitted for determination by the judge without the intervention of a jury, and a judgment was rendered in favor of the defendants, to which Hitch excepted.

There is nothing in the record which shows, or from which it can be inferred, on what part of the lot the alleged trespass was committed. It was admitted that the land belonged originally to Jeff Kirkland, and the title of the plaintiff was derived from him in the following manner: A judgment was rendered in favor of the Bradley Fertilizer Company, against Kirkland, on February 13, 1897. The execution which issued thereon was levied on the lot of land in question, which was sold by the sheriff on October 13, 1899. The plaintiff purchased at this sale, and received title from the sheriff. At the time of this sale, the Bradley Fertilizer Company held an unenclosed mortgage on the land, which bore date April 15, 1894, to secure the notes on which the common-law judgment was rendered. Defendants claimed title to the south half of the lot under a conveyance by the sheriff, at another sale, to one of their number, Tanner. This sale was had under an execution in favor of the Chesapeake Guano Company, which issued on a judgment that company had obtained against Kirkland on October 12, 1896. So the only question presented for our deter-

¶ 1. See Execution, vol. 21, Cent. Dig. §§ 769, 763.

mination is what title the parties respectively acquired by these purchases.

The lien of the judgment of the Chesapeake Company was superior to that of the Bradley Company, but inferior to that of the unforeclosed mortgage. At the sale under the common-law *fi. fa.* of the Bradley Fertilizer Company, it was agreed between Kirkland, defendant in *fi. fa.* and mortgagor, and the Bradley Company, plaintiff in *fi. fa.* and mortgagee, that the entire estate should be sold, and that the purchaser should take under the lien of the mortgage in the same manner as if his mortgage had been foreclosed; and it is contended under Civ. Code, § 2759, that, this having been agreed to at and before the sale under the judgment in favor of the Bradley Company, the purchaser at that sale took title to the entire estate, and holds the same, not only under the lien of the common-law judgment, but also under the lien of the mortgage; and that the title so acquired is superior to that which vested in Tanner, to the south of the lot, by virtue of the sale under the older common-law judgment in favor of the Chesapeake Company. This is not a sound contention. When the land was sold under the common-law judgment in favor of the Chesapeake Company, the purchaser at that sale acquired all the interest which the defendant Kirkland had in the south half of the lot of land. That was the equity of redemption. *Tarver v. Ellison*, 57 Ga. 54; *Cottle v. Harrold*, 72 Ga. 830; *De Vaughn v. Byrom*, 110 Ga. 904, 36 S. E. 267, and cases cited. After such sale, Kirkland had no further interest in that part of the land. Having none, no consent which he might thereafter have given would authorize the entire estate to be sold under the common-law judgment in favor of the Bradley Company; and without regard to such consent, and to any agreement which may have been made between the Bradley Company as plaintiff in *fi. fa.* and mortgagee, and Kirkland, the defendant in *fi. fa.* and mortgagor, the purchaser at the sale under the Bradley Company's *fi. fa.* took no title to that part of the lot in question. That, subject to the lien of the mortgage, had vested in Tanner, the purchaser under the execution in favor of the Chesapeake Company. All that could have been sold under the judgment of the Bradley Company was Kirkland's interest in the land, he being the defendant in *fi. fa.* After the execution of the mortgage, he held only the equity of redemption. Tanner had previously acquired this in the south half of the lot; hence, Kirkland not having any interest at the time of the second sale in that part of the land, Hitch, who purchased thereat, could acquire none.

The plaintiff in error sought to recover a judgment by way of damages for a trespass, which he alleged was committed on the lot of land, to the whole of which he claims title. As has been shown, he has no title to the south half of the lot. He does not allege

that the defendants committed a trespass on the north half. Therefore, under the admitted facts found in the record, he was not entitled to recover, and a judgment in favor of the defendants was properly rendered.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 929)

STEELE v. GATLIN.

(Supreme Court of Georgia. July 19, 1902.)

LIFE INSURANCE POLICY—ASSIGNMENT—GIFT—ENFORCEMENT.

1. A policy of life insurance is a chose in action even before the death of the insured.

2. To vest the legal title to a policy of life insurance in an assignee, it is essential that the assignment should be in writing.

3. A verbal assignment of a policy of life insurance by the insured, accompanied by words indicating an intention to give, and by a delivery of the policy, does not constitute a complete gift; and in such a case a court of equity will not interfere, at the instance of the alleged donee, to complete the gift, when she has not acted to her injury, or incurred expense, on the faith of the incomplete gift.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Ima Gatlin against N. J. Steele. Judgment for plaintiff. Defendant brings error. Reversed.

Arnold & Arnold, for plaintiff in error. C. T. Ladson, for defendant in error.

OOBB, J. Mrs. Gatlin brought suit against N. J. Steele as administrator of the estate of J. R. Steele; the allegations of the petition being, in substance, as follows: The estate of J. R. Steele is solvent, there being no creditors of the same, and his heirs at law are brothers and children of deceased brothers and children of a deceased sister, the plaintiff being one of the latter. The decedent, during his lifetime, had procured two policies of insurance upon his life in a named association, payable to his "estate or his lawful heirs"; copies of these policies being attached to the petition as exhibits. The association was a mutual benefit and assessment association, and by its constitution and by-laws the insured had a right, upon compliance with certain requirements, to change the name of the beneficiaries at pleasure, but no change was ever made in accordance with the rules of the association. Three years before the death of the insured he "verbally assigned" the policies to the plaintiff, and delivered the same to her for her exclusive benefit, saying at the time that he wanted her to have the money that would be paid thereon, that he would always keep the dues paid up as long as he lived, and that the policies would be to plaintiff "as good as gold." Plaintiff accepted the gift, and received the policies from her uncle's own hands, who told

¶ 2. See Insurance, vol. 22, Cent. Dig. § 472.

her to take good care of them, as the money paid thereunder would help support plaintiff and her children. Plaintiff kept the policies as long as her uncle lived, and until they were surrendered to the association after his death. Her uncle often spoke of having given the policies to her, after the delivery above referred to. Upon being asked if it was necessary "to put the policies in petitioner's name," he said no written assignment was necessary to make the gift legal and binding, nor was it necessary that plaintiff's name should be placed on the policies, or upon the books of the association; that he had previously caused other policies which he held in the association, and which stood in the name of another beneficiary, to be changed "to his estate and his heirs," so that he could at any time, by mere gift and manual delivery, give and verbally assign the same to whomsoever he might select, without the necessity of changing the beneficiaries upon the books of the association. For years before and since her uncle verbally assigned to her the policies, plaintiff had rendered to him many acts of kindly service, and he visited her home, and in many ways showed his affection for her. Upon the death of her uncle, plaintiff and defendant each made proofs of loss under the policies. To avoid delay in collecting the amount due from the association, plaintiff and defendant, without waiving any of their legal or equitable rights, entered into an agreement to collect the amount from the association, and abide by the decision of the courts as to who owned the money. Under this agreement, the money was collected from the association and placed in a solvent bank, subject to the joint check of plaintiff and defendant; the bank acting as a stakeholder until there could be a final judgment and decree of a court having jurisdiction to settle the controversy. Plaintiff avers that she is the rightful and equitable owner of the fund in controversy; and she prays for a judgment and decree to this effect, and for general relief. To this petition, the defendant filed a demurrer upon various grounds, among them being that the petition set forth no ground for relief, legal or equitable; that no consideration is stated for the assignment of the policies to plaintiff; that the petition shows upon its face that the assignment relied on was verbal, and under the law the assignment would not be valid unless it was in writing. The court overruled the demurrer, and the defendant excepted.

A policy of life insurance is, after the death of the insured, unquestionably a chose in action, it being then simply a promise to pay money. It has been held in numerous cases that a policy of life insurance, even before the death of the insured, is a chose in action. See *Ex parte Ibbetson*, 8 Ch. Div. 519; *Harley v. Helst*, 86 Ind. 196, 45 Am. Rep. 285; *Bushnell v. Bushnell*, 92 Ind. 503; *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *Insurance Co. v. Flack*, 3 Md. 341, 56 Am. Dec.

742; *Bank v. McLean*, 84 Mich. 625, 48 N. W. 159; *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782.

A policy of life insurance, being a chose in action arising upon a contract, may, under the provisions of our Code, be assigned so as to vest the title in the assignee. Civ. Code, § 3077. But such assignment must be in writing. *Turk v. Cook*, 63 Ga. 681; *Bank v. Prater*, 64 Ga. 613; *Insurance Co. v. Amos*, 98 Ga. 533, 534, 25 S. E. 575, and cases cited. The Code provisions in reference to fire insurance are, wherever applicable, equally the law of life insurance. Civ. Code, § 2117. In *St. Paul Fire & Marine Ins. Co. v. Brunswick Grocery Co.*, 113 Ga. 786, 39 S. E. 483, it was held that an assignment of a policy of fire insurance must be in writing. In the opinion, Mr. Justice Fish says: "The Civil Code, § 2089, requires that a contract of fire insurance must be in writing. As an assignment of an insurance policy with the assent of the company is a new contract of insurance between it and the assignee, it must, under the provisions of this section of the Code, be in writing." In the case of *Insurance Co. v. Amos*, supra, and in the case of *Insurance Co. v. Grace*, 106 Ga. 264, 32 S. E. 100, it was held that, in order to transfer the legal title to a policy of fire insurance, the assignment must be in writing. As the assignment of a policy of fire insurance, in order to be valid, must be in writing, so, under the provisions of our Code making the principles relating to fire insurance, wherever applicable, apply equally to the law of life insurance, an assignment of a policy of life insurance must be in writing in order to vest the title in the person claiming to be the assignee. The assignment of the policies in the present case not having been in writing, but merely verbal, the plaintiff did not acquire title to the same, and hence could not maintain a suit in her own name against the association upon the policies. It is said, though, that, even if it be true that if the association had not paid the amount of the policies to the bank, to be held subject to the rights of the plaintiff and defendant, the plaintiff could not have maintained in her own name an action on the policies, still, under the facts alleged in the petition, the plaintiff became in equity the owner of the policies; and, while the legal title to the same would be in the administrator of the estate of the insured, the plaintiff would be entitled to use the name of the administrator in order to enforce her claim against the association as the equitable owner of the policies. If the plaintiff had been a purchaser for value of the policies, she would in equity be the owner of the same, and would be entitled to use the name of the administrator for the purpose of asserting her rights. The verbal assignment of the policies to the plaintiff, although followed by an actual delivery thereof, was entirely without any valuable consideration. The transaction would not be complete as a gift, under the

law of this state, unless the assignment was in writing; and it is too well settled now to admit of controversy, at least in this state, that equity will not interfere, at the instance of a volunteer, for the mere purpose of making perfect a gift which was incomplete because lacking in some of the essentials required by law.

There are cases holding that bonds and other negotiable obligations for the payment of money may be the subject of a valid gift, and that a delivery of the obligation to the donee without written assignment, but with a clear and manifest intention to pass the title, is sufficient to satisfy the rule requiring delivery of the thing given; and this rule has been applied to a life insurance policy. See *Insurance Co. v. Grant* (N. J. Ch.) 33 Atl. 1060; 3 *Joyce, Ins.* § 2326; 1 *Bac. Ben. Soc.* (New Ed.) § 297. Even if, in those jurisdictions where the law does not require the assignment of a life insurance policy to be in writing, a verbal assignment, followed by actual delivery of the policy and words indicating an intention to give, would make a complete gift, certainly in this state, where the law requires the assignment to be in writing, a gift which was not a substantial compliance with the statute would not have the effect to vest the title, either legal or equitable, in a mere volunteer. Mr. Justice Hall, in *Nally v. Nally*, 74 Ga. 669, 673, 58 Am. Rep. 458, thus states the rule governing the case of a volunteer who appeals to a court of equity: "Equity never interferes in favor of volunteers except where the contract is actually executed (Code, § 3116 [Civ. Code, § 3972]), and will never decree the performance of a voluntary agreement, or merely gratuitous promise, unless the volunteer has gone into possession, and upon the faith of the agreement has incurred expense in making improvements of the property donated, or has done something of a similar nature which would render it inequitable upon the part of the donor not to carry out the contract. The donee must not be placed in a worse condition than she was before the gift was tendered." In the present case, the plaintiff is in exactly the condition she was in at the time of the verbal assignment; she has done nothing to change her position; and nothing in the allegations of her petition would authorize a court of equity to interfere in her behalf. She failed to secure a legal title to the policies when she relied upon a verbal transfer, and this transfer, although accompanied by a delivery of the policies and words indicating an intention to give, will not make her the equitable owner, when she has done nothing upon the faith of the transfer which would make it inequitable for the heirs or legal representatives of the insured to urge now the invalidity of the transfer on account of the failure of the parties to comply with the

rule of law requiring such an assignment to be in writing. There is nothing in the case of *Nally v. Nally*, supra, to conflict with the ruling now made. The contest there was between a sister who was the named beneficiary in a policy of life insurance as originally issued, and the wife of the insured, who had married him upon the faith of a promise that the policy should be so changed as to make her the beneficiary. This change was authorized, by the terms of the policy, without the consent of the beneficiary named therein. The company had agreed to make the change, but had neglected to do so. It was held that as the sister was a mere volunteer, and the wife was a purchaser for value, marriage being a valuable consideration, the wife was to be preferred, and was entitled to the proceeds of the policy. The court erred in overruling the demurrer.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 835)

OGLETREE v. STATE.

(Supreme Court of Georgia. July 18, 1902.)

HOMICIDE—STATEMENT BY DECEDENT—ARGUMENT OF COUNSEL—EVIDENCE.

1. When the accused in a trial for murder, alleged to have been committed by shooting, has been allowed to prove by a witness a positive declaration by the decedent that he did not know who shot him, it affords the accused no just cause of complaint that the court refused to permit the same witness to testify that the decedent further stated: "If he [the accused] shot me, it was an accident." The additional declaration was, under these circumstances, the mere statement of a conclusion, and one which was manifestly of no probative value whatever. *Kearney v. State*, 29 S. E. 127, 101 Ga. 803, 65 Am. St. Rep. 344; *Sweat v. State*, 33 S. E. 422, 107 Ga. 712.

2. It is the right of counsel, in arguing a case to the jury, to draw and state to them his own conclusions from the law and the testimony, provided that in so doing he does not misstate the testimony, or state facts as to which there is no evidence.

3. The evidence warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Butts county; E. J. Reagan, Judge.

Emanuel Ogletree was convicted of murder, and brings error. Affirmed.

O. M. Duke and A. Wright, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1677.

(115 Ga. 864)

WILLIAMS v. STEWART, Tax Collector.
STEWART, Tax Collector, v. **WILLIAMS**.
 (Supreme Court of Georgia. July 18, 1902.)

TAXES—VOLUNTARY PAYMENT—ACTION TO RECOVER.

1. Where an officer not authorized to issue a warrant notifies a person that he will have him arrested on a warrant, and prosecuted, unless he pays a certain tax, and such person, because of such threat, pays the tax, the payment is voluntary, under Civ. Code, § 3723, and the money paid cannot be recovered.

2. A petition seeking to recover money so paid is subject to demurrer, although it alleges that such payment was made under an urgent and immediate necessity therefor, and to prevent an immediate seizure of the plaintiff's person and property. These averments are but conclusions of law, and can avail nothing, where it appears that the facts upon which they are based make the payment a voluntary one.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by R. A. Williams against A. P. Stewart, tax collector. From the judgment, both parties bring error. Judgment on main bill of exceptions affirmed, and cross bill dismissed.

Jas. Davison, for plaintiff. Culberson, Willingham & Johnson, for defendant.

SIMMONS, C. J. Suit was brought by Williams against Stewart, tax collector of Fulton county, to recover \$500 which he alleged he had paid Stewart under duress. The petition alleged that Stewart demanded of him \$500 as a special tax upon him as an emigrant agent; that he was not such an agent, and was not subject to the tax; that he refused to pay the tax until Stewart notified him that, unless he paid it, Stewart would have a warrant issued against him, and prosecute him for a misdemeanor. Plaintiff paid the money under this threat. The petition alleged that the money so paid was paid under an urgent and immediate necessity, and to prevent an immediate seizure of plaintiff's person and property. The defendant filed a demurrer, which was sustained by the court. Williams excepted.

Under the Civil Code (section 3723), "payments of taxes or other claims, made through ignorance of the law, or where the facts are all known, and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party, are deemed voluntary, and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule." Under this section it was incumbent on the plaintiff to show that the payment was made to prevent his immediate arrest or the immediate seizure of his property. Under the statute imposing the tax upon emigrant agents, certain viola-

tions of the statute are made penal, but the tax collector is given no unusual power to enforce its terms. The mere fact that the tax collector, who has no authority to issue a warrant, or to make an arrest with or without warrant, notifies a person that he will have a warrant issued, and the person prosecuted, unless he pays the tax, is not sufficient to constitute duress under the Code. Under such a threat the danger to the person threatened is not urgent or immediate. It may have been an idle threat on the part of the tax collector, or he might have reconsidered upon an investigation of the law; for the law was at that time that the person against whom the tax was assessed should not be prosecuted for not paying the tax until after he had registered as an emigrant agent. It was only after he had registered as such agent, and then failed to pay the tax, that he could be prosecuted for the non-payment of the tax, although before registry he might have been prosecuted for his failure to register. No warrant appears to have been issued against the plaintiff for any offense, and the allegations of his petition show that there was no urgent or immediate necessity for paying the tax, or any immediate danger of the seizure of his person or property. It is true that the petition alleges that there was such a necessity, and that the tax was paid to prevent the immediate seizure of his person and property; but the court below properly held that these averments were merely conclusions of the pleader, which were not justified by the facts on which they were based. The demurrer did not admit the conclusions of law set out in the petition, but admitted only the matters of fact which were well pleaded. Accordingly, there was no error in the ruling of the court below sustaining the demurrer of the defendant.

Judgment on main bill of exceptions affirmed; cross-bill dismissed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 915)

McKNIGHT et al. v. MAYOR, ETC., OF TOWN OF SENOIA et al.

(Supreme Court of Georgia. July 18, 1902.)

MUNICIPAL CORPORATION—ISSUE OF BONDS—REGISTRATION—ASSENT OF QUALIFIED VOTERS.

1. When an election is held in a municipality to determine whether two-thirds of the qualified voters will give their assent to the issuance of bonds, and there is no law authorizing or requiring a registration of the voters of the town, and at the election held the total number of votes cast exceeds the total number cast at the last general election in the town, as shown by the tally sheets of that election, and no question is raised as to the right of any of the voters to participate in the bond election, the assent of two-thirds of the qualified voters is not obtained where the number voting in favor of bonds is less than two-thirds of the votes cast at the bond election.

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

Application by the mayor and council of the town of Senoia and others to validate certain bonds. From an order validating the same, J. A. McKnight and others bring error. Reversed.

H. A. Hall, for plaintiffs in error. R. W. Freeman and T. A. Atkinson, Sol. Gen., for defendants in error.

COBB, J. An election was held in the town of Senoia to determine whether the assent of two-thirds of the qualified voters could be obtained to an issuance of bonds by that municipality. 133 votes were cast; 85 for and 48 against bonds. From the tally sheets of the last general election held in the town preceding the bond election it appeared that 120 persons had voted. Upon an application to the judge of the superior court to validate the bonds under the act of 1897 (Acts 1897, p. 82), an order was passed declaring the bonds valid, over the objection of certain citizens that the assent of two-thirds of the qualified voters had not been obtained. The constitution declares that a municipal corporation shall not incur a debt of the character sought to be incurred in the present case "without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law." Civ. Code, § 5893. The general assembly has declared that in determining whether two-thirds of the qualified voters voted in favor of the issuance of bonds "the tally sheets of the last general election held in said county, municipality or division shall be taken as a correct enumeration of the qualified voters thereof." Pol. Code, § 880. The local act under which the election in the present case was held declared: "The election for mayor and council last preceding in said town shall be taken and considered to determine the number of voters in said town." Acts 1901, pp. 630, 633, § 10. It has been held that the rule prescribed in the Political Code, which determines the question as to whether two-thirds of the qualified voters have given their assent to the issuance of bonds by reference to the tally sheets of the last general election is to be applied only in cases where there is no better or more satisfactory test in reference to the question, and that, therefore, where there is a law authorizing or requiring the registration of voters for an election to be held on the question of the issuance of bonds, the result of the election is to be determined by a reference to the list of voters registered for the election, and not to the tally sheets of the last general election. *Gavin v. City of Atlanta*, 86 Ga. 132, 12 S. E. 262; *Mayor, etc., v. Wade*, 88 Ga. 699, 16 S. E. 21; *Mayor, etc., v. Wilson*, 96 Ga. 251, 23 S. E. 240; *Floyd Co. v. State*, 112 Ga. 704, 38 S. E. 87. Where there is no

better test than that prescribed in the Political Code, the rule there laid down may be followed. *Kaigler v. Roberts*, 89 Ga. 476, 15 S. E. 542; *Howell v. City of Athens*, 91 Ga. 139, 16 S. E. 966; *Heilbron v. City of Cuthbert*, 96 Ga. 312, 23 S. E. 206; *Carver v. City of Dawson*, 99 Ga. 7, 25 S. E. 832; *Brand v. Town of Lawrenceville*, 104 Ga. 487, 30 S. E. 954; *Slate v. City of Blue Ridge*, 113 Ga. 646, 38 S. E. 977 (2). The provision in the local act of 1901 in reference to the test to be applied in determining whether two-thirds of the qualified voters have given their assent to the issuance of bonds is in substance the same as that laid down in the Political Code. See, in this connection, *Brand v. Town of Lawrenceville*, supra. The two provisions are therefore to be construed simply as prescribing rules to be followed in the absence of a more satisfactory and better test. 133 votes were cast at the bond election. There is no question raised as to the right of any of these voters to vote at this election. It is to be presumed, therefore, that there were on the date of the election at least 133 qualified voters in the town of Senoia. If this is true, the issuance of bonds by the town without the assent of two-thirds of this number would be a palpable violation of the provisions of the constitution of the state. The fact that there can be, and was in the present case, a larger number of persons qualified to vote in the bond election than actually voted in the last general election conclusively shows that the test prescribed in the Political Code cannot always be followed, and ought never to be followed when the facts are such that to apply the test would result in a direct violation of the constitution. Certainly, the court should not attribute to the general assembly the intention of prescribing a test which would authorize an issuance of bonds when so doing would be in direct violation of the constitution. If the registration lists, in cases where registration is required, should be looked to in determining whether two-thirds of the qualified voters have given their assent to the issuance of bonds, certainly in cases where no registration is required the total number of votes cast, when no question is raised as to the right of any voter to participate in the election, should be looked to to determine whether the requisite number of voters have given their assent. If the total number of votes cast is less than the total number cast at the last general election as shown by the tally sheets, then it may be safely presumed that there has been no change in the population of the town, and the enumeration of voters as shown by the tally sheets of the last general election may be followed. But if it appears that the total number of votes cast in the election is greater than the number cast at the last general election, and no question is raised as to the right of any voter to participate in the election, certainly it cannot be said that the assent of two-thirds of the

qualified voters has been obtained to the issuance of bonds when the total number voting in favor of the issuance of such bonds is less than two-thirds of those actually voting. If a registration of the voters has been authorized or required, then the list of registered voters is conclusive on the question as to how many qualified voters there are. If no registration is required, or there is no other satisfactory means of ascertaining who are the qualified voters, then, if the total number of votes cast at the bond election is less than the total number cast at the last general election, two-thirds of the votes cast at the last general election will be presumed to be two-thirds of the qualified voters of the town. If there is no registration, and the total number of votes cast at the bond election is greater than the total number cast at the last general election, and no question is raised as to the right of any voter to participate in the election, the number of votes actually cast at the bond election will be considered as conclusive on the question of how many qualified voters there are in the town on that day. While this question was not involved directly in the case of *Bell v. Mayor, etc.*, of Americus, 79 Ga. 152, 8 S. E. 612, the conclusion now reached was stated by Mr. Justice Blandford, who used the following language: "We think that under the act referred to the requisite number in favor of the issuing of bonds is at least two-thirds of the number of qualified voters at the preceding election, and also two-thirds of the qualified voters at the election held to determine that question." The judge erred in entering an order validating the bonds.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 28)

MOORE et al. v. CAREY et al.

BENTLEY v. MOORE et al.

(Supreme Court of Georgia. July 23, 1902.)

ADMINISTRATOR'S SALE—VALIDITY—CONVEYANCE TO WIFE—MINOR—ESTOPPEL—EJECTMENT—PERMANENT IMPROVEMENTS—TRIAL.

1. A purchase by an administrator, at his own sale, of any interest in the property, renders the entire sale voidable at the instance of any one interested in the estate who moves within a reasonable time to set aside the sale.

2. A wife may be a bona fide purchaser, without notice, from her husband, where he is dealing with the property as his own. It follows that, while a purchase by an administrator at his own sale is voidable at the election of heirs or creditors of the estate, a deed made by him conveying the property to his wife for a valuable consideration vests the title in her, if she had no knowledge of the manner in which he acquired his title.

3. The guardian of a minor, who is the distributee of an estate, has no authority to consent that the administrator of the estate and others may purchase property of the estate at a given price; and the fact that the adminis-

trator does so purchase the property, and pays over to the guardian the part of the proceeds which would be due to the minor, does not estop the latter from seeking to set aside the purchase by the administrator at his own sale, when the minor has had no settlement with the guardian, and received no part of the proceeds of the sale so collected by him.

4. A plea claiming a set-off under the act of December 21, 1897, which provides that the value of permanent improvements placed upon the land by one who is in bona fide possession under an adverse title may be set off against the value of the land, if such permanent improvements exceed the value of mesne profits, is fatally defective where the allegations do not set forth with certainty the value of the permanent improvements alleged to have been placed upon the property.

5. When the defendant in a civil case introduces no evidence, he is entitled to the opening and conclusion of the argument.

6. In the trial of an action brought to set aside an administrator's sale upon the ground that he was a purchaser at his own sale, where it is sought to estop the plaintiff upon the ground that his guardian had collected from the administrator the amount due him as his portion of the proceeds of the sale, and had paid over the same to him after his arrival at majority, after putting him in full possession of all the facts in reference to the sale, testimony by the guardian that at the time of the payment by him to his ward it was stipulated by the ward that the payment of the money should have no other effect than to pass the fund into his possession, and he should not be concluded thereby from afterwards electing to restore the money to the administrator and to set aside the sale, was relevant.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; Jno. C. Hart, Judge.

Action by Lee A. Bentley and others against John D. Moore and Lizzie E. Moore, his wife. From the judgment, Moore and wife and Lee A. Bentley bring error. Reversed.

Saml. H. Sibley, for plaintiffs. Cloud & Jennings and Colley & Sims, for defendants.

OOBB, J. Lee Anna Bentley and Martha J. Carey, a minor, the latter suing by her guardian, William A. Carey, brought suit against John D. Moore and his wife, Lizzie E. Moore, alleging that plaintiffs are the children of Martha Elizabeth Carey, who was the daughter of John R. Moore, deceased; that they are the heirs at law of their grandfather, and as such entitled each to a one-fourteenth interest in his estate; that John D. Moore was the administrator upon the estate, and as such caused a tract of land to be sold, and became himself the purchaser, and thereafter sold the land to his wife, Lizzie E. Moore, who had full knowledge of the fact that he was administrator and had bought the property at his own sale. The prayer of the petition was that the deeds under which the defendants Moore and wife claimed title might be canceled, and that the plaintiffs recover a one-seventh interest in the property, with mesne profits. To this action the defendants filed pleas, which were in substance as follows: (1) The land sued for was sold at administrator's sale as alleg-

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 579, 1500.

ed. Before the property was sold, Moore, the administrator, who was also an heir at law and entitled to a one-seventh interest in the estate, agreed with six other persons, the father of both of the plaintiffs and guardian of the minor plaintiff being one of them, that they would bid in the land at the sale, if it did not bring a given price. The land did not bring this price, and, under the agreement referred to, the property was bid in by one Richards for the sum of \$800. The persons for whom Richards bid in the property, not being able to resell the property, finally prevailed upon Moore to buy the property from them, and take the same at the amount which Richards paid for the property. Moore agreed to do this, and, in pursuance of this arrangement, he, as administrator, conveyed the property to Richards, and Richards conveyed the same back to Moore individually, who accounted to the estate for \$800, the amount of the bid. The arrangement before the sale was that Moore should not have any further interest in the property after the sale than the one-seventh which he would have been entitled to as an heir at law. (2) Lizzie E. Moore purchased the property from John D. Moore, her husband, who conveyed the same to her by a deed; and at the time of the purchase she had no knowledge, notice, or belief whatever that the plaintiffs claimed, or would ever claim, any interest in the property, nor did she have any notice that the title which Moore had to the land was either void or voidable. She bought the land in good faith, believing that John D. Moore owned the same, and without any notice whatever that the plaintiffs, or either of them, had at the time of the sale to her any interest, right, title, or claim in or to the property. (3) William A. Carey was the duly appointed guardian of both of the plaintiffs during their minority, and represented them in the conferences and arrangements in reference to the sale, and as such guardian received from the administrator the portion of the purchase price belonging to each of his wards; and Lee Anna Bentley, upon her arrival at majority, received her proportion of the proceeds of such sale with a full knowledge of all the facts, and this conduct on her part amounted to a ratification of the purchase by Moore of the property, even if it was illegal; and the receipt by the guardian of Martha J. Carey is binding upon her, although she is a minor. (4) Lizzie E. Moore is a purchaser in good faith, and in adverse possession of the property, and since her purchase has expended a large sum of money in permanent improvements upon the property; and she prays that the value of the improvements may be set off against the mesne profits and the value of the land. Attached to this plea is a long bill of particulars, consisting of items from August, 1895, to May, 1901, aggregating several thousand dollars, all claimed to be items of

expense in connection with the permanent improvements alleged to have been placed upon the land. Some of these items are such as would be clearly connected with permanent improvements; others are such as would clearly not be so connected, and still others are items of expense resulting from the ordinary and usual repairs upon a mill which was on the property. Some of the items are apparently disconnected with improvements, either permanent or otherwise, and a number of the items are for expenses incurred after the suit was filed, and represent improvements alleged to have been made since that time. The plaintiff made an oral motion to strike all of the pleas above referred to, upon the ground that they presented no defense; and made special objection to the plea attempting to set off the value of improvements, upon the ground "that the same set up a mass of expenditures, and was not so framed as to show any excess of improvements in value over mesne profits at the time of trial." An order was passed striking all of the pleas except the one which alleged that Lee Anna Bentley had ratified the sale to Moore by receiving her portion of the proceeds of the same, and the court submitted this issue to the jury. The jury returned a verdict finding in favor of Martha J. Carey for a one-fourteenth interest in the land and mesne profits, and a verdict in favor of the defendants, so far as Lee Anna Bentley was concerned. Both Lee Anna Bentley and the defendants made motions for new trials, and both motions were overruled. The defendants filed a bill of exceptions, assigning error upon the refusal of the court to grant them a new trial, and upon exceptions pendente lite, which had been duly filed, to the striking of the pleas above referred to. Lee Anna Bentley excepted to the judgment overruling her motion for a new trial.

1. It is familiar law that a purchase by an administrator at his own sale, either by himself or through an agent, is voidable at the instance of any person interested in the property. It is not essential to the application of this rule to a particular case that the administrator should be the purchaser of the entire interest in the property. A purchase by him at his own sale of any interest in the property renders the same voidable. The same reasons which made a purchase by him of the entire interest voidable at the instance of those who are interested in the property would apply with equal force where he was at all interested in the purchase. In the present case, the administrator being interested to the extent of a one-seventh interest in the purchase at his own sale, the temptation to look to the interest of himself and his associates, rather than to the interest of the heirs and creditors of the estate, would be just the same as if he was buying the entire property.

2. As to property rights, a wife is in this

state a separate and distinct person from her husband. While transactions between husband and wife are closely scrutinized where the rights of third persons are involved, we know of no reason why a wife may not occupy in law the attitude of a bona fide purchaser for value, without notice, from the husband. A husband may sell to his wife property owned by him; and if, under similar circumstances, a third person would be protected in law as a bona fide purchaser without notice, the wife will be protected. On account of the relation which they occupy to each other, however, slighter circumstances might be sufficient to negative good faith and want of notice than would be sufficient in the case of strangers. It has been held that a wife could not be a purchaser at a sale where the husband was the representative of another, and would himself be precluded from becoming a purchaser. *Reed v. Aubrey*, 91 Ga. 435, 17 S. E. 1022, 44 Am. St. Rep. 49. Mrs. Moore, therefore, could not have been a purchaser of the property at the administrator's sale by her husband. But if her husband was the purchaser of the property at that sale, she could become a purchaser from him; and if she bought in good faith, and for value, and without notice of the manner in which he acquired his title, although that title was voidable as against the heirs and creditors of the estate which he represented, his deed to his wife under the circumstances above referred to would convey to her a good title. Mrs. Moore, in her plea, alleges, in substance, that she did not know that her husband was to be one of the purchasers at the administrator's sale by him; and if, after the title had vested in him under the deeds made following the sale, she bought the property from him, paying value for it, and was ignorant of the manner in which he acquired his title, her right to the property would be complete as against the heirs and creditors of the estate. The court erred in striking the plea in which Mrs. Moore set up that she was a bona fide purchaser without notice.

3. The court did not err in striking the plea which set up that the guardian of Martha J. Carey had not only agreed that the administrator might become one of the purchasers at the sale, but also received from him, as guardian, the proportionate amount of the proceeds of the sale which would be due to her as the heir at law of her grandfather. The guardian had no authority to consent that the property of his ward might be purchased by the administrator in this irregular way. The guardian had no right to sell the property of his ward at private sale; and to consent that the administrator of the estate in which his ward was interested might purchase the property at the sale at a given price would be, in legal effect, a private sale of the interest of his ward. Having no authority to

enter into this arrangement with the administrator, the mere fact that he afterwards received from the administrator the proportionate amount of the proceeds which fell to his ward would not estop her from seeking to set aside the sale at which the administrator was one of the purchasers. See, in this connection, *Groover v. King*, 46 Ga. 101; *Candler v. Clarke*, 90 Ga. 550, 556, 16 S. E. 645.

4. The plea attempting to set off the value of permanent improvements made by the defendants against mesne profits and the value of the land was properly stricken. This plea was an attempt to set up the right of set-off under the act of December 21, 1897 (Acts 1897, p. 79; Van Bpps' Code Supp. § 6653); the plea alleging in terms that it was filed under the provisions of that act. The act provides that, where an action is brought for the recovery of land, the defendant who has bona fide possession of such land under adverse claim of title may set off the value of all permanent improvements bona fide placed thereon by himself or other bona fide claimants under whom he claims, and, in case the legal title is found to be in the plaintiff, if the value of the improvements at the time of the trial exceeds the mesne profits, the jury may render a verdict in favor of the plaintiff for the land and in favor of the defendant for the amount of the excess of the value of such improvements over the mesne profits. A plea under this act should set forth not only the value of the land and the value of the mesne profits admitted to be due, but also the value of the permanent improvements which it is claimed that the possessor has placed on the land. It is to be noted that the act does not provide for a set-off of the value of any improvements except of that class which is described by the term "permanent." The scheme of the act is that the verdict should find the value of the land at the time of the trial, and the plaintiff should have the right to have the land, subject to the payment to the defendant of the excess of the value of improvements over mesne profits; and, in the event the plaintiff refuses to take the land upon these terms, then the defendant should have the right to take the land and pay to the plaintiff the value of the land and mesne profits. The plea must set forth the value of the land, the value of the permanent improvements claimed to have been placed upon the same, and the amount of mesne profits admitted to be due, because the verdict is required to set forth a finding in reference to all three; and a plea which fails to set forth the facts from which the jury can find the value of the improvements, as well as the value of the land and the amount of mesne profits, is not a sufficient plea under this act. Of course, any improvements, although permanent in their character, which were placed upon the land after suit was brought to recover the same,

cannot be the subject-matter of set-off, either under the act of 1897 or under any other law. The plea in the present case was fatally defective, for the reason that it failed to set forth the value of the permanent improvements. It is impossible to tell from the averments of the plea, taken in the light of the exhibits thereto, what is the value of the permanent improvements which were claimed to have been placed upon the land.

5. At the trial the defendant introduced no evidence, and the court, over the objection of the plaintiffs, allowed counsel for the defendant to open and conclude the argument to the jury. This ruling is assigned as error. Counsel insists that there is no law of force in this state which gives to a defendant in a civil case the right to open and conclude the argument to the jury in cases where no evidence is introduced in his behalf. It is said that the right of the defendant to open and conclude the argument in a criminal case, when he introduced no evidence, is given in Pen. Code, § 1029, and that a similar right is given to the claimant in a claim case when no evidence is introduced in his behalf under rule 13 of the superior court (Civ. Code, § 5644), and that there is nothing in the Code which gives to the defendant in a civil case the right to open and conclude the argument simply because he introduces no evidence. The statement of counsel that there is nothing in the Code in relation to the subject except the provisions above referred to seems to us to be correct; for in our investigations we have been unable to find any provision in the Code which in express terms declares that the failure to introduce evidence on the part of the defendant in a civil case gives him the right to open and conclude the argument. It has been, within the knowledge of some of the present members of this bench, the practice for more than 40 years for the defendant to take the opening and conclusion of the argument when he introduced no evidence, and not within the knowledge of any of us has the legality of this practice heretofore been brought in question. In 1849, it was held by this court that, when an equity case was submitted to the jury on the bill, answer, and replication, and the defendant introduced no evidence, he was entitled to conclude the argument before the jury. *Fall v. Simmons*, 6 Ga. 265 (1). This has been uniformly, since that time, recognized as the rule in equity cases. See *Ferguson v. Ferguson*, 51 Ga. 341 (5); *Cade v. Hatcher*, 72 Ga. 359; *Guess v. Railway Co.*, Id. 320. This court has also recognized that this is the proper rule of practice to be applied in civil cases other than equity and claim cases. *Arthur v. Commissioners*, 67 Ga. 221; *Railway Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778 (4). In 1852 the general assembly recognized, as the existing practice in civil cases, that the defendant was entitled to the open-

ing and conclusion where he introduced no testimony; for in that year an act was passed which declared: "The order of argument of counsel in criminal cases shall be the same as it now is in civil cases; that is to say, after the testimony is closed on both sides, the state's counsel shall open and conclude the argument to the jury, except in those cases in which the defendant shall introduce no testimony, but in that event the defendant's counsel shall open and conclude the argument to the jury after the testimony on the part of the state is closed." Acts 1851-52, p. 242. We have been unable to trace to its origin this practice. The right of the defendant to open and conclude the argument to the jury in cases where he introduces no testimony has been claimed in other jurisdictions, but the general rule seems to be that the defendant can secure the right to open and conclude the argument to the jury only in those cases where he pleads an affirmative plea, and thus relieves the plaintiff of the onus which rests upon him in all cases. See, in this connection, 17 Am. & Eng. Enc. Law (1st Ed.) 209; 15 Enc. Pl. & Prac. 186, 187; 1 Thomp. Tr. § 254; 2 Elliott, Gen. Prac. § 543; Bailey, Onus Probandi, § 624; *Worsham v. Goar*, 4 Port. 441 (6). Without reference to what was the origin of this practice in this state, or whether the practice is founded upon sound reasons or not, we will not now disturb that which has been the uniform practice for more than half a century, which has been expressly recognized by the general assembly more than 50 years ago, and which has been allowed to prevail, both by the bench and bar, during that period of time.

6. Error is assigned, in Mrs. Bentley's motion for a new trial, upon the refusal of the judge to allow W. A. Carey, her guardian, to testify that when he paid over to her her part of the proceeds of the sale, which he had collected from Moore, the administrator of her grandfather, it was stipulated that the payment from him to her of this amount should have no other effect than to transfer the fund to her possession, and that she received the fund from him upon the express condition that her rights in the land which the administrator had bought should not be affected by her taking possession of the money. We think the court erred in refusing to admit this testimony. On the question as to whether Mrs. Bentley had ratified the purchase by the administrator at his own sale, it was not only necessary that it should be shown that she had full knowledge of all the facts, but that she accepted the money in full satisfaction of any claim or demand which she might have upon the administrator. The mere payment by her guardian to her of the money would not alone be sufficient to show that she received the same in satisfaction of her claim upon the administrator of the estate. If she afterwards retained the money, and use^d it, or did any

other act indicating her purpose to treat the amount received as a settlement of her claim, of course this would amount to a ratification; but if she simply received from her guardian the amount in his hands, and held it for the purpose of tendering it back to the administrator at the proper time, and did not use the same, or exercise any acts of ownership over it to indicate that the amount was received in satisfaction of her claim against the administrator, and did subsequently tender the same back to him, then a finding that she had ratified the sale would not be authorized. This evidence should have been admitted, in order that the jury might pass upon the question as to whether, after having been informed of all the facts in connection with the sale of the property in which she was interested, she elected to receive the money as her own, and thus discharge the administrator from further liability; or whether, after having arrived at age, she received the money from her guardian simply that it might pass into her possession, where it lawfully belonged, in order that she might thereafter herself deal with the administrator in reference to the fund, instead of through the medium of her former guardian.

Judgment in each case reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 965)

TOWNER et al. v. GRIFFIN.

(Supreme Court of Georgia. July 19, 1902.)

LETTERS OF ADMINISTRATION—APPLICATION.

1. An application for letters of administration, which fails to allege that the applicant is an heir at law of the decedent, or a creditor of the estate, or any other reason which, under the law, would entitle the applicant to the administration, should be dismissed upon motion made on that ground by caveators appearing at the hearing, who are heirs at law of the decedent.

(Syllabus by the Court.)

Error from superior court, Glascock county; H. M. Holden, Judge.

Application by David Griffin for letters of administration. From an order granting the same, W. A. Towner and others bring error. Reversed.

B. F. Walker, for plaintiffs in error. Seaborn Reese, for defendant in error.

COBB, J. Griffin applied for letters of administration de bonis non with the will annexed upon the estate of Towner. Certain persons, describing themselves as heirs at law of Towner, appeared, and moved to dismiss the application, upon the ground that it did not appear therefrom that the applicant was a creditor of the estate, or an heir at law of the testator, or in any way interested in

the estate. The court overruled this motion, and the case proceeded to trial upon various grounds of caveat, one of them being that there was no necessity for administration. A judgment was entered in the court of ordinary, appointing one of the caveators administrator upon the estate. The caveators appealed to the superior court, and in that court a motion to dismiss the application was again made and overruled by the court. Exceptions pendente lite were filed to this ruling. The case proceeded to trial upon the grounds of caveat, and resulted in a verdict finding that there was a necessity for administration, and designating as administrator the caveator who had been appointed by the ordinary. The caveators made a motion for a new trial, which was overruled, and the case is here upon a bill of exceptions assigning error upon the overruling of the motion to dismiss the application and upon the refusal to grant a new trial.

The Code provides that every application made to the ordinary for the granting of any order shall be by petition in writing, stating the ground of such application and the order sought. Civ. Code, § 4254. It is also provided that all objections or caveats to an order sought shall be in writing, setting forth the grounds of such caveat. Civ. Code, § 4256. It has been held that caveat to an application for letters of administration should show that the caveator is interested in the estate, either as a creditor of the estate or an heir at law of the decedent. *Williams v. Williams*, 113 Ga. 1006, 39 S. E. 474, and case cited. The reason of this rule is that a mere interloper should not be allowed to interfere where a proper application has been made for letters of administration upon the estate. A person who is not concerned in any way in the question should, of course, not be heard before the court. While there is no ruling to the effect that an application for letters of administration must show that the applicant is an heir at law, or a creditor, or for some other reason entitled to the administration, it would seem that the principle at the foundation of the ruling above referred to would apply in such a case. Except in those cases where the law authorizes the county administrator or the clerk of the superior court to be appointed administrator upon an estate, the law does not recognize the right of any one to be appointed administrator, unless he is an heir at law of the decedent, or a creditor of the estate, or otherwise interested therein as legatee or devisee, or has been selected by a majority of the heirs at law as administrator, or has been associated as co-administrator with one who is entitled to the administration for some one or more of the reasons just referred to. Civ. Code, § 3367. No other person than those just referred to is entitled to be appointed administrator; and it would seem that no other person should be allowed to file an application for letters of administration, and thus involve the estate, and

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 90.

those interested therein, in the expense necessary to determine whether an administration is necessary, or to defeat the application of a mere intermeddler. If the heirs and creditors and all other persons interested in the estate are satisfied to allow the same to go unrepresented, it is no concern of one who has no interest whatever in the estate. In the present case the application does not allege that the applicant has any interest whatever in his own right in the estate, or that he represents, either as next friend or otherwise, any one who is interested in the estate. He does not show, upon the face of his application, that he has any right to bring before the court the question as to whether administration should be had upon the estate. The section of the Code which requires that every application made to the ordinary must state "the ground of such application," when applied to a petition for letters of administration, means that the applicant must show in his application that he has such an interest in the estate, either in his own right or as the representative of some other person, as would authorize him to bring the estate before the court, in order that it might determine whether there should be representation thereon. See, in this connection, 1 Woerner, Adm'n (2d Ed.) *562, § 261. It is said, though, that this court has held in *Beale v. Hall*, 22 Ga. 431, that "the pleadings need not aver the grounds upon which an administrator is entitled to the letters, even if the letters express them." It will be found upon an examination of that case that the question now under consideration was not involved. That was an action of trover, brought by an administrator, and it was simply held that the pleadings in the trover case need not contain any averment of the grounds upon which the administrator was entitled to the administration. Nor is there anything in the case of *De Lorme v. Pease*, 19 Ga. 220, in conflict with the ruling now made. That was an action of ejectment, brought by an administrator; and when he offered in evidence the judgment of the court of ordinary appointing him, thus showing his authority to sue, it appeared therefrom that he was not the applicant, but that he was appointed at the hearing of an application brought by another person, without a new citation having been issued. It was held that the ordinary had authority to appoint a person other than the applicant without issuing a new citation. The question now under consideration—as to whether the application must show, as against an objection made before any appointment has been made, that the applicant is so interested in the estate as to be entitled to the administration—was not involved in that case. Neither was this question involved in the case of *Mandeville v. Mandeville*, 35 Ga. 243. That was a contest over an application for administration. The applicant was an heir

at law, and interested in the estate, and hence had a right to apply for the administration. The caveators were also heirs at law, and were in number two-thirds of those interested in the distribution of the estate. In their caveat they set up that the applicant was not a proper person to administer, and also that they had selected another one of the heirs at law as administrator. It was held that the court had authority to appoint a person other than the applicant, without issuing a new citation; and that, where a majority of the next of kin of the decedent agree upon one of their number as administrator, the ordinary must appoint him. The court erred in overruling the motion to dismiss the application for administration upon the ground that it did not appear therefrom that the applicant had a right to file the same.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 965)

HEIDT v. HEIDT et al.

(Supreme Court of Georgia. July 19, 1902.)

WILL—CONSTRUCTION—PROPERTY DEVISED.

1. A father executed a will, by the terms of which a described tract of land, containing 800 acres, was, after his death, to go to four named children. In this will the testator declared: "Should either or each of said heirs improve any portion of said land before division between themselves, it is my will and desire that one who does the improving be entitled to that portion of said [land] improved." One of these children, a son, in reliance upon the will, and with the father's knowledge and consent while in life, built a dwelling and certain outhouses on a portion of the land, and thereafter died before the father. *Held*, that under this state of facts, the son's sole heir could not recover from the representatives of the testator's estate any particular 200 acres, or other definite portion, of the entire tract mentioned in the will; this being so for the reason that, even if what occurred between the father and son, and the latter's acts in pursuance thereof, could be said to operate as a parol gift of land followed by the erection of valuable improvements thereon, it would be impossible to ascertain to what particular portion of the tract such gift applied.

2. There was no error in granting a new trial in this case.

(Syllabus by the Court.)

Error from superior court, Effingham county; P. Seabrook, Judge.

Action by O. N. Heidt against E. E. Heidt and others. Verdict for plaintiff. From an order granting a new trial, he brings error. Affirmed.

H. B. Strange and D. H. Clark, for plaintiff in error. A. C. Wright, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

115 Ga. 882)

CLARKE v. HAVARD.

(Supreme Court of Georgia. July 18, 1902.)

ACTION ON NOTE—DIRECTING VERDICT—EVIDENCE.

1. Where the only defense to a suit on a promissory note was that the loan for which it was given was usurious, in that the broker who negotiated the loan, and who charged commissions for his services out of the money loaned, was the agent of the lender, who knew of and acquiesced in that method of compensating the broker; and where the uncontradicted evidence showed that the broker was the agent of the borrower, and not of the lender,—it was not erroneous to direct a verdict for the plaintiff for the full amount appearing to be due on the note.

2. Evidence that papers pertaining to a loan were sent to a given point, inclosed in a letter, is admissible without the necessity of introducing the letter itself; the contents of the letter not being in any way involved in the controversy, and no attempt being made to offer proof in regard thereto.

(Syllabus by the Court.)

Error from city court of Atlanta; **H. M. Reid**, Judge.

Action by **Agnes H. Havard** against **Manda A. Clarke**. Judgment for plaintiff, and defendant brings error. Affirmed.

R. O. Lovett, for plaintiff in error. **Anderson, Anderson & Thomas**, for defendant in error.

FISH, J. This is the second time this case has been before us. On the first trial the judge of the court below directed a verdict for the plaintiff for the full amount sued for, and this court reversed the judgment. See *Clarke v. Havard*, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499, where the facts upon which the decision was founded are fully set forth. The case was tried a second time, and again the court directed a verdict for the plaintiff; and upon this ruling, as well as certain rulings of the court in regard to the admission of evidence, the case is now here for review.

1. It is clear that, unless the evidence contained in the record now before us is different from that which was introduced on the first trial of the case, the judgment should again be reversed. We find, however, that the facts disclosed by this record make quite a different case from that in 111 Ga., 36 S. E., 51 L. R. A. The grounds upon which the judgment of reversal was rendered when the case was formerly before this court were that the evidence warranted a finding that **Barnett** was the agent of the *Security Investment Company* for the purpose of making a loan to **Manda A. Clarke**; and also warranted a finding that the lender knew that **Barnett** was charging a commission for his services, and tacitly authorized the making of such a charge, thus rendering the loan obnoxious to the laws against usury. It appeared on that trial that the jury would have been authorized to find that **Barnett** kept on hand money belonging to the *Security Investment Company* for the purpose of lending it out

as satisfactory applications were made to him; that **Barnett** alone passed upon the applications submitted to him, and approved or disapproved the security offered him; that the lender must necessarily have known that **Barnett** received compensation for his services as a broker out of the amounts advanced to borrowers; and that **Barnett's** testimony that he was not the agent of the lender was simply the statement of his conclusion from the facts given. It also appeared that the application for the loan, which in terms expressly made the broker the agent of the borrower, was dated 17 days later than the day on which the note was signed; and in this connection *Presiding Justice Lumpkin* in the opinion (page 246, 111 Ga., page 839, 36 S. E., and 51 L. R. A. 499) pertinently asks: "Could not the jury have found, and ought they not, in view of all the evidence, to have found, that the contract embraced in the application was purely colorable?" On the second trial much that was before obscure or misleading was explained. It appears from the uncontradicted evidence that the original application for a loan was made to **Barnett** by the husband of the defendant. This was some time in January, 1896. **Barnett** testified: "There was an application made at the time he came in,—a rough application. It was a statement taken down in pencil first, and then it is from that rough application that we prepared the application that is subsequently made, which is forwarded to the lender when we are asking him to accept it, to state whether or not he would accept the loan." Subsequently the witness prepared a typewritten application, which was signed by the defendant, and forwarded to the *Georgia Loan & Trust Company of Macon*. After the lapse of a few days, the application was returned accepted, and with it a check for the amount of the loan, and all the papers to be signed by the defendant. The note and security deed were signed on January 21, 1896, but the note, for convenience, was dated January 1st, a rebate being allowed for the interest from January 1st to January 21st. *Beardsley*, a member of the copartnership known as the *Security Investment Company*, swore: "I do not know **Samuel Barnett**, of Atlanta, Ga. Never saw him, and he is not connected with the *Security Investment Co.* He has no right to make loans for the *Security Investment Co.* without first submitting them for acceptance. He is not the agent for the *Security Investment Co.*, and I do not know him. * * * I had no knowledge as to what compensation, if any, was paid by **Manda Clarke** to **Samuel Barnett** for procuring the loan from the *Security Investment Co.* **Samuel Barnett** was not the agent of the *Security Investment Co.* in making the loan to **Manda Clarke**." The evidence above outlined was not contradicted. Two results therefore follow: As to the agency of **Barnett**, the case falls within the ruling in *Merck v. Mortgage Co.*, 79 Ga. 213,

7 S. E. 265, from which it was specially excepted in the opinion in 111 Ga., 36 S. E., and 51 L. R. A.; and, conceding that Barnett was the agent of the Security Investment Company (the contrary of which we think was clearly shown), the case is then controlled by the ruling in the case of McLean v. Camak, 97 Ga. 804, 25 S. E. 493, for there is no evidence whatever to show on the part of the lender any connivance at, or even knowledge of, the alleged usurious charge for commission made by the intermediary. We are therefore clearly of the opinion that the court below did not err in directing a verdict for the plaintiff for the full amount of principal and interest sued for.

2. There is nothing in the objection made by the defendant to the evidence of Barnett that he placed the application for a loan in a letter, and sent it to Macon; the objection being that the evidence was not competent without the letter. It was not sought to prove, by parol or otherwise, the contents of the letter. The fact that the letter was sent was incidental to the submitting of the application to the lender, and the evidence to that effect could certainly do no harm to the defendant.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 313)

**DU VALL v. CITY COUNCIL OF
AUGUSTA.**

(Supreme Court of Georgia. July 17, 1902.)

**INTOXICATING LIQUORS—ILLEGAL SALE—
EVIDENCE.**

1. Even if an accusation in a police court, charging a person with the sale of "intoxicated" liquors, can be properly construed to charge the sale of intoxicating liquors, a judgment finding such person guilty is erroneous when the only evidence as to the character of the liquor sold is that it was beer, the evidence not showing what kind of beer it was, or that it was an intoxicating liquor.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Lillie Du Vall was convicted of selling intoxicated liquors on Sunday, and brought certiorari. From an order overruling the certiorari, she brings error. Reversed.

Sam. F. Garlington, for plaintiff in error.
Wm. H. Barrett, for the State.

SIMMONS, C. J. In the recorder's court of the city of Augusta, Lillie Du Vall was tried and convicted on a charge of selling "intoxicated" liquors on Sunday. The accusation was demurred to on the ground that it set out no offense against any of the ordinances of the city. The demurrer was overruled, and the case proceeded to trial. Two witnesses testified that after 12 o'clock on a certain Saturday night they purchased a bottle of beer of a woman in the employment of the defendant, and paid her there-

for in the presence of the defendant. The recorder found the defendant guilty, whereupon she sued out a writ of certiorari from the superior court, alleging that it was error to overrule the demurrer, and that the judgment of guilty was without evidence to support it, as the evidence did not show that the liquor sold was intoxicating. Upon the hearing the certiorari was overruled. The plaintiff in certiorari excepted.

We think it very doubtful whether the charge was well founded under the ordinance of the city. That ordinance makes it penal for any dealer in intoxicating liquors, or any other person, to sell spirituous, vinous, or fermented liquors after certain hours at night. The charge in the present case was of selling "intoxicated" liquors. This is to us a new kind of liquor, and is not mentioned in any of the books on the subject of liquors. Be that as it may, we are clear, treating the charge as relating to intoxicating liquors, that the case was not made out. If the charge amounted to an accusation of unlawfully selling intoxicating liquors, then the proof should have shown that the liquors sold were intoxicating. There was no evidence as to the kind of beer which was sold. There are many kinds of beer made and used, such as potato beer, persimmon beer, rice beer, and other beers, which are known to be not intoxicating. There is also lager beer, which may or may not be judicially known to be intoxicating, the courts differing as to this matter. The evidence in this case merely showed that the liquor sold was beer, and did not disclose what kind of beer it was. The recorder stated on the trial that he would take judicial notice that beer was intoxicating. In this, we think, he erred. Assuming that the beer sold was lager beer, the courts in the different states differ as to whether or not they will notice judicially that it is of an intoxicating nature. This court, so far as we know, has never decided the question. As in this case it was not even shown that the beer sold was lager beer, we think it cannot be assumed to have been intoxicating. The judge therefore erred in overruling the certiorari.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 339)

**ATLANTA TRUST & BANKING CO. v.
CLOSE.**

(Supreme Court of Georgia. July 19, 1902.)

**SAVINGS BANK—RECOVERY OF DEPOSIT—
EVIDENCE—DEMAND—WAIVER.**

1. A pass book given to a depositor in a savings bank, the entries in which are shown to have been made by an officer of the bank, is admissible in evidence against the bank, and is prima facie evidence that the bank is indebted to the depositor for the balance shown by the book.

[1. See Banks and Banking, vol. 6, Cent. Dig. § 300.

2. When the depositor is a nonresident, and places the collection of her account in the hands of an attorney, who presents the pass book, and demands of the bank's officers the payment of the balance shown therein, the rules of the bank allowing it to pay out deposits to any one holding the pass book, and the officers inform the attorney that they will not pay the interest claimed, but will look into the question of paying the principal, in a suit against the bank it cannot set up as a defense that the attorney had not complied with the by-laws by showing written authority from his client to collect what was due her. This objection, not having been made at the time of the demand, was waived. See *Fenn v. Ware*, 28 S. E. 238, 100 Ga. 563, and authorities cited.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by E. M. Close against the Atlanta Trust & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dorsey, Brewster & Howell and Hugh M. Dorsey, for plaintiff in error. Ben J. Conyers, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 950)

HARRIS v. DAVIS et al.

(Supreme Court of Georgia. July 19, 1902.)

HUSBAND AND WIFE—SEPARATION—ARBITRATION AS TO PECUNIARY OBLIGATIONS—ALIMONY—RIGHTS OF DOWER.

1. Where a husband and wife, reciting that they have voluntarily separated, but fail to "agree upon any sum in satisfaction of the claims of the wife upon the husband for alimony as allowed by law, and all other demands of a pecuniary nature that might or could arise under the law," submit to arbitration "the matters in dispute between them touching alimony and all pecuniary obligations under the law of all kinds whatever," empowering the arbitrators to award to the wife a sum certain, to belong absolutely to her, which shall be "final and forever conclusive upon the parties in regard to alimony and all pecuniary obligations due from the husband to the wife," and an award is made in accordance with such submission, and entered as the judgment of a court of competent jurisdiction, the sum so awarded being paid to the wife, and accepted and used by her, she living thereafter separate and apart from the husband, such award has the force and effect of a decree granting permanent alimony. Civ. Code, § 2464 et seq.

2. Under Civ. Code, § 2472, the allowance of permanent alimony to a wife bars her of her rights of dower and year's support from her husband's estate.

(Syllabus by the Court.)

Error from superior court, Newton county; Z. A. Littlejohn, Judge.

Action by L. F. Harris against John B. Davis, administrator, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jas. F. Rogers and J. G. Lester, for plaintiff in error. Capers Dickson and E. F. Edwards, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 866)

GREER et al. v. WAXELBAUM.

(Supreme Court of Georgia. July 18, 1902.)

ACTION AGAINST FIRM—PETITION—AMENDMENT.

1. A petition in an action brought against a partnership described as the firm of "A. & B.," and alleged to be composed of the individuals A. and B., is not amendable so as to make the action one against a partnership described as the firm of "C. & B.," and composed of the individuals C. and B. A partnership being an entity, one described as the firm of "C. & B.," and composed of the individuals C. and B., is necessarily a different entity from a partnership described as the firm of "A. & B.," and composed of the individuals A. and B.

2. Where, to an action of the nature above indicated, an improper amendment of the kind mentioned was allowed, the error thus committed vitiated the entire proceeding, and all subsequent steps therein should be treated as altogether nugatory and void.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by J. J. Waxelbaum against Greer & Arnold. Judgment for plaintiff. Defendants bring error. Reversed.

Walter T. Colquitt, for plaintiffs in error. S. K. Abbott and Abbott & Greer, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 959)

NEAL-MILLARD CO. v. OWENS.

(Supreme Court of Georgia. July 19, 1902.)

PROCESS—VALIDITY—AMENDMENT—SERVICE.

1. Where a defendant in a pending suit is served with a process in which an entirely different person is named as defendant, such process is, as to the person served therewith, no process at all; and the name of the real defendant cannot, by amendment at the trial term of the case, be substituted for the person named in the process. In such a case, it is proper to sustain a timely motion made by the defendant, to vacate the entry of service upon him made by the sheriff.

(Syllabus by the Court.)

Error from superior court, Chatham county; P. Seabrook, Judge.

Action by the Neal-Millard Company against Mary H. Owens. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Oliver, for plaintiff in error. Wm. P. Hardee, for defendant in error.

COBB, J. The Neal-Millard Company filed, in the office of the clerk of the superior court of Chatham county, a petition against Hampton J. Herb and Mrs. Henry H. Owens. The process annexed to the petition stated the case as "Neal-Millard Company v. Hampton J. Herb and Ed. L. Prince;" and in the body of the process "the defendants, Hampton J. Herb and Ed. L. Prince," were required to appear at the next term of the court to answer the plaintiff's petition. The process was dated August 13, 1901. On the back of the petition, the case was stated as the "Neal-Millard Company v. Hampton J. Herb and Mrs. Mary H. Owens." Mrs. Mary H. Owens was duly served personally with a copy of the petition and process, an entry to this effect being made on the petition by the sheriff. On November 30, 1901, Mrs. Owens filed in the office of the clerk a petition praying that the court "pass an order vacating the said entry of service of said copy of the writ upon her by said sheriff." On December 14, 1901, the plaintiff offered to amend the process by striking out the name of Ed. L. Prince wherever it occurred, and inserting in lieu thereof the name of Mrs. Mary H. Owens. Mrs. Owens objected to this amendment; and the court, after hearing argument upon the motion to amend, and the motion to vacate the entry of service, took the case under advisement, and on January 16, 1902, rendered a judgment disallowing the amendment, and sustaining the motion to vacate the entry of service. To this judgment, the plaintiff excepted.

The Code provides that "no technical or formal objections shall invalidate any petition or process, but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded." Civ. Code, § 4904. It is also provided that "the mistake or misprision of a clerk or other ministerial officer shall in no case work to the injury of a party, where by amendment justice may be promoted." Id. § 5125. The Code contains the further provision that "void process, or where there is no process or waiver thereof, cannot be amended, but if service be acknowledged by the defendant, and, upon hearing testimony, the court becomes satisfied that process was waived by the defendant, and that, at the time such service was acknowledged, by accident or mistake the entry of such waiver was omitted, such omission may be supplied by amendment nunc pro tunc." Id. § 5109. There is no evidence of a waiver of process by Mrs. Owens; and therefore the question to be determined is whether the process served upon her was void for the reason that, although she was named in the petition as one of the defendants to the suit, her name did not appear anywhere in the process annexed thereto, but the same contained the names of one of the persons named in the petition as defendants, and of another person who had

no connection with the case. This is the only question to be determined; for it will be conceded that a void process is not amendable, and that a mere irregularity in a process can be cured by amendment.

"Process is the means whereby a court compels the appearance of a defendant before it, or a compliance with its demands." 20 Enc. Pl. & Prac. 1101. To every petition there must be annexed a process, unless the same be waived. Civ. Code, § 4974. Where no process is attached to the petition, and process is not waived by the defendant, service of the petition upon him does not give the court jurisdiction to render a judgment against him. In such a case, process cannot be supplied by amendment at the trial term, and service be perfected. *Ross v. Jones*, 52 Ga. 22; *Killen v. Compton*, 60 Ga. 117; *Scarborough v. Hall*, 67 Ga. 576; *McGhee v. Mayor, etc.*, 78 Ga. 790, 3 S. E. 670; *Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825; *Nicholas v. Assurance Co.*, 109 Ga. 621, 34 S. E. 1004. A void process is equivalent to no process, and the same result would follow from attaching a void process as from a failure to attach any process whatever. Was the process in the present case void, or was the substitution of another name for that of Mrs. Mary H. Owens such a clerical misprision or irregularity as could be cured by amendment? If, in order to give the court jurisdiction of a proceeding brought, against a defendant, he must either have been served with a mandate from the court to appear, and answer the plaintiff's demand, or must have waived such demand, it would seem to follow, as a necessary corollary from this, that the service upon a defendant of a process commanding some one else to appear in court would be no process at all as to the defendant, and he would have a right to utterly disregard the same. When, after the service of such a process, the sheriff enters a return that the defendant has been served with the petition and process, the fact that he may institute a proceeding to have the entry of service vacated, and by so doing show that he has had notice of the pendency of the suit, ought not to put him in any worse position than if there had been no return of service, and he had treated the whole proceeding as a nullity so far as he was concerned. We do not think it is a purely technical or formal objection for a defendant to urge that he has not been served with process requiring him to appear in court; or that a process which commands a person other than the defendant to appear in court can be said to substantially conform to the law relating to process. If this is true, then the mere fact that the defendant may have had notice of the pendency of the suit against him would authorize the court to proceed to enter a judgment against him in the proceeding which had been instituted without any valid service upon him.

It was argued that, inasmuch as the process in the present case was valid as to the

defendant Hampton J. Herb, it could not be treated as a void process within the meaning of the statute, and therefore not amendable. This contention is not well founded. There is no reason why a process might not be valid as to one defendant, and void as to the other, even though the defendants may have been sued jointly. See, in this connection, *Stanford v. Bradford*, 45 Ga. 97; *Crayton v. Fox*, 106 Ga. 853, 33 S. E. 42. Several cases were cited by the plaintiff in error, but none of them are controlling upon the point made, and we are not disposed to extend the rulings therein made to a case like the present. While the decision in *Cochran v. Davis*, 20 Ga. 581, that the decisions made by the supreme court as to the want of original process do not apply to a defect in the copy process, might be distinguished upon the idea that that point was really not involved in that case, still the principle of that ruling does not conflict with the decision made in the present case. Here, the defect is in the original process, and not the copy. In *Smith v. Morris*, 29 Ga. 339, the process referred merely to "the defendant," without stating any name. The court held that the declaration and the process must be taken together, and, the name of the defendant being stated in the declaration, the process was not defective merely because it omitted to name the defendant. This decision is not at all in conflict with the present ruling. The declaration having been served on the defendant named therein, together with a process commanding "the defendant" to appear in court at a specified time, he was bound to know that the process referred to the person named in the declaration. But where an entirely different name is stated in the process as defendant, the case is wholly different. In *Baldwin v. McMichael*, 68 Ga. 828, it appears from the record of file in the office of the clerk of this court that the name of the defendant was not stated at all in the body of the process, but that, in the caption of the process, the defendant was stated to be an entirely different person from the one named as such in the declaration. The court held that this defect in the caption of the process did not render the process void, but the defect was amendable. In *Smith v. Morris*, supra, it was held that the omission of the name of the defendant from the process did not render the same void. The caption to the process is no part of the process, and might be altogether omitted without affecting the validity of the process. This being so, when, in the body of the process, "the defendant" is commanded to come into court, this word "defendant" refers to the person named in the declaration as such, and a defendant served with such a process has no right to look to the caption to ascertain who is commanded by the court to appear and answer the plaintiff's demand. Under this view of the *Baldwin* case, the

decision made therein does not conflict with the ruling now made. In *Mitchell v. Long*, 74 Ga. 94, it was held that a process which did not contain any direction to the officer of court to execute it was not void. Where the process contains a command to the defendant to appear in court at a certain time for a specified purpose, and where this process is actually executed by the proper officer, the mere fact that the formal direction to the officer to execute the process is omitted therefrom would be at most a mere clerical omission or irregularity, which could be cured by amendment. That decision is clearly distinguishable from the present ruling.

In *Railroad Co. v. Benson*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446, it was held that where the declaration prayed for process requiring the defendant to appear at the August term of the court, that being the next regular term, and the process attached by the clerk commanded the defendant to appear at the next term, to be held "on the first Monday in July," and the defendant by counsel appeared at the August term, and moved to dismiss the case because the process was void, the court, having jurisdiction of the case, could allow the process to be amended. The erroneous statement of the date in the process was held to be such a technical or formal defect as could be cured by amendment. The process referred to in that case was clearly not void, it containing all of the requirements of a valid process. The defendant was chargeable with knowledge of the law which fixed the time for holding the next regular term of the court in August, and therefore he must have known that the date stated in the process was a clerical error. Knowing this, it was his duty to disregard the date named in the process. This was the theory upon which that case was decided, and there is nothing in the facts of the case to make the decision controlling in the present case.

In *Scudder v. Massengill*, 88 Ga. 245, 14 S. E. 571, it was ruled that process annexed to a declaration is not void because, in stating the case, it misdescribes it by inserting a name as plaintiff different from the name of the plaintiff in the action as shown by the declaration. Such misdescription is amendable at any time, either before or after judgment. It appears from the facts of that case that the defendant acknowledged due and legal service, and waived copy, copy process, and all other and further service by the sheriff. The defendant testified that he intended to waive everything that was necessary to give the court jurisdiction of the case; and it was further held that the acknowledgment of service could be amended so as to insert the words "original process" for the words "copy process" appearing therein. If the defendant had waived process, he of course could not afterwards make the point that the process was defective. It

was therefore entirely unnecessary for the court to make the ruling first above stated, even if such ruling can be said to conflict with the decision made in the present case. But that ruling does not conflict with the decision made in the present case. The process served on the defendant in the present case was, so far as she was concerned, no process at all. It did not contain any demand upon her to do anything. The process in the Scudder Case did command the defendant to come into court on a specified day, and it was incumbent upon him to obey this command. If, when he came into court in obedience to this requirement, he had not been prepared to defend a suit brought by the person named in the petition as plaintiff, the court would doubtless have extended him time to prepare his defense. In the present case, the defendant had a right to treat the process served on her as no process at all; and, this being so, the absence of process could not be cured by amendment at the trial term. The suggestion in *Gaines v. Bankers' Alliance*, 113 Ga. 1140, 39 S. E. 502, that such a defect in process as the one appearing in the present case could be cured by amendment, was not made in response to any point raised in that case, and hence what was said is not to be regarded as a precedent binding upon us in the present case.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 939)

FIREMEN'S FUND INS. CO. v. SIMS.

(Supreme Court of Georgia. July 19, 1902.)

INSURANCE—REQUIREMENTS OF POLICY—EXAMINATION OF INSURED.

1. A requirement in a policy of fire insurance that the insured shall submit to an examination under oath touching the matters relating to the risk assumed by the company and the destruction of the property insured is binding and valid, and a refusal to comply with this condition will preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until after a compliance with such condition.

2. Where the insured voluntarily absents himself in such a manner that he cannot be found for the purpose of examination under oath, his absence will be taken as equivalent to a refusal, where the company has in due time elected to require such examination, and made all reasonable efforts to notify the insured of the requirement. In such a case neither the insured nor any one claiming under or through him can maintain an action on the policy until after the insured has complied with such requirement.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by G. H. Sims, trustee in bankruptcy of E. G. Coffman, against the Firemen's Fund Insurance Company. Judgment

for plaintiff, and defendant brings error. Reversed.

King & Spalding, for plaintiff in error. Brown & Randolph, Felder & Rountree, and Payne & Tye, for defendant in error.

COBB, J. Suit was brought by Sims as receiver in bankruptcy appointed to take charge of the assets of E. G. Coffman, who had been adjudged a bankrupt, against the Firemen's Fund Insurance Company upon a policy of fire insurance which had been issued to Coffman. By an amendment the name of Sims, trustee in bankruptcy, was substituted for that of Sims, receiver, as a party plaintiff. The case was submitted to the trial judge upon an agreed statement of facts, and he rendered a judgment in favor of the plaintiff, to which judgment the insurance company excepted. It appears from the agreed statement of facts that, immediately after the fire occurred which destroyed the property covered by the policy sued on, Coffman, the insured, gave the company notice of the fire, as required by the terms of the policy. Shortly thereafter Coffman voluntarily left the city of Atlanta, the place of his residence, and since that time his whereabouts have been unknown. A few days after Coffman's departure certain of his creditors filed a petition in the United States court to have him adjudicated a bankrupt, which was accordingly done, and at the instance of these creditors Sims, the defendant in error, was appointed receiver in bankruptcy, and directed by the court to make the formal proofs of loss required by the policy sued on, and collect the amount due thereon. Proofs of loss were made out in due time by the receiver, and verified by the affidavits of three persons, who made oath that the facts stated in the proofs of loss were true, to the best of their knowledge and belief. One of these persons was an agent of Coffman, who had been in control of the property destroyed. Daniel W. Rountree, Esq., as "attorney at law of Coffman," also concurred in the proofs of loss made out by the receiver, but it does not appear that he had any express authority from Coffman to make proofs of loss. When this paper was tendered, the company, without admitting or denying liability under the policy, declined to receive the same as proofs of loss, placing its refusal upon that stipulation in the policy which required the insured to make out and verify the proofs of loss. The company took no exception to the contents of the paper furnished by Sims, but stood upon its supposed right to have the insured personally make the proofs. At the time the company objected to the proofs of loss submitted it also demanded that Coffman, the insured, should submit to an examination under oath by the company, and should subscribe to such examination when made; the date upon which and the place where such

¶ 1. See *Insurance*, vol. 23, Cent. Dig. § 1254.

examination was to be held being set forth. This demand was based upon the following stipulation in the policy: "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath by any person named by this company, and subscribe the same, and as often as required shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." The policy further provided that no suit could be maintained thereon until after a compliance by the insured with the conditions therein set forth, the one above quoted being of that number.

Three contentions are made by the company: First, that the plaintiff, Sims, had no authority under the bankrupt act to maintain a suit as receiver in bankruptcy for the benefit of creditors; second, that proofs of loss must have been furnished by the insured before a recovery could be had on the policy, and that the proofs submitted did not constitute a substantial compliance with the terms of the policy; third, that no recovery could be had on the policy until the insured had complied with the demand of the company to submit to an examination under oath. Inasmuch as we have reached the conclusion that the contention last referred to was well taken, it is not necessary to pass upon the other two. The authorities seem to hold that an agent for the insured can make the proofs of loss when the insured is absent at the time the fire occurred, and the agent is in a position to furnish the information necessary to complete the proofs of loss, or when the insured is in a position where for any reason it would be impossible for him to make the proofs and the agent possesses the necessary information. See 13 Am. & Eng. Enc. Law (2d Ed.) 332; Insurance Co. v. Bell, 63 Ill. App. 67 (1); Id., 166 Ill. 400 (1), 45 N. E. 130, 57 Am. St. Rep. 140; Insurance Co. v. Grunert, 112 Ill. 68 (3); Sims v. Insurance Co., 47 Mo. 54 (1), 4 Am. Rep. 311; O'Conner v. Insurance Co., 31 Wis. 160 (4); Warren v. Insurance Co. (Tex. Civ. App.) 35 S. W. 810. In Walsh's Adm'r v. Insurance Co., 54 Vt. 351, it was held that if the insured was absent, and his agent could not make the proofs of loss, equity might grant relief. And it has been held that an attaching creditor might, where the insured was absent, make the proofs by taking the depositions of the insured and the testimony of other witnesses. See 13 Am. & Eng. Enc. Law (2d Ed.) 333. We have not, however, found any authority which goes to the extent of holding that a creditor can, where the insured fails or refuses to make the proofs of loss, prepare and file such proofs on information received from third persons. It was

argued that, as the policy provided that the word "insured" wherever it appeared therein should include the legal representative of the insured, the receiver in bankruptcy might make the proofs, he being comprehended within the term "legal representative." It would seem, however, that the words "legal representative" as used in the policy refer to an executor or an administrator. See 18 Am. & Eng. Enc. Law (2d Ed.) 813. These questions, however, we expressly leave open, placing our judgment of reversal upon the conclusions which will be stated below.

The general rule as to the validity of the requirement that the insured shall submit to an examination under oath is thus stated in the American & English Encyclopædia of Law (volume 13, p. 358): "As the facts with respect to the amount and circumstances of a loss are almost entirely within the sole knowledge of the insured, and the opportunity and temptation to perpetrate a fraud upon the insurer is often great, it is necessary that it have some means of cross-examining, as it were, upon the written statement and proofs of the insured, for the purpose of getting at the exact facts before paying the sum claimed of it. Such considerations justify the provision, universally to be met with in policies, requiring the insured as often as demanded to submit to an examination under oath touching all matters material to the adjustment of the loss, and provisions of that character are held to be reasonable and valid." In Gross v. Insurance Co. (C. C.) 22 Fed. 74, the insured refused to submit to such an examination, and it was held that he could not recover. See, also, Bonner v. Insurance Co., 13 Wis. 677. In Fleisch v. Insurance Co., 58 Mo. App. 596, it was held that a stipulation in a policy of insurance of the character now under consideration was valid and binding, even to the extent that a violation thereof works an absolute forfeiture. Of course, where it is impossible for the insured to comply with this condition, or where the circumstances are such, through no fault of the insured, that he cannot submit to the examination, his failure to do so will not operate to forfeit the policy. See, in this connection, Phillips v. Insurance Co., 14 Mo. 220. But the voluntary absence of the assured, concealing his whereabouts, so that the company cannot, by the exercise of the utmost diligence, find him, would certainly not avail him as an excuse for failing to comply with the demand of the company to submit to an examination. In this connection Mr. Ostrander says: "When the assured refuses to be examined under oath, he will forfeit all right to recover, and where he absents himself in such a manner that he cannot be found for the purpose of an examination under oath his absence will be regarded as the equivalent to a refusal." Ostr. Fire Ins. p. 442, § 172.

It is insisted, however, that the insured

ought not to be allowed, by collusion it may be with the insurance company, to prevent his creditors from subjecting the amount due on the policy to the payment of his debts. The case of *Harris v. Insurance Co.*, 35 Conn. 310, is very similar to the present case, and contains a complete answer to this suggestion. There a proceeding was brought against the insurance company by persons claiming to be creditors of one who held a policy of insurance in the defendant company which had become due and payable. The policy in that case contained a stipulation very similar to the one contained in the policy sued on in the present case. The defendant set up that it had made demand on the insured to submit to an examination, and had used due diligence to notify him of the requirement, but that it had been unable to find him, and he had neglected to submit to the examination. It was held that under this state of facts the plaintiffs could not recover. In the opinion *Hinman, C. J.*, says: "Now, as the plaintiffs stand upon the right of the assured, Bass, and are in no better condition than he would be were he now prosecuting his suit for the damages caused by the loss (*Dewit v. Baldwin*, 1 Root, 138), it becomes important to determine whether the stipulation for his personal examination is a condition precedent to his right under the policy. The plaintiffs insist that it is not such a condition in this case, because it does not appear that notice that a personal examination was required has ever been brought home to the assured. If this was so in consequence of the fault of the defendants, there would doubtless be force in the suggestion. But the defendants have not been in fault. Having used due diligence to notify the assured that they required the performance of this stipulation, they clearly ought not to be held to have waived its performance. If the assured has intentionally absented himself so that he cannot be notified that performance of the stipulation is required, he should be held to have had notice. And if for any cause, whether by his fault or otherwise, he cannot be notified, that may be his misfortune, or the misfortune of those claiming under or through him, but is no reason for treating as inoperative an important stipulation which the defendants saw fit to require, and the assured to give, as a condition which was to be complied with before there could be any obligation to pay for the loss." In the present case the plaintiff represents those who claim under and through Coffman, the insured, and their right to recover must necessarily depend upon whether Coffman could recover had he instituted the action. It does not lie in their mouths to complain that Coffman may by collusion with the insurance company prevent them from getting possession of a fund which they could subject to the payment of their debts if it were paid over

to him. They are in no worse position with respect to this matter than if Coffman had not left his home, but had failed or refused to comply with this condition in the policy, or with any other a failure to comply with which would have operated as a forfeiture of the policy. We think the stipulation under consideration in this policy is a valid and binding one; that a failure or refusal to comply with its requirements, without any fault on the part of the insurer, will operate as a forfeiture of the policy; and that no recovery can be had thereon either by the insured or any one claiming under or through him; and, as this would be so without regard to whether proofs of loss had been submitted and accepted or not (see *Insurance Co. v. Schueller*, 60 Ill. 465), it is wholly unnecessary to determine whether the proofs of loss submitted in the present case were a sufficient compliance with the terms of the policy.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 814)

JONES v. STATE (two cases).

(Supreme Court of Georgia. July 17, 1902.)

CRIMINAL LAW—WRIT OF ERROR—DISMISSAL—CONTINUANCE—INDICTMENT—DEMURRER—PLEA IN ABATEMENT.

1. The supreme court will dismiss the writ of error based upon a bill of exceptions, assigning error upon the overruling of a demurrer to an indictment, when it appears that after such bill of exceptions had been sued out a nolle prosequi was, in the court below, entered upon the indictment.

2. It does not follow, because a criminal case was called for trial on the day after that upon which the bill of indictment was returned, that the accused had not had sufficient opportunity to prepare for his defense, when it appears that he had for some time been under indictment for the identical offense charged in that indictment, and that it in fact took the place of a previous indictment upon which a nolle prosequi had been entered.

3. An indictment good in substance will not be quashed upon a demurrer which in mere general terms characterizes it as "vague, uncertain, and indefinite," without pointing out any particulars in which it is so.

4. The words, "contrary to the laws of said state, the good order, peace, and dignity thereof," appearing at the conclusion of an indictment, though apparently, in their grammatical connection, referring to a preceding statement therein not relating to the commission of the act constituting the offense charged, will be held to apply to that act.

5. A special plea in abatement of an indictment, alleging the pendency against the accused of another indictment for the same offense, is certainly not good when the plea itself discloses that a nolle prosequi has been entered upon the former indictment.

(Syllabus by the Court.)

Error from superior court, Dooly county; B. D. Evans, Judge.

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 495.

Lee B. Jones was convicted of embezzlement, and brings error on two bills of exceptions. Writ of error in one case dismissed, and judgment affirmed in the other.

Allen Fort, W. J. Grace, and Anderson, Anderson & Thomas, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LUMPKIN, P. J. Lee B. Jones was indicted, in Dooly superior court, for embezzlement. On the 13th day of March, 1902, during the February term of that court, a demurrer to the indictment, which he had filed, was overruled; and thereupon he sued out a bill of exceptions in which the only assignment of error was upon the refusal of the trial court to sustain the demurrer. This bill of exceptions was certified on the 20th day of March, 1902. On the 25th day of that month, a special term of Dooly superior court was convened for the trial of criminal cases, and the solicitor general, with the consent of the presiding judge, entered a nolle prosequi upon the indictment, and immediately presented the case anew to the grand jury in session at this special term, who on that date returned a new indictment for the same offense.

This indictment reads as follows: "Georgia, Dooly county. The grand jurors selected, chosen and sworn for the county of Dooly, to wit: * * * In the name and the behalf of the citizens of Georgia, charge and accuse Lee B. Jones with the offense of embezzlement; for the said Lee B. Jones, on the 13th day of April, in the year 1898, in the county aforesaid, did then and there unlawfully and with force and arms, being then and there the president of the Naval Store and Lumberman's Bank, a corporation under the laws of Georgia, and located in said county and state, and having as such president the general management of the business and control of the funds of said corporation, and having as such president custody and control of money belonging to said corporation, did receive as such president, at divers times between May 2d, 1896, and April 15th, 1898, various sums of money, the property of said corporation, aggregating the sum of \$45,000, then and there entrusted to him as such president, to be applied by him to the use and benefit of said corporation only; did then and there embezzle, steal, secrete, and fraudulently take and carry away said sum of \$45,000 by then and there taking same out of said bank from time to time from May 2d, 1896, to April 13th, 1898, in cash, by then and there drawing out said moneys from said bank from time to time from May 2d, 1896, to April 13th, 1898, by checks, by then and there making and causing to be made false entries in the books of said bank to cover the sums so secreted, stolen, and embezzled from said bank, and by other means unknown to the grand jurors, and all with intent to embezzle, steal, secrete, and

fraudulently take and carry away the same. The fact that said Lee B. Jones had committed the above acts of embezzlement, and had stolen, secreted, and carried away said \$45,000, as above described, was not known until April 13th, 1898, but by the false and fraudulent conduct of said Lee B. Jones all these facts were concealed until said date,—April 13th, 1898. The said Lee B. Jones having been indicted for this same offense, charged as having been committed at the same time, by the grand jury of Dooly county, at the February term, 1900, and the indictment then and there returned against him having been in open court, on the — day of March, 1902, nolle prosequi on motion of the solicitor general on the grounds of certain informations: [?] Now, within six months from the date of said nolle prosequi, this indictment is preferred and returned. Contrary to the laws of said state, the good order, peace, and dignity thereof. F. A. Hooper, Solicitor General. E. W. Bullock, Prosecutor."

It does not appear that any objection to the entering of the nolle prosequi was made by the accused. On the 26th of March, the case of State v. Jones, based on the new indictment, was called for trial, and the accused moved for a continuance on the grounds: (1) That, owing to the recent return of the indictment, he had not had a sufficient time to prepare for trial; and (2) that a named witness, by whom he expected to prove certain facts material to his defense, was absent. The state met the second ground of this motion by making admissions which rendered the presence of the witness unnecessary, and the motion was then overruled. The accused thereupon presented a demurrer to the indictment, of which the following is a copy: "The defendant in the above-stated case, Lee B. Jones, comes now, and demurs to the bill of indictment in said case, and prays that the same be quashed upon the following grounds: First. Because said indictment is so vague, uncertain, and indefinite, in the portion thereof which seeks to charge said defendant with the offense of embezzlement, that the jury cannot understand therefrom the motive [?] and character of the offense charged, nor when, how, or in what manner the same was committed. Second. Because said indictment is so vague, uncertain, and indefinite as to the offense charged that defendant cannot intelligently prepare his defense thereto. Third. Because said indictment does not follow the form of indictment prescribed by statute, in that it does not allege that the facts set out constitute an offense against the final [?] laws of the state of Georgia, and does not allege that they are 'contrary to the laws of said state, the good order, peace, and dignity thereof.'" This demurrer was overruled. Before pleading to the merits, the accused filed a special plea in abatement, alleging the

pendency of a previous indictment for the same offense,—the indictment here referred to as shown by the plea itself, being that first mentioned above. This plea was stricken, and the accused sued out a second bill of exceptions, alleging error: (1) In refusing to grant him a continuance; (2) in overruling his demurrer to the second indictment; and (3) in striking his special plea in abatement.

1. The writ of error issued upon the first bill of exceptions must be dismissed. It could not be of any possible service or benefit to the plaintiff in error to reverse the judgment of the trial court in overruling the demurrer to the first indictment. Under no circumstances can the accused ever again be put on trial upon that indictment, for it has been finally and effectually disposed of in the manner above pointed out. There is no force in the argument that the jurisdiction of the superior court, after the suing out of the first bill of exceptions, was limited to a trial on its merits of the case made by that bill of indictment. That case was there to be disposed of by the court, its action thereon being subject to such judgment as might be rendered by this court in dealing with the ruling of the trial judge with respect to the demurrer to the indictment. It was conceded, by the able counsel who presented the case here for the plaintiff in error, that, had the case gone to trial and conviction in the lower court, and this court had affirmed the judgment overruling the demurrer, the conviction would stand. We can see no reason why the trial judge was not at liberty, pending the consideration by this court of the question made by the first bill of exceptions, to finally dispose of the case in any manner authorized by law. The Penal Code (section 801) declares that the solicitor general "has authority, on the terms prescribed by law, to enter a nolle prosequi on indictments." Section 957 declares that: "After an examination of the case in open court, and before it has been submitted to the jury, the solicitor general may enter a nolle prosequi with the consent of the court." The trial court, having full jurisdiction over the case, made a final disposition of it. This disposition was none the less final whether the judge correctly or incorrectly held, upon the facts made to appear to him by the solicitor general, that the case was one in which it was proper and expedient to allow a nolle prosequi to be entered. With that question we have now no concern. Suffice it to say that the case is at an end, having been finally disposed of by a solemn judgment rendered in the lower court. That judgment was in favor of the accused, and by reason thereof he is as effectually secure from any further prosecution upon the first indictment as he would be were we to reverse the judgment of which he complains in the bill of excep-

tions first sued out in his behalf. This being so, we are not called upon to pass on the merits of the questions presented by that bill of exceptions.

2. There was clearly no error in refusing to grant a continuance. While the indictment on which the accused was actually tried had been returned but a day before the trial began, he had for a very considerable time been under indictment for the same offense, and appears to have been unable to assign any satisfactory reason for his statement that he was unprepared, because of lack of opportunity, to make a defense against the charge preferred against him.

3. The first and second grounds of the demurrer interposed to the second bill of indictment were in their nature decidedly loose and general. Neither of them pointed out in what respect the accused regarded the indictment as insufficient, or for what reason or reasons he felt authorized to characterize it as "vague, uncertain, and indefinite." It impresses us as being very much to the point. Certainly, it was good in substance, and, therefore, sufficient to withstand the general attack made upon it. It is true that in the brief of counsel for the plaintiff in error quite a number of specific criticisms upon the indictment are made and insisted upon; but whether or not the objections thus urged against it are well founded we do not attempt to decide, for the reason that they were not set up in the demurrer upon which he relied in the court below.

4. The ground of the demurrer which presents the point that the indictment does not conform to the statute, in that it fails to allege that the acts committed by the accused were "contrary to the laws of said state, the good order, peace, and dignity thereof," is really unworthy of notice. As will have been observed, the indictment does conclude with these very words; but it was, in effect, insisted on the argument here that the intention of the pleader was to assert that the indictment itself was "preferred and returned contrary to the laws of said state," etc. We content ourselves with remarking, without further discussion, that we are not prepared to sustain this contention.

5. The special plea in abatement was properly stricken. It on its face disclosed that a nolle prosequi had been entered upon the first indictment before the second was returned; and it was therefore palpably not true, as in this plea asserted, that, "at the time said bill of indictment was found and returned, there was pending another bill of indictment, for the same offense, against the defendant."

Writ of error in the one case dismissed; judgment affirmed in the other. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 231)

CANNON et al. v. MERRY et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

PUBLIC NUISANCE—INJUNCTION—BLIND TIGER.

1. Except in a case falling under the provisions of the act of December 19, 1899, providing for abating or enjoining "any place commonly known as a 'blind tiger,'" equity will not enjoin the maintenance of a public nuisance in a given municipality at the instance of one who suffers no injury or inconvenience therefrom save such as is common to all residents thereof; and the more especially is this true if the acts alleged to constitute such nuisance be indictable.

2. A dispensary where intoxicating liquors are openly and publicly sold in a town, in good faith, under color of lawful authority, though in fact operated in violation of law, is not "what is commonly known as a 'blind tiger,'" subject to be abated or enjoined under the provisions of the act of December 19, 1899.

(Syllabus by the Court.)

3. A dispensary for the sale of intoxicating liquors, established and operated under an ordinance of a municipal corporation which is void for want of authority in the municipal authorities to pass such an ordinance, is, within the meaning of the act of December 19, 1899 (Acts 1899, p. 73; Van Epps' Code Supp. § 6654 et seq.), a "blind tiger," and a public nuisance; and its operation should be enjoined under the provisions of that act. Per Little and Cobb, J.J., dissenting.

Error from superior court, Mitchell county; W. N. Spence, Judge.

Action by H. C. Cannon and others against H. H. Merry and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. D. McKenzie and W. A. Covington, for plaintiffs in error. Sam. S. Bennet and J. H. Scaife, for defendants in error.

FISH, J. H. C. Cannon, M. O. Kinney, A. Palmer, D. F. Pickeron, and W. H. Taylor filed their equitable petition against H. H. Merry, J. J. Mize, J. L. Hand, W. S. Hill, O. M. Baggs, and J. E. Nelson. The petition alleged, in substance, that the plaintiffs were residents of the town of Pelham, and taxpayers therein; that the defendants were residents of the town, and that Merry was mayor, and the other defendants, except Nelson, were councilmen; that the mayor and councilmen, in February, 1902, passed an ordinance seeking to establish a dispensary in the town, and in pursuance of the ordinance elected the defendants Baggs, Mize, and Nelson dispensary commissioners; that, under the supervision of such commissioners, a dispensary was being operated in the town by such dispensary officers, where spirituous and intoxicating liquors were daily sold; that the mayor and council had no authority under the charter of the town, nor under the laws of the state, to pass an ordinance establishing a dispensary for the purpose of buying and selling spirituous and intoxicating liquors in the town; and that the ordi-

nance passed for such purpose was unlawful and void; that the charter, which authorized the mayor and council to regulate the sale of spirituous and intoxicating liquors, required the written consent of a two-thirds majority of all the freeholders within a radius of three miles of the S. F. & W. Railway depot in the town of Pelham before the municipal authorities could issue a license to any person to conduct the sale of such liquors therein; that neither the commissioners, nor any other officer of the dispensary, had ever complied with the charter provisions requiring the written consent of such freeholders; and that the sales of the liquors, which were being made by the officers of the dispensary, were without lawful right or authority, and such traffic was a public nuisance, hurtful to the peace, quiet, health, and morals of the community in which the sales were being made. The prayer of the petition was that the defendants, their agents and employes, be enjoined "from further operating said dispensary in buying and selling spirituous and intoxicating liquors in said town of Pelham." The defendants, in their answer, denied that the mayor and council had no authority to pass the ordinance referred to in the petition, and to establish a dispensary in the town, and also denied that the liquors were being unlawfully sold, and that the sale of them was a public nuisance, as charged in the petition. The other allegations of the petition were admitted. The court refused to grant an injunction upon the interlocutory hearing, and the plaintiffs excepted.

It will be seen that the application for injunction in this case is based upon the theory that the operation of a dispensary where in spirituous and intoxicating liquors are sold, in the town of Pelham, is a public nuisance, which the petitioners, as residents of such town, have the right to enjoin. Granting that the mayor and council of the town of Pelham had no authority, under its charter or under any law, to establish a dispensary for the sale of spirituous and intoxicating liquors in such town, or to authorize any one else to operate such a dispensary in the town, and that the operation of the same was a public nuisance, the plaintiffs, in our opinion, were not entitled to an injunction restraining the operation of such a dispensary as a public nuisance, unless it was what is commonly known as a "blind tiger," and, therefore, subject to be abated or enjoined under the provisions of the act of December 19, 1899 (Acts 1899, p. 73; Van Epps' Code Supp. § 6654). If the operation of this dispensary is, as alleged, a public nuisance, it is manifest from the petition that it is one from which the plaintiffs suffer no injury or inconvenience save such as is common to all other residents of the town. Therefore, unless it is what is commonly known as "a blind tiger," the right to abate

or enjoin which is, by the above-mentioned act, given to any citizen of the county wherein it may be located, it is a nuisance which cannot be enjoined on behalf of the plaintiffs under the case made by their petition. "Generally, a public nuisance gives no right of action to any individual, but must be abated by process instituted in the name of the state." Civ. Code, § 3858. "One seeking to enjoin a public nuisance must show some special injury peculiar to himself, and independent of the general injury to the public." 1 High, Inj. § 762; 2 High, Inj. §§ 1301, 1321. "And, to sustain an action by a private individual against a public officer, it must not only appear that the duty violated was one owing to individuals, but the individual suing must show some reason why he singles himself out as the party injured. In other words, he must show that he, as distinguished from individuals in general, has suffered some special and peculiar injury from the wrongful act of which he complains." Mechem, Pub. Off. § 600. See, also, Throop, Pub. Off. §§ 549, 816. If, in the operation of the dispensary, the defendants should render themselves liable to indictment for the illegal sale of spirituous and intoxicating liquors, it is clear that a court of equity will not enjoin them from the commission of the crime when it does not appear that any property rights of the plaintiffs will be affected thereby. Paulk v. Mayor, etc., 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128; O'Brien v. Harris, 105 Ga. 732, 31 S. E. 745.

2. Counsel for plaintiffs in error contend that, if the defendants were operating the dispensary in violation of law, it was a blind tiger, or nuisance, and should be abated or enjoined, as such, under the provisions of the above mentioned act of 1899. The title to that act is: "An act to declare as a nuisance any place where spirituous, malt or intoxicating liquors are sold in violation of law, to provide for abating or enjoining such nuisance, and for other purposes." Acts 1899, p. 73. The act, however, is not as broad as its title. It declares: "That from and after the passage of this act, any place commonly known as a 'blind tiger,' where spirituous, malt or intoxicating liquors are sold, in violation of law, shall be deemed a nuisance, and the sale may be abated or enjoined as such, as now provided by law, on the application of any citizen or citizens of the county where the same may be located." See section 1 of the act. Whatever a "blind tiger," as commonly known, may be, we are quite sure that the dispensary in question, which was being openly and publicly operated in the town of Pelham, in pursuance of an ordinance of the town, which those engaged in operating the dispensary evidently thought to be valid, was not such a place as is commonly known as a "blind tiger," even though spirituous, malt, and intoxicating liquors were there being sold in violation of

law. The Standard Dictionary defines a "blind tiger" to be "a place where intoxicants are sold on the sly." "Sly" means, "artfully dextrous in doing things secretly; cunning in evading notice or detection;" "done with or marked by artful secrecy." Id. We are clearly of opinion that a place where intoxicating liquors are openly and publicly sold, in good faith, under color of lawful authority, is not what is "commonly known" as a "blind tiger," although the sales of such liquors therein may, in fact, be in violation of law.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness, and LITTLE and COBB, JJ., dissenting.

COBB, J. (dissenting). What is known as the "Blind Tiger Law" is an act passed in 1899 (Acts 1899, p. 73), and in the following words:

"An act to declare as a nuisance any place where spirituous, malt or intoxicating liquors are sold in violation of law, to provide for abating or enjoining such nuisance, and for other purposes.

"Section 1. Be it enacted by the general assembly of Georgia, that from and after the passage of this act, any place commonly known as a 'blind tiger,' where spirituous, malt or intoxicating liquors are sold, in violation of law, shall be deemed a nuisance, and the same may be abated or enjoined as such, as now provided by law, on the application of any citizen or citizens of the county where the same may be located.

"Sec. 2. Be it further enacted, that if the party or parties carrying on said 'nuisance' shall be unknown or concealed, it shall be sufficient service in the abatement or injunction proceedings under this act to leave the writ or other papers to be served, at the place where such liquor or liquors may be sold, and the case or cases may proceed against 'parties unknown,' as defendants.

"Sec. 3. Be it further enacted, that the court shall have authority under this act to order the officers to break open such 'blind tiger' and arrest the inmates thereof, and seize their stock in trade, and bring them before him to be dealt with as the law directs."

Section 4 repeals conflicting laws.

When this act is construed as a whole, and in the light of its title, it is manifest that the legislative purpose was to declare places where intoxicating liquors are sold in violation of law to be a public nuisance, and vest in the courts the power to deal with them as such; a court of law to have authority to abate them by the proceedings usual in abatement of such nuisances, and a court of equity to abate them by the writ of injunction. What is commonly known as a "blind tiger," within the meaning of this law, is a place where intoxicating liquors are sold without authority of law. It is immaterial whether the sale is open or secret,

if the person selling had no authority to sell from any one empowered, under the law of this state, to give such authority. In such a case, the place where the liquor is sold is a blind tiger within the meaning of that term as it is generally understood. This may not be the meaning given that term by the lexicographers, but it is the ordinary popular meaning of the term. It is evident from the title of the act that the general assembly used the term in that sense. The mere fact that the act authorizes proceedings against a blind tiger where the person operating it was concealed or unknown should not be made to limit the scope of the act so as to include only blind tigers of this description. The legislation is directed against all blind tigers,—all persons who sell liquors in violation of law,—whether the sales be conducted covertly or on the sly, or be made in an open manner, showing an utter disregard of law. I have found only one case where the term "blind tiger" has been judicially defined. In *Schulze v. Jalonick*, 18 Tex. Civ. App. 299, 44 S. W. 581, Mr. Chief Justice Fisher says: "A 'blind tiger' we find to be a place where such intoxicating drinks as are prohibited by the local option law are disposed of or sold in violation of that law." That was an action for libel, where the plaintiff alleged that the defendant had charged him with running a blind tiger. The defendants in the present case were not operating a dispensary; they were maintaining a public nuisance; and they should have been restrained from a further maintenance of it. It is not necessary to express any opinion in this case on the question as to whether one who holds a license to sell liquor from an authority empowered to grant such license, but which was irregularly granted, is liable to be proceeded against under the "Blind Tiger Law." It may be that under such circumstances there would be such color of authority that the holder of such irregular license would be relieved from the penalties of the law until the license is revoked. However, upon that subject I now express no opinion. In the present case there was no authority, or color of authority. See *Mayor, etc., v. Putnam*, 103 Ga. 111, 29 S. E. 602; *City of Barnesville v. Murphey*, 113 Ga. 780, 39 S. E. 413. The whole proceeding was in direct violation of, and in utter disregard of, all law, and those in charge of the so-called dispensary should have been dealt with in the manner that the law declares the lawless should be treated. The act was remedial in its nature, and was intended to provide instruments for the suppression of a great evil, and its intended beneficent effects should not be destroyed or even lessened by giving the words a too narrow and contracted meaning. The injunction prayed for should have been granted.

I am authorized by Mr. Justice LITTLE to say that he concurs in the views above presented.

(115 Ga. 945)

**HALL & BROWN WOODWORKING
MACH. CO. v. BARNES, Sheriff,
et al.**

(Supreme Court of Georgia. July 19, 1902.)

TROVER AGAINST CORPORATION—BAIL—ARREST OF OFFICERS—DEFAULT OF SHERIFF—LIABILITIES.

1. Even if bail can be required in an action of trover in which the defendant is a corporation, there is no provision of law under which the sheriff is authorized in such a proceeding to commit to jail the officers of the defendant corporation, when such officers are not parties to the action.

2. In such a case the sheriff cannot be held liable by the plaintiff for a failure to arrest the officers, or for a failure to take a bond or recognizance from the defendant for the property, when the defendant declined to give one.

3. Where, in such a proceeding, the sheriff seizes all of the property which can be found, he is not liable to the plaintiff for his failure to seize the remainder.

4. Where suit is brought on a sheriff's bond for damages alleged to have been sustained by the failure of the sheriff to properly perform his duties, the plaintiff cannot recover on account of breaches of duty not alleged, but is restricted to such breaches as are set out and relied upon in the declaration.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Hall & Brown Woodworking Machine Company against J. J. Barnes and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Walter R. Brown and Thos. L. Bishop, for plaintiff in error. King & Spalding, for defendants in error.

SIMMONS, C. J. The Hall & Brown Woodworking Machine Company brought an action against the Wilson Coal & Lumber Company to recover certain personal property. The plaintiff also sued out a bail process against the defendant. In the affidavit to obtain bail plaintiff described certain machinery, which it claimed was in the hands of the defendant. The process was placed in the hands of the sheriff, who seized one of the articles mentioned in the affidavit, and stated in his return that none of the other articles could be found in the county, and that the defendant could not be arrested, because it was an intangible and invisible legal person. The plaintiff recovered a money judgment against the defendant. Thereafter the plaintiff brought its action on the bond of the sheriff against him and his sureties, and alleged as breaches thereof: (1) That the sheriff had failed to require and take from the defendant in the trover suit a recognizance for the forthcoming of the property described in the bail affidavit; (2) that he had failed to seize the property, and hold it until a recognizance was given; and (3) that, when the defendant company refused to give a recognizance, the sheriff had failed to arrest its president and other officers, and commit them to jail until

the property was surrendered or recognizance given. In their answer the defendants alleged that the plaintiff had declined to take out bail process against any natural person whatever, or to designate any such person as having custody or control of the property; that it was impossible to arrest the defendant corporation; that the sheriff had no process against any natural person, as officer of the corporation or otherwise; and that there was no legal bail process placed in his hands by the plaintiff. The case coming on for a trial, after the introduction of certain evidence by the plaintiff, which it is unnecessary now to set out, save that the sheriff's return on the bail process showed that he had seized one saw, and that the other property described could not be found, the judge granted a nonsuit. To this the plaintiff excepted.

1. In the consideration of this case we will first take up the third alleged breach of the sheriff's bond, because by its determination the case will be largely controlled. It is unquestionably true that trover will lie against a corporation. Whether bail process can legally issue against a corporation as such we need not decide in this case, as it did in fact issue, and the officer attempted in part its execution, and no objection was made by the defendant. Independently of this question, it is certain that a failure to find the property pointed out in the process does not authorize the sheriff to seize the officers of the corporation and commit them to jail, unless the process is against them individually as well as against the corporation. *Nichols v. Thomas*, 4 Mass. 232. Our Code provides that in bail trover cases the officer, if he fails to find the property, and recognizance is given, shall arrest the person of the defendant, and confine him in jail until the property is produced or recognizance given. But in this case the defendant who was alleged to have possession of the property was a corporation, and, while a corporation acts through its officers and agents, these latter are not the corporation, and cannot be arrested under bail process against the corporation alone.

2. It follows that the sheriff was not liable on his bond for not arresting the president or other officers of the corporation. Nor could he be held liable for a failure to take a bond or recognizance for the forthcoming of the property, when the defendant had declined to give one. The giving of the bond is a voluntary act on the part of the defendant in the bail process. He may give bond or not, as he chooses, and the sheriff has no authority to force him to give bond. The sheriff's authority is limited to seizing the property or arresting the defendant unless a bond is given. When, in the case now under consideration, the defendant corporation refused to give bond, there was no one whom the sheriff could arrest and imprison, and therefore he cannot be held liable for a fail-

ure to do an act which it was illegal for him to do.

3. The return of the sheriff was not traversed or contradicted, and must be taken as true. It showed that he seized one saw, and that the other articles mentioned in the bail affidavit could not be found. If he could not find the property, he certainly could not be held to have committed a breach of his bond by his failure to seize it.

4. It was argued here that the sheriff's return showed he had seized one Eureka scroll saw, and that the nonsuit was erroneous, because he was liable at least to account to the plaintiff for the value or proceeds of that saw. After a careful reading of the declaration, we find that there was no allegation of any breach of the sheriff's bond in this particular. The only breaches alleged are those above set out, and the plaintiff cannot recover on account of any other. In a suit upon a sheriff's bond the plaintiff must be restricted to the breaches set out, and cannot recover on account of breaches, however clearly shown by the evidence, which were not alleged and relied upon in the declaration.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 385)

SWIFT v. BROYLES.

(Supreme Court of Georgia. July 18, 1902.)
NUISANCE—ACTION FOR DAMAGES—EVIDENCE.

1. Proof of a tortious invasion of one's property rights cannot, unless supplemented by evidence disclosing the extent of the loss thereby inflicted upon the injured party, afford a basis for the recovery by him of more than nominal damages.

2. The owner of a dwelling house which he himself occupies as a home is entitled to just compensation for the annoyance and discomfort occasioned by the maintenance, by another, of a nuisance on adjacent premises; and, in fixing the amount of damages to be awarded in such a case, proof of depreciation in rental value of the dwelling house, caused by such nuisance, may be looked to as furnishing a proper evidentiary guide for determining the extent of the annoyance and discomfort actually suffered.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by Robert A. Broyles against Gustavus F. Swift. Judgment for plaintiff. Defendant brings error. Reversed.

Hoke Smith and H. C. Peeples, for plaintiff in error. Arnold & Arnold and Nash R. Broyles, for defendant in error.

LUMPKIN, P. J. The plaintiff below, Robert A. Broyles, brought against Gustavus F. Swift a suit for damages, and recovered therein a verdict for \$1,000.

The case made by the plaintiff's petition was, in brief, as follows: "Petitioner is, and for three years past has been, the owner of
• • • a tract of land consisting of about

six (6) acres, and lying in the county of Fulton, and on the west side of what is known as the 'Marietta Road.' * * * Plaintiff's property has upon it a large dwelling house, a large barn and carriage house, a servant's house; is covered with grass and vegetation; has a large garden upon it; and has upon it oak, peach, apple, plum, and pine trees in abundance. * * * About the month of January, in the year 1899, the defendant began the operation of certain chemical works 'in the immediate neighborhood of' plaintiff's property, and began the manufacture of fertilizer and the use of strong acids in the manufacture of the same. * * * The various acids and noxious gases and odors which have been emitted by the defendant from [these] works in the operation of said plant have had the effect to ruin and totally destroy the property of plaintiff; have ruined and destroyed it as a home and residence for plaintiff and family; have killed and destroyed all of the vegetation on it," as well as "all of the trees aforesaid; and the constant presence of the said noxious gases upon the premises have totally destroyed the same for residence purposes." The noxious gases and other "harmful and injurious substances sent out into the air by defendant in the operation of" said plant continuously pervade the premises of the plaintiff, "prevent the comfortable and safe occupancy of the house upon said premises; kill all the vegetation thereon; and are a nuisance dangerous to property and health." Plaintiff has, as a result of such nuisance, been damaged in the sum of \$2,000, in that the rental value of his property has been depreciated to the extent of \$25 per month; trees of the value of \$500 have been killed; the injury done to other trees amounts to a like sum; and the vegetables planted in his garden have been destroyed, entailing upon him an annual loss of \$300. An answer was filed by the defendant, in which he denied the allegations of fact upon which the plaintiff relied for a recovery. After a hearing of the case on its merits, with the result already stated, Swift made a motion for a new trial, which was overruled, and he excepted. The case, as here presented, is controlled by the questions dealt with in the discussion which follows.

1. If, in point of fact, the defendant was guilty of the wrongs complained of, the plaintiff, as owner of the premises described in his petition, was entitled to recover damages for all permanent injuries done to his freehold estate; and, as he occupied the premises himself, he also had a right to demand just compensation for such injuries as temporarily deprived him of the unrestricted use and full enjoyment of the same. *Danielly v. Cheeves*, 94 Ga. 264, 21 S. E. 524; *Holmes v. City of Atlanta*, 118 Ga. 961, 39 S. E. 458; *City of Nashville v. Comar*, 88 Tenn. 415, 12 S. W. 1027; *Carl v. Depot Co.*, 82 Minn. 101, 20 N. W. 89; *City of Chicago v. Huenerbein*, 85 Ill. 694, 28 Am. Rep. 626; *Emery v. City of Low-*

ell, 109 Mass. 197. There was testimony in his behalf which tended to show that a number of pine trees growing on his place were killed, and all of his fruit and shade trees seriously affected, by noxious gases which escaped into the air from the defendant's works. Evidence as to the value of these pine trees was submitted, but no proof was offered from which any fair and reasonable estimate could be made of the amount of damages sustained by reason of the injuries done to such of the trees as had not been killed. Total annihilation of all plant life in the plaintiff's garden was also shown. The extent of the loss thereby incurred by him was, however, left as much in the air as the destroying agencies which he claims played havoc with his vegetables could possibly have been. It necessarily follows that the trial judge should, as he was in writing requested to do by defendant's counsel, have instructed the jury that they were not, save only as to the trees actually destroyed, authorized to find for the plaintiff more than nominal damages for any of the above-mentioned injuries suffered by him.

2. Undoubtedly, it was his right to receive additional compensation for any annoyance or discomfort occasioned by the air in and about his dwelling house being permeated with noisome gases and offensive odors discharged from the defendant's fertilizer plant. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. Ed. 739; *Railroad Co. v. Grabill*, 50 Ill. 241; *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392; *Weeson v. Iron Co.*, 18 Allen, 95, 90 Am. Dec. 181; *Emery v. City of Lowell*, 109 Mass. 197; *Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; 1 Wood, Nuis. (3d Ed.) § 511; 2 Wood, Nuis. (3d Ed.) §§ 561-563. Where there is such a wrongful interference with "the comfortable enjoyment of property by a person in possession, no precise rule for ascertaining the damage can be given, as, in the very nature of things, the subject-matter affected is not susceptible of exact measurement; therefore the jury are left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance." See section 866 of the volume last cited. It is not, of course, the policy of the law that the jury shall be permitted to act arbitrarily in the matter. On the contrary, they are expected to observe the cardinal rule that only actual damages can lawfully be recovered by the injured party. To the end that they may be enabled to arrive at a just and reasonable conclusion as to the amount of compensation to be awarded him, the courts have with marked unanimity held that the jury may consider proof of, and adopt as the measure of, his damages, the depreciation in rental value of his property, caused by the discomforts to which its use has been sub-

jected. *City of South Bend v. Paxon*, 67 Ind. 228; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wiel v. Stewart*, 19 Hun, 272; *Belr v. Cooke*, 37 Hun, 38; *Michel v. Board*, 39 Hun, 47; *Pinney v. Berry*, 61 Mo. 360; *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Shirely v. Railway Co.*, 74 Iowa, 169, 37 N. W. 133, 7 Am. St. Rep. 471. One who himself occupies premises of which he is the owner cannot, it is true, logically be said to have suffered any actual loss of rent by reason of a tortious interference with the enjoyment of his home. The decisions just cited are not, however, based upon any such erroneous theory, but rest upon the perfectly rational doctrine that the owner of property of a given rental value is entitled, if he elects to be at once his own landlord and tenant, to get an amount of enjoyment out of it equal to the sum he would be obliged to pay as rent for premises, of a like rental value, belonging to another. See, in this connection, the remarks of Smith, P. J., in *Michel's Case*, supra. We have been able to find but one case, that of *Potter v. Froment*, 47 Cal 165, in which this doctrine has been repudiated. It is further to be observed that the recovery by the injured party is not to be limited to the depreciation in rental value of his premises if he shows that he has been put to expense on account of sickness in his family caused by the nuisance complained of. *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Brown v. Railroad Co.*, 80 Mo. 457; *Jarvis v. Railway Co.*, 26 Mo. App. 253. While, as was held in the case of *Kemper v. City of Louisville*, 14 Bush, 87, "no recovery can be had for physicians' bills paid, or loss of time on the part of the occupants on account of sickness" thus produced, "still these facts may be proved with a view of showing the extent to which" the plaintiff has been damaged by being wrongfully deprived of the natural comforts of his home; that is to say, proof of such facts, or of depreciation in rental value, can merely serve as an evidentiary guide in determining what amount of money will compensate him for the grievous wrong which the law seeks to redress, viz., the tortious invasion upon his legal right of unmolested enjoyment of his property,—an injury which may or may not be attended with the incidents just mentioned. As was clearly pointed out in the opinion delivered by Beck, J., in *Randolf v. Town of Bloomfield*, 77 Iowa, 52, 41 N. W. 563, 14 Am. St. Rep. 268: "While rental value may be the subject of inquiry in some cases in order to determine the damages, it is plain that, when the enjoyment of a homestead [is] destroyed or diminished, the true rule for the measure of damages requires the owner to be compensated therefor." The rental value of his premises may not be appreciably affected, or their value for rent may be actually enhanced by a demand for houses by the employés of the proprietors of the manufacturing enterprise which produces

the nuisance; yet this can constitute no valid reply to the incontestable fact that his enjoyment of the comforts of his home has been wrongfully interfered with, to his legal injury. *Francis v. Schoellkopf*, 53 N. Y. 152. That the wrongdoer should not be permitted to "take credit for such increase, by way of indirect set-off against the direct loss or injury which he has occasioned," was recognised by this court in *Davis v. Railway Co.*, 87 Ga. 612, 13 S. E. 567.

It seems that in the case now before us the trial judge confounded, with the root of the evil calling for redress, a mere derivative result indicating the extent of the plaintiff's loss. After instructing the jury to the effect that he was entitled to recover such damages as he may have sustained by reason of any depreciation in the rental value of his premises caused by the alleged nuisance, his honor added: "Another item of damage is the destruction of the home and its comfortable enjoyments. Plaintiff says that, by reason of the fumes and gases, the comforts of his home have been entirely destroyed; that he and his family have suffered physical discomforts and pain. If you believe these allegations are true, under the law you could give such damage as would fairly and reasonably compensate him." Exception is taken to these instructions on the ground that the court thereby "permitted the jury to find both for the diminution of rental value of the premises during a time when they were occupied by plaintiff himself, and for the destruction of the home and its comfortable enjoyments, and for the physical discomforts and pain of plaintiff and his family during the same period; thus, in effect, visiting double damages on defendant, or at least greater damages than the law would authorize." This criticism on the charge of the court is, we think, not only just, but temperate. Indeed, the amount of the verdict returned against the defendant, which in his motion for a new trial he characterizes as excessive, may, in view of the instructions given to the jury upon this branch of the case, be readily accounted for.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 866)

MARTIN v. WHITE.

(Supreme Court of Georgia. July 18, 1902.)
VOLUNTARY CONVEYANCE—CONSIDERATION.

1. A conveyance which expresses as a consideration a sum of money, or any other thing which the law deems valuable, no matter how small the sum or the value may be, cannot be said as a matter of law to be a voluntary conveyance.

2. A conveyance which expresses, as a consideration, love and affection and a small sum of money, is not upon its face voluntary.

¶ 2. See *Deeds*, vol. 16, Cent. Dig. §§ 26, 23, 20; *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 190, 201½.

3. The consideration of a deed may be always inquired into when the principles of justice require it.

4. Whether a deed which expresses as a consideration love and affection and a small sum of money is a voluntary conveyance depends upon the intention of the parties, and this intention is to be ascertained by an inquiry into all the facts and circumstances, at the time of its execution, which will throw light upon the question as to whether the deed was executed as the consummation of a sale or as the evidence of a gift.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Isham White against M. C. Martin. Judgment for plaintiff. Defendant brings error. Reversed.

C. T. Ladson, for plaintiff in error. Green & McKinney, for defendant in error.

GOBB, J. This was an action of complaint for land. The plaintiff derived title through a deed from his father, dated June 10, 1875, and duly recorded. This deed recited that the grantor conveyed the land described, "for and in consideration of the sum of five dollars, and love and affection he bears for his said wife and children." The defendant's title was derived through a deed from the plaintiff's father to Nancy E. Moore, dated February 7, 1883, recorded June 22, 1883, which recited a consideration of \$700, and a deed from Nancy E. Moore to the defendant, dated June 3, 1886, recorded August 3, 1886, which recited a consideration of \$500. The defendant offered Nancy E. Moore as a witness to prove that she bought the land in controversy from the plaintiff's father on the date mentioned in the deed above referred to, paying him therefor the sum of \$700; that she had no knowledge whatever of the existence of the deed under which the plaintiff claimed; and that she had sold the land in controversy to the defendant. This evidence was objected to as irrelevant, and the court excluded the same. The defendant offered an amendment to his answer, alleging that, at the date of the deed under which the plaintiff claimed, the property conveyed thereby was worth the sum of \$500. Upon objection by the plaintiff, the court refused to allow the amendment. The defendant offered to prove, by a witness who was familiar with the land in controversy, that, on the date of the execution of the deed under which the plaintiff claims, the property was worth \$500. To the introduction of this evidence, the plaintiff objected, and the evidence was excluded as irrelevant. The court then directed a verdict in favor of the plaintiff. All of the rulings above referred to are assigned as error.

It is the settled law of this state that a voluntary conveyance is not within the operation of the laws providing for the registry of deeds, and that, therefore, the recording of such a conveyance is not notice to a subsequent purchaser for value. See *Finch v.*

Woods, 113 Ga. 996, 89 S. E. 418, and cases cited. The controlling questions in the present case are whether a deed which recites a consideration of \$5 and love and affection is upon its face a voluntary conveyance; and, if not, if the same be shown to be a deed from father to son, and the money consideration is a trifling amount compared with the value of the land, whether, as against a subsequent purchaser from the father, for value, and without notice of the prior deed, it should be held to be a voluntary conveyance, and therefore not within the protection of the registry laws.

As between the grantor and the grantee, in the absence of fraud, any sum paid or contracted to be paid is a sufficient consideration to make the conveyance valid. Hence it has been held that a consideration of \$1 is sufficient to support a quitclaim deed, and that this is true whether the money be actually paid or not, as, if not paid, it may be recovered by action. *Nathans v. Arkwright*, 66 Ga. 179. Mere inadequacy of consideration, in the absence of fraud, will never invalidate a conveyance by a grantor who is competent to contract. While a conveyance based on a grossly inadequate consideration will pass the title from the grantor to the grantee, and, as between the parties to the deed, the grantee will be treated as having purchased for a valuable consideration, under what circumstances, if any, can such a conveyance be treated as voluntary as against creditors of the grantor or subsequent purchasers from him who had no actual notice of the existence of the conveyance? What is a voluntary deed? Mr. Bump says: "A voluntary conveyance is a conveyance without any valuable consideration. The adequacy of the consideration does not enter into the question. The character of purchase or voluntary is determined by the fact whether anything valuable passes between the debtor and the grantee as a consideration for the transfer. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary." *Bump, Fraud. Conv.* (4th Ed., Gray) § 238. The supreme court of Connecticut defined a voluntary conveyance to be one that is wholly without a valuable consideration. *Washband v. Washband*, 27 Conn. 424. The supreme court of Pennsylvania held that a conveyance by a father to his daughter for a consideration of \$1 actually paid, and natural love and affection, is not a voluntary conveyance. *Appeal of Ferguson* (Pa.) 11 Atl. 885. Mr. Jones, in his work on Real Property, says: "A voluntary conveyance is one wholly without a valuable consideration, or for a valuable consideration which is merely a nominal one." Volume 1, § 288. In *Ward v. Trotter*, 3 T. B. Mon. 1, it was held that a consideration of \$1 in a deed of trust would be treated, as against creditors, as nominal only; Mr. Chief Justice Boyle saying in the opinion: "We ascribe no importance to the consideration of one dollar

mentioned in the deed. That would indeed be sufficient to pass the legal title as against the grantor, but as against creditors and purchasers it would, were it the only consideration, be deemed merely nominal, and the deed of course would be voluntary, and consequently fraudulent and void as to them. In *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756, the supreme court of Alabama held that, as against existing creditors, a deed from husband to wife in consideration of love and affection and \$1 was voluntary. In *McKeown v. Allen*, 37 Fla. 490, 20 South. 558, it is said that the general rule is that a deed with a consideration merely nominal will be considered voluntary as against existing creditors of the grantor. See, also, *Worthington v. Bullitt*, 6 Md. 172; *Scoggin v. Schloath*, 15 Or. 380, 15 Pac. 635; *Worthy v. Caddell*, 76 N. C. 82; *Ridgeway v. Ogden*, 4 Wash. C. C. 139, Fed. Cas. No. 11,814; 2 Devl. Deeds (2d Ed.) § 814; *Notes to Hagerman v. Buchanan*, 14 Am. St. Rep. 739 (s. c. [N. J. Err. & App.] 17 Atl. 946). In *Felder v. Harper*, 12 Ala. 612, it was held that "a consideration of \$10 expressed in a deed of gift of two slaves is on its face merely nominal." In *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809, it was held that one who acquires title to valuable property for a merely nominal money consideration, although actually paid, but under circumstances indicating a gift or advancement, is not, within the meaning of the recording act of New York, a purchaser for a valuable consideration, and his deed, although recorded, conveys no title as against a prior unrecorded conveyance of the same property. In that case *Maynard, J.*, in a well-considered opinion, in which numerous English and American cases are referred to, reaches the conclusion above stated. We quote the following forcible and pertinent language: "We think it would be a perversion of language to say that a father who had conveyed to a daughter property of the value of twenty thousand dollars, for no greater sum than ten dollars paid, had sold the property to his child, or that she had bought it of him. The transfer would be recognized by the popular, as well as the judicial, mind as possessing all the essential qualities of a gift. It has been frequently so held." The same judge says, on page 43, 135 N. Y., page 995, 31 N. E., 31 Am. St. Rep. 809: "We deem it unnecessary to undertake to determine here what degree of adequacy of price is required to uphold a subsequent deed first recorded. Upon this branch of the case, we have no occasion to go, farther than to hold that a small sum, inserted and paid, perhaps, because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration." It is true that in that case the court was dealing with the New York re-

ording act, but it appears that under the terms of this statute no person was protected by the record of a deed, except a purchaser for a valuable consideration; and, as it has been frequently held that only such persons are within the recording act of this state, what is said by the New York court in that case is peculiarly applicable to a case arising under the registry laws of this state. A deed which shows that there was no consideration for the same, or that the consideration was love and affection only, is upon its face a voluntary conveyance. A deed which sets forth as a consideration any sum of money, no matter how trivial and insignificant, is not upon its face a voluntary deed. A deed which states as a consideration anything which is in law valuable, no matter how small the value may be, is not upon its face a voluntary deed. A deed which sets forth as a consideration love and affection and a sum of money, or other thing of value, would not be upon its face voluntary. Such a deed would, according to some authorities, be a voluntary conveyance only so far as the value of the property conveyed exceeded the amount stated as the valuable consideration, or the value of the property or thing stated as the consideration.

Applying what has been said to the facts of the present case, the deed upon which the plaintiff relied was not upon its face a voluntary conveyance, but it was at most a deed founded in part upon a good consideration and in part upon a valuable consideration. In some jurisdictions it is held that parol evidence is not admissible to show that the real consideration of a deed is different from that expressed therein. Where this rule prevails, a deed of the character now under consideration would, in the absence of fraud or reformation, be conclusively held to be a deed founded in part upon a valuable consideration. In this state, however, the consideration of a deed is always open to inquiry. The Code declares that the consideration of a deed may be always inquired into when the principles of justice require it. Civ. Code, § 3599. In *Finch v. Woods*, supra, it was held that a deed which purported to be founded upon a valuable consideration could be shown by parol evidence to have been based either upon simply a good consideration, or upon no consideration whatever, and, when this is conclusively done, the deed would stand as a voluntary conveyance, without regard to the consideration expressed therein. Under the rule allowing the consideration of a deed to be inquired into, evidence is admissible to show the relation of the parties to each other, the circumstances of the grantor, such as his financial condition, etc., the value of the property at the time of the conveyance, whether the consideration stated was actually paid, and, if so, whether the payment was really intended as compensation for the property conveyed, and, if not paid, whether

the parties intended that it should be paid, or whether the amount inserted as the money consideration was placed in the deed simply for the reason that it was supposed to be necessary, to render the deed valid, that a sum of money should be stated as a part of the consideration. Evidence as to the circumstances above alluded to, and all other circumstances which would throw light upon the question whether the transaction between the grantor and the grantee was a gift or a sale, is admissible in order that the jury may determine from all the facts and circumstances what was the real intention of the parties. If a deed be made by a father to a son, or by a husband to a wife, or by any one to another who would, upon the death of the grantor, be one of his heirs at law, and the deed expresses as a money consideration an amount that would be trivial and insignificant compared with the value of the property at the date of the conveyance, and it appears that the amount thus stated was not actually paid, or the circumstances indicate that it was not intended by the parties to be paid, or, if actually paid, that it was not really intended by the parties as compensation for the property conveyed, a jury might find from these circumstances that the deed was voluntary, and was intended either as a gift or as an advancement. If a deed between parties of the character just referred to, executed under the circumstances referred to, expresses as the consideration love and affection and a sum of money which, compared to the value of the property, is trifling in amount, the inference that the deed was purely voluntary, and that the transaction was intended either as a gift or as an advancement, would be strong enough to authorize, even if not require, a jury to so find.

The final conclusion reached by us is that when a deed expresses upon its face a valuable consideration, no matter how small, it cannot be said as matter of law that such a deed is a voluntary conveyance. Whether a deed which expresses upon its face a trifling and insignificant sum as a money consideration, or one which expresses such a sum and love and affection as the consideration, is either wholly or in part a voluntary conveyance, depends upon the intention of the parties at the time the conveyance was made; this intention to be derived from circumstances of the character above alluded to, or any other which may throw light on this question. The popular idea is that there must be a money consideration expressed in all deeds, to render them valid. As a general rule, deeds which appear upon their face to be founded upon love and affection and a small money consideration are intended by the parties as gifts, as the money consideration is rarely ever paid or intended to be paid. While it is well known to the profession that it is not essential to the validity of a deed of gift to express therein

a money consideration, still, to satisfy the popular belief, it is the almost universal practice to state a small sum of money as a part of the consideration in such a deed. The learned lawyer who was the immediate predecessor of the present chief justice of this court, in drawing a deed of gift which was to be executed by himself, once expressed the consideration of the same to be love and affection and "the fictitious dollar of the law." He thus yielded to the popular belief, and at the same time indicated by the language used that it was not essential to the validity of the deed that it should be founded upon anything else than simply a good consideration. Let this case be tried again in the light of what has been here laid down. If the jury find, under all the facts and circumstances, that the relation of vendor and purchaser existed between the parties, and that the deed was intended as the evidence of a sale from the grantor to the grantee, then the plaintiff would be entitled to recover. If, under all the facts and circumstances, the jury should find that the transaction was intended as a gift, and that the real consideration of the deed was love and affection only; that there was in no sense a sale of the property; that the money consideration expressed in the deed was not paid, and not intended to be paid, having been inserted simply as a matter of form, to comply with what was supposed to be the requirement of the law, or, if actually paid, it was not intended by the parties as compensation for the property conveyed,—then the deed would be purely voluntary, would not be within the protection of registry laws although actually recorded in due time, and would not prevail against a subsequent purchaser for value who had no actual notice of the existence of the conveyance.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 918)

WHITLEY GROCERY CO. v. ROACH.

(Supreme Court of Georgia. July 19, 1902.)

DOCUMENTARY EVIDENCE—BANKRUPTCY—UNLAWFUL PREFERENCE—COMPUTATION OF TIME.

1. Where several persons co-operate in making an inventory of a stock of merchandise, such inventory as a whole is not admissible in evidence, as a memorandum, in connection with the testimony of any one of them, unless he can verify and adopt it in its entirety as representing his knowledge on the subject.

2. There was no material error in instructing the jury to the effect that, in determining whether a transfer of his property by a debtor was made within four months next preceding the filing of a petition in bankruptcy against him, they should, in computing the time, exclude the day upon which the transfer was made, and include the day upon which the petition was filed.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 261, 297

3. The verdict in this case was warranted by the evidence.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by W. S. Roach, trustee, against the Whitley Grocery Company and another. Judgment for plaintiff, and defendant grocery company brings error. Affirmed.

Allen Fort & Son and O. R. Winchester, for plaintiff in error. W. P. Wallis, J. H. Lumpkin, and W. A. Dodson, for defendant in error.

FISH, J. Roach, as trustee for Bagley, a bankrupt, sued the Whitley Grocery Company and the Bank of Southwestern Georgia to recover certain personalty, or its value, which plaintiff alleged that Bagley, while insolvent, for the purpose of paying his past-due indebtedness to defendants, and with the intention, then known to them, of giving them a preference over his other creditors, had transferred to defendants within four months prior to the filing of the petition in bankruptcy against him. Upon the trial, a verdict was rendered for the plaintiff, against the Whitley Grocery Company; it moved for a new trial, which being refused, it excepted.

1. Two stocks of merchandise located, at the time of the transfer, in Sumter county, were portions of the property for which the action was brought. The value of this merchandise, and the exact date on which it was transferred by Bagley, were important questions in the trial of the case. It appeared that Bagley sold the merchandise to Clegg, an agent of the Whitley Grocery Company, and that Clegg afterwards sold it to the Cash Store at Cordela. Defendants, for the purpose of showing the date it was made and the value of the merchandise, offered in evidence an inventory of the goods, purporting to have been made by Hearn, one of the partners who owned the Cash Store, and Horne and Collins, two clerks therein, after the sale by Clegg to the Cash Store. This inventory was offered in connection with the testimony of Hearn and Horne; Collins not being introduced as a witness. It was excluded by the court, and this ruling was complained of in the motion for a new trial. There was no merit in the complaint. Hearn, on cross-examination, in reference to the inventory, testified as follows: "Mr. Horne and Mr. Collins made all these entries in this book. This is the book. That 'A. G. S.' is the cost mark. 'Leo Washington' was the cost mark. Mr. Horne wrote this. The book was written by Mr. Horne and Mr. Jim Collins; there is where Mr. Collins wrote [indicating]. I didn't do any of the writing; I called it out; they put it down as I called it out; did it under my directions part of the time. Mr. Horne called some, and Mr. Collins; we were all in it. * * * I say that I took that invoice, and made that entry in that book, on the first day of November; that is what the

book shows now, and I say so. Mr. Horne or I—one—made that entry [examining entry]. Mr. Horne made it. I am swearing to that because I saw it when it was done." Horne testified, as to the inventory: "I know something about the invoice presented in book; it is the invoice of the Bagley stock,—that is, so much as was received at the Cash Store; that is, the invoice that was taken at the Cash Store checked up what we received. That is a correct invoice. This submitted to me is in my handwriting, and it is correct; it is all right." Hearn and Horne both swore, in a general way, that the inventory was correct, but it is evident that they could not know this of their own knowledge. Hearn's testimony that it was made by himself, Horne, and Collins, in the manner set forth in his evidence, was not controverted, so we take it as true that the inventory was prepared in that way. Hearn made none of the entries; he simply called items for Horne or Collins to enter. What items he called, and who entered them,—Horne or Collins,—did not appear. Horne and Collins also called items, and the one entered those called by the other, but such items were not identified, and it did not appear that Hearn had any knowledge whatever of them. Nor was it shown that Horne had any knowledge of the items called by Hearn and entered by Collins. The inventory as a whole was, therefore, not admissible as a memorandum upon the testimony of Hearn or Horne, or their joint testimony, because neither of them aided in the preparation of all of it, and it could not possibly represent their respective recollections of the items called and the entries made about which they, respectively, had no knowledge at the time the inventory was prepared. Moreover, the portion of the inventory made up of the items called by Collins, and entered by Horne, would seem, in the absence of Collins' testimony as to their correctness, to be mere hearsay. It was held in *Insurance Co. v. Hart*, 112 Ga. 765, 38 S. E. 67 (4), that: "Before a memorandum made for the purpose of preserving a record of a given fact or transaction can, in any event, be admitted in evidence as original testimony, it must affirmatively appear that it was made by the witness in connection with whose testimony it is offered, and that testimony must show absolutely the genuineness and correctness of the memorandum." See, also, 1 Greenl. Ev. (15th Ed.) § 439b.

2. Section 60b of the bankrupt act of 1898 provides: "If a bankrupt shall have given a preference within four months before the filing of a petition, and the person receiving it, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." The court instructed the jury to the effect that, in determining whether the transfer of his property by Bagley to Clegg

was made within four months next preceding the filing of the petition in bankruptcy against Bagley, they should, in computing the time, exclude the day on which the transfer was made, and include the day on which the petition was filed. Error was assigned upon this charge. The petition against Bagley was filed March 2, 1899, and there was evidence from which the jury could find that he made the transfer to Clegg on November 2, 1908. The rule for the computation of time was therefore very material. While it would have been technically more accurate for the court to have instructed the jury to include the day when the transfer of the property occurred, and exclude the day when the petition was filed, we cannot see how the plaintiff in error was hurt by the rule laid down by the court for computing the period of four months before the filing of the petition in bankruptcy, within which the assignment of his property by the bankrupt must have been made in order to authorize a recovery of the property or its value by the trustee. It is clear that both the day when the assignment was made and the day when the petition in bankruptcy was filed cannot be included in the computation; the one or the other must be excluded. Unless both these days can be included in the computation, there is no real merit in the exception to the charge of the court; and we know of no authority which would authorize this to be done. If, as would seem to be most natural in computing a given period of time before the happening of a particular event, the date when the petition was filed be taken as the terminus a quo, and the time reckoned backward from this event, excluding the day on which it occurred, and including the day when the assignment was made, precisely the same result would be reached as would be attained if the computation were made as the court directed,—that is, forward, excluding the day when the assignment was made, and including the day when the petition was filed. If, including the day of the transfer, and excluding the day of the filing of the petition, the computation would show that the period of four months had not expired, it seems to us clear that excluding the day of the transfer, and including the day of the filing, would show that this period of time had not elapsed. On the other hand, if the computation in the one case would show that the four months had expired, the computation in the other case would necessarily show the same thing.

In *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130, in construing the phrase, "within four months before the filing of the petition," as contained in the bankrupt act of 1867, the supreme court of the United States laid down the rule that: "In computing the four months before filing the petition in bankruptcy, within which time the assignment of his property by an insolvent debtor,

with a view to give a preference to any creditor, is void, the day upon which the petition is filed must be excluded." But Mr. Justice Clifford, in delivering the opinion, said: "Taken literally, it might be suggested that the phrase, 'four months before the filing of the petition,' would exclude the day the petition was filed, fractions of a day being forbidden in such a computation; nor would it benefit the respondents if the rule prescribed by section 5013 of the Revised Statutes should be applied, which is that in all cases in which any particular number of days is prescribed in that title, or shall be mentioned in any rule or order of court, or general order, which shall at any time be made for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day. Where the phrase to be construed does not contain any expression to the contrary, the enactment is that that rule shall apply, leaving it to be understood that the phrase to be construed may contain words prescribing its own rule in that regard, and that, if it contains any inconsistent expression to the contrary, that the rule prescribed in that section shall not necessarily control the meaning of the phrase to be construed. Apply that qualification to the rule prescribed in section 5013, and still it might be suggested that the meaning of the phrase, 'within four months before the filing of the petition,' is entirely consistent with that rule. Unless the day when the notes, accounts, and property were assigned, and the day when the petition in bankruptcy was filed, are both included in the computation, the defense fails, and the complainant is entitled to an affirmance of the decree. Neither argument nor authority is found in the brief of the respondent supporting any such rule of construction, and it is believed that no decided case can be referred to where such a theory was ever adopted. Decided cases may be found in which it is held, where the act is required by statute to be done a certain number of days, at least, before a given event, that the time must be reckoned, excluding both the day of the act and that of the event. *Reg. v. Justices of Shropshire*, 8 Adol. & E. 173; *Mitchell v. Foster*, 12 Adol. & E. 472; *Zouch v. Empsey*, 4 Barn. & Ald. 522. Search has been made in vain for a decided case in which it is held that both the day of the act and the day of the event shall be included in the computation in order to ascertain the specified period of time." In that case it was adjudged that a conveyance made on December 8, 1869, was "within four months before" a petition filed April 8, 1870.

The present bankrupt act contains a provision substantially similar to that in section 5013 of the Revised Statutes, which is dealt with in the above-quoted extract from the opinion in the *Dutcher Case*. Section 81 of the act now under consideration is as fol-

lows: "Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." In *Re Stevenson* (D. C.) 94 Fed. 110, it was held: "The four months after the commission of an act of bankruptcy within which, under the provisions of the bankrupt act of July 1, 1898, a petition in involuntary bankruptcy must be filed, are to be so computed as to exclude the day on which such act was committed; hence, where the act of bankruptcy was committed October 20, 1898, the petition could properly have been filed February 20, 1899." In the opinion in that case, Bradford, J., said: "Section 31 [of the present bankrupt act] provides that 'whenever time is enumerated by days in this act, * * * the number of days shall be computed by excluding the first and including the last, unless,' etc. Section 5013 of the Revised Statutes provides that, 'in all cases in which any particular number of days is prescribed by this act * * * for the doing of any act or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless,' etc. I am unable to perceive any distinction in meaning between the phrase, 'whenever time is enumerated by days in this act,' and 'in all cases in which any particular number of days is prescribed by this act.' In *Dutcher v. Wright*, this rule was relied on as not inconsistent with, but applicable to, the computation of months. This could only have been done on the ground that the specification of a number of months from an event was equivalent to an enumeration of the days contained in those months, as applied to a given case. Whatever force was given to section 5013 in *Dutcher v. Wright* must be accorded to section 31 in the present case." It will be seen that, according to the decision in the *Dutcher Case*, when the point to be ascertained is whether or not an assignment of his property by an insolvent debtor was made within four months before the filing of a petition in bankruptcy against him, the computation must be made backward from the latter event, excluding the date when it occurred, while, according to the ruling in the *Stevenson Case*, when the point to be determined is whether or not the petition in bankruptcy has been filed within four months after the commission of an act of bankruptcy, the computation must be made forward from the day on which such act was committed, excluding that day. In each case, the day constituting the terminus a quo, or point from which the time was to be reckoned, was excluded, which was, technically, the proper way to make the computation; but it is evident that the result reach-

ed, in each instance, would have been the same if the day constituting the terminus a quo had been included, and the day constituting the terminus ad quem, or point to which the time was to be reckoned, had been excluded. In the *Dutcher Case*, while it was held that the computation in that case should be made exclusive of the day the petition in bankruptcy was filed, the opinion of the court shows that the practical result would be the same if the computation were made inclusive of that day, and exclusive of the day the act of bankruptcy was committed. In *Richards v. Clark*, 124 Mass. 491, it was held that an attachment made on September 9, 1876, was made "within four months next preceding" the commencement of proceedings in bankruptcy by a petition filed on January 9, 1877. So in *Cooley v. Cook*, 125 Mass. 406, it was held that: "Under the United States Revised Statutes, § 5013, the four months next preceding the commencement of proceedings in bankruptcy, an attachment made within which is dissolved by section 5044, are to be reckoned exclusive of the first day, and, if the last day falls on Sunday, exclusive of that also." There, the attachment was made Saturday, February 10, 1877, at 1 p. m., and the petition is filed on Monday, January 11, 1877, at 12 m. The court said the attachment was within four months next preceding the filing of the petition.

The purely technical error which the court committed in the case under consideration was in applying the rule for the computation of time, applicable in a case where the point to be determined is whether or not a petition in involuntary bankruptcy was filed within four months after the commission of an act of bankruptcy, to a case in which the question to be decided was whether or not an assignment of his property by an insolvent debtor was made within four months before a petition in bankruptcy was filed against him. For the reasons which we have given, this error was perfectly harmless to the plaintiff in error, and therefore afforded no ground for the grant of a new trial.

When an act of bankruptcy has been committed, and is followed by the filing of a petition in bankruptcy within four months after the commission of such act, the court has the power to appoint a trustee to receive, collect, and take charge of the effects of the bankrupt, including those which he may have illegally transferred within the period of four months before the filing of the petition. It would be a remarkable anomaly if, by adopting different methods of computing time, it could be shown that a petition in bankruptcy had been filed within four months after a person, by making an illegal assignment or transfer of his property, had committed an act of bankruptcy, and yet that this act of bankruptcy had been committed more than four months before such petition was filed. The result of such an

anomaly would be that the party could be lawfully adjudged a bankrupt because he had illegally transferred his property, and a petition in bankruptcy had been filed against him within four months thereafter; but the trustee appointed by the court could not recover this property or its value from the transferee thereof, because the transfer of the same occurred four months before the petition in bankruptcy was filed. If, in such a case, the act of bankruptcy consisted in the transfer of his entire property by the bankrupt, the whole purpose of the law in reference to involuntary bankruptcy would be defeated; for there would be nothing for the trustee to receive or collect.

3. As no material error was committed at the trial, and the verdict was supported by sufficient testimony, no reason for setting it aside appears.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 833)

HILL et al. v. STATE.

(Supreme Court of Georgia. July 18, 1902.)

CRIMINAL LAW—CERTIORARI—PROCEDURE.

1. A writ of certiorari purporting to have been sued out in forma pauperis is void when the affidavit of the plaintiff does not at least substantially meet the requirements of the statute.

2. When such a certiorari is dismissed for want of the proper affidavit, the case is at an end, and cannot be renewed under the provisions of Civ. Code, § 3786.

(Syllabus by the Court.)

Error from superior court, Pike county; E. J. Reagan, Judge.

Ralph Hill and others were convicted of riot. From an order dismissing a writ of certiorari, defendants bring error. Affirmed.

G. D. Dominick, for plaintiffs in error. O. H. B. Bloodworth, Sol. Gen., for the State.

LITTLE, J. Hill, Riggins, and Parks were indicted for the offense of riot. The case was transferred to the county court of Pike county, where it was tried, and a verdict was rendered finding the defendants guilty. It seems that the defendants had previously sued out a writ of certiorari to review the errors alleged to have been committed on the trial. When it came up for a hearing, it was dismissed because the affidavit in forma pauperis attached thereto was defective. Subsequently counsel for the convicted persons sued out this the second certiorari in proper form, but after the time in which a certiorari may be sued out had expired. When this certiorari came on to be heard, the trial judge dismissed the same because it was the attempted renewal of a former certiorari, passing the following order: "Ordered, that the within certiorari be, and the same is hereby, dismissed, because the first certiorari was dismissed for defective affi-

davits." To this ruling and order the defendants excepted, and the question made by the present bill of exceptions is whether the judge erred in passing the order complained of. In the case of *Hamilton v. Insurance Co.*, 107 Ga. 728, 33 S. E. 705, it was ruled by this court that when the writ of certiorari is issued on the filing of a bond which has never been approved at all the writ is void, and the bond is not amendable in the superior court. Presiding Justice Lumpkin, in the opinion which he rendered in that case, said: "The issuing of the writ by the clerk being, under the circumstances stated, totally unwarranted, it was the same thing, in contemplation of law, as if the writ had never been issued." To the same effect, see, also, *Dykes v. Twiggs Co.*, 115 Ga. 698, 42 S. E. 36. It is just as essential to the validity of such a writ in a criminal case that the affidavit prescribed by the Penal Code (section 765) should be made as it is that the bond required in a civil case should be given; and, as it has been ruled that in the absence of such a bond the writ is void in a civil case, it must follow that without a proper affidavit in a criminal case such writ is likewise void. It appears by the order in this case that the first certiorari sued out was accompanied by a defective affidavit, and because of such defect the writ was dismissed; and it must, therefore, be held that such first writ of certiorari which issued in the present case was void in effect.

2. It is provided by the Civil Code (section 3786) that, if a plaintiff shall be nonsuited, or shall discontinue or dismiss his cause, and shall recommence the same within six months, such renewed case shall stand upon the same footing, as to limitations, as the original case. We are aware that in the case of *Hendrix v. Kellogg*, 32 Ga. 435, it was ruled that a certiorari was a suit, within the meaning of the section of the Code to which we have just referred; and in the case of *Grimes v. Jones*, 48 Ga. 362, it was further ruled that a renewal within three months from the time at which a former certiorari had been dismissed was within the statute. But in the case of *Railway Co. v. Goodrum*, 115 Ga. 689, 42 S. E. 49, it was expressly ruled that, where a certiorari had been dismissed for want of a valid bond, the certiorari could not thereafter be renewed. It has no existence at first. It is not voidable; it is void. It is not a living thing, but a dead thing at its inception; and the statute which authorizes a renewal of suits within six months does not and cannot apply to any other than a living case, which for some reason has been dismissed. We are not unmindful of the ruling made in the case of *Mercer v. Davidson*, 80 Ga. 495, 6 S. E. 175, similar to that made in the *Grimes Case*, supra; but the reasoning of Chief Justice Simmons in the case of *Railway Co. v. Goodrum*, by which he shows that the ruling in *Grimes v. Jones* is not in conflict with the ruling in

Railway Co. v. Goodrum, applies with equally as much force to the ruling in the Davidson Case. It is apparent from the reasoning of Judge Blandford in this last-named case that the main question with which the court was then concerned was whether a certiorari was such a suit as could be renewed within six months, under the provisions of the Code cited supra. While we commend the reasoning of Justice Blandford as very strong in showing that it is not, yet we in no particular go to the extent of ruling that a certiorari, when properly sued out, is not a suit within the contemplation of the law. All the reasoning in the later cases is to the effect that, when a certiorari is defective in that a requirement of the statute necessary to the issuance of the writ has been omitted, the writ is void; it is a nonentity, and not a suit. It must therefore be ruled that, when the first certiorari was dismissed because of a defective affidavit, the case was at an end, because the attempt to certiorari was abortive, and the writ which issued was void. Being so, it cannot be renewed under the provisions of the Civil Code (section 3786), as was attempted to be done in the present case.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 121)

THORNTON v. TRAVELERS' INS. CO.
TRAVELERS' INS. CO. v. THORNTON.

(Supreme Court of Georgia. Aug. 7, 1902.)

APPEAL—REVIEW—GRANT OF NEW TRIAL—CITY COURT—JURY TRIAL—ACCIDENT INSURANCE—ACTION ON POLICY—WAIVER—PLEADING—AMENDMENT—PROOF OF LOSS—REFUSAL TO PAY.

1. A judgment granting a first new trial will never be reversed unless the law and the facts demanded the verdict rendered; and this is true notwithstanding the grant of a new trial may have been based upon a single ground in the motion, and though this ground may not have been well taken. But where, in such a case, the defendant in error brings a cross-bill of exceptions, the assignments of error therein relating to matters which will probably arise at another hearing will be decided.

2. A judge of a city court, who has, under the act creating the court, "power and authority to hear and determine all civil cases of which the said court has jurisdiction," when no demand for a jury is made within a given time, may hear all such cases without a jury; but he is not required to do so, and he may, in his discretion, submit any civil case to a jury, though no demand for that form of trial may have been made by either party.

3. When an accident insurance company seeks to avoid liability under a clause in a policy providing that the "insurance shall not cover . . . accident, nor injuries, nor death, nor loss of limb or sight, resulting, wholly or partly, directly or indirectly, . . . from hernia," and the insured had, at the time of the injury for which indemnity is claimed, an existing hernia in his system, it is incumbent upon the company, after it has been prima facie shown that an injury to the plaintiff resulted from an accident within the meaning of the policy, to show that the existence of the hernia at that time was a substantial

contributing cause, which wholly or partly, directly or indirectly, brought about the injury resulting from the accident; and liability under the policy is not defeated by showing simply that the existence of the hernia rendered more serious the consequences resulting from the accident. Lumpkin, P. J., and Little, J., dissenting.

4. Where, in a policy of insurance, there is an express stipulation that "no agent has power to waive any condition of this policy," the insured, by an acceptance of the policy, is estopped from relying upon any agreement made with an agent having the effect of waiving one of the conditions enumerated in the policy.

5. In a suit brought upon a policy of accident insurance to recover an indemnity for loss of time during a period of total disability, it is error to allow an amendment setting up a claim under the policy for indemnity for a partial disability for a period of time following the period of total disability, when the amendment does not allege that proper proof of such claim was made within the time required under the policy. A refusal on the part of the company to pay a claim for a total disability or a denial of liability on its part for such indemnity, would not have the effect of relieving the insured from the necessity of making the proof necessary to establish his additional claim for a partial disability.

6. Such of the assignments of error as are not referred to in the preceding notes which relate to matters which may arise upon another trial are dealt with in the opinion.

(Syllabus by the Court.)

Error from city court of Americus; C. R. Crisp, Judge.

Action by W. J. Thornton against the Travelers' Insurance Company. Judgment for plaintiff for a part of the amount paid, and both parties bring error. Judgment on the main bill of exceptions affirmed. Cross-bill reversed.

J. H. Lumpkin, for plaintiff. E. A. Hawkins, for defendant.

COBB, J. Thornton sued the insurance company in the city court of Americus upon a policy of accident insurance, and recovered a verdict. The defendant filed a motion for a new trial, which was granted, the judge stating in the order sustaining the motion that a new trial was granted for the reason that under the contract contained in the policy and the evidence produced at the trial he did not think the plaintiff was entitled to recover, and that a new trial was granted for this reason alone. To this judgment Thornton excepted, and the insurance company, by a cross-bill of exceptions, assigns error upon various rulings made during the progress of the case, and upon the refusal of the court to grant a new trial upon all of the grounds contained in the motion therefor.

1. This was the first grant of a new trial, and, as the verdict rendered was not demanded under the law and the facts of the case, an affirmance of this judgment necessarily results. Carter v. Dunson, 113 Ga. 374, 38 S. E. 830, and cases cited. As the effect of this affirmance is to leave the case to be tried again in the court below, it is necessary to decide such of the questions raised in the cross-bill of exceptions as relate

to matters which will likely arise at the next trial. Civ. Code, § 5527; *Holmes v. Langston*, 110 Ga. 862, 38 S. E. 251 (7).

2. The plaintiff failed to make a demand for a jury trial at the first term, but such a demand was made in writing at the next succeeding term. The court submitted the case to a jury, over the objection of the defendant, and upon this ruling error is assigned. The fourteenth section of the act creating the city court of Americus is as follows: "The judge of said city court shall have power and authority to hear and determine all civil cases of which the said court has jurisdiction, and to give judgment and issue execution thereon: provided, always, that either party in any case shall be entitled to a trial by jury in said court upon entering a demand therefor by himself or his attorney in writing on or before the call of the docket at the term to which the cause is returnable, in all cases where such a party is entitled to a trial by jury under the constitution and laws of this state." Under this act the judge of the city court of Americus has authority to try without a jury all civil cases in which no demand for a jury trial is made at the first term; but he is not required to do this, if, in his discretion, a jury trial is to be preferred. *Railroad v. Gleason*, 69 Ga. 201 (3).

3. The present suit was brought for loss of time resulting from an injury received by Thornton while riding as a passenger upon a railway train using steam as a motive power. The contract of insurance contained a stipulation indemnifying the insured against loss of time "resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation." It also indemnified against loss of time from partial disability under certain circumstances. The policy contained a stipulation in the following language: "This insurance shall not cover * * * accident, nor injuries, nor disability, nor death, nor loss of limb or sight, resulting wholly or partly, directly or indirectly, * * * from hernia." The insured was at the time of the injury, and had been for years before that time, afflicted with what is called by the medical experts who testified in the case a "reducible hernia," and at the time of the injury this hernia was of such a character as to require the insured to wear a truss. While traveling as a passenger upon a railway train, the insured arose from his seat, and walked along the aisle of the car for the purpose of obtaining a drink of water, and while thus walking in the car a sudden lurch of the train threw him violently to one side, and the truss which he was wearing struck against the arm of one of the seats, and the blow thus received produced what is termed by the medical experts "a strangulat-

ed hernia." It was necessary, in order to relieve this strangulated hernia, that a surgical operation should be performed, and, as a consequence of the injury received by the insured, he was totally disabled from work for some weeks, and after this total disability ceased he was partially disabled for an additional time, consisting of several weeks. Upon this state of facts the defendant contends that it is not liable to the insured, for the reason that, while the injury was a "bodily injury effected through external, violent, and accidental means," the loss of time did not result from this injury independently of all other causes, but was partly, if not wholly, and indirectly, if not directly, the result of the hernia which existed in the system of the insured at the time of the accident. On the other hand, the insured claims that he is entitled to recover, for the reason that the hernia which existed in his system at the time of the accident was not the proximate cause of the injury; that the injury would have resulted even if he had been a perfectly sound man, and altogether free from the bodily infirmity resulting from hernia; that the company is liable to him for the reason that he was injured as the result of an accident, within the meaning of the policy; and that the mere fact that his injuries might have been aggravated by the existence of the hernia at the time of the injury does not defeat his right to recover under the contract. There can be no question that the insured's injuries were the result of an accident within the meaning of the policy. The question to be determined is whether the fact that the insured had at that time a hernia existing in his system would preclude him from recovering on the policy, when the effect of the injury resulting from the accident was to change the character of the complaint from which he was suffering from that of a reducible hernia, which seems not to be necessarily of a serious nature, to that of a strangulated hernia, which seems to be in some cases of a dangerous, and in all cases of a serious, nature. It seems to us that the test to be applied in order to determine whether there is a liability under the contract is whether the condition of the insured in having, at the time of the accident, a reducible hernia, contributed to the accident in whole or in part, directly or indirectly. If it did contribute, the company would not be liable. But if the existence of the hernia in the system of the insured at the time of the accident did not substantially contribute, wholly or partly, directly or indirectly, in bringing about the injury, but merely aggravated the consequences of the accident, then the plaintiff would be entitled to recover. If the insured had been a perfectly sound man at the date of the accident, and it had resulted in producing a hernia, the company would be liable. In *Accident Ass'n v. Alexander*, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188, it was held that the insurer was not relieved from

liability upon an accident policy by a clause therein providing that the policy should not cover "injuries or death resulting from or caused directly or indirectly, wholly or in part, by disease or bodily infirmity, hernia, * * * rupture," etc., although the injury received may have produced hernia, which caused the death of the insured. In that case the insured was a perfectly sound man, a blacksmith by trade, and a blow made by him with a sledge hammer produced a strangulated hernia, from which death resulted. The ruling in that case was, in substance, that under the facts there was no injury resulting from hernia, but a hernia resulting from an injury. This ruling is amply supported by authorities both English and American, some of which are cited in the opinion. See, also, 1 Cyc. Law & Proc. 263; 1 Am. & Eng. Enc. Law (2d Ed.) 318, note 1; 3 Joyce, Ins. § 2833; Nibl. Acc. Ins. (2d Ed.) § 396; Benefit Ass'n v. Grauman, 107 Ind. 288, 7 N. E. 233. In construing a policy of life insurance, that interpretation is to be placed upon the words of the policy which is most favorable to the insured, and all ambiguities and doubts are to be resolved in favor of a liability against the insurer. Benefit Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (2); Warwick v. Knights of Damon, 107 Ga. 121, 32 S. E. 951. And especially is this rule of construction to be adhered to and applied in cases where the insured has prima facie established a right to recover under the terms of the policy, and the company is seeking to defeat such a liability by showing that the act complained of is within one of the exceptions reserved in the contract as a defense to an action on the policy. All such exceptions are to be construed strictly against the company, and liberally in favor of the insured.

Accident policies generally contain a clause the purpose of which is to relieve the insurer from responsibility in case of death or disability of the insured from disease. The language of this clause is not the same in all policies, and the determination of the question whether, under such a clause, the company is relieved in a particular case, depends upon the exact language in which the exception is couched. The American and English Encyclopedia of Law (vol. 1 [2d Ed.] p. 315 et seq.), in referring to clauses of this character in policies of accident insurance, says: "The tendency of the courts, under the settled rules of construction applicable to insurance contracts, is to interpret the clause in a manner favorable to the insured; and where the accident can be considered as the proximate cause of death, although disease may have been present as a secondary cause, or where the death is the reasonable and natural consequence of the injury, although disease may have supervened, the policy is not avoided unless the exception plainly includes such case. Policies excepting 'death or disability in conse-

quence of disease,' or 'injury happening directly or indirectly in consequence of disease, or caused wholly or in part by disease,' or 'injury caused by or arising from natural disease,' have received interpretation in accord with the above principles; yet where the death is directly due to disease, and not to accident, the exception protects the insurer." In the case of Travelers' Association v. Smith, 56 U. S. App. 393, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653, Sanborn, Circuit Judge, in referring to the question as to when an accident insurance company would be liable under a contract containing clauses similar to those in the policy under consideration, says: "If the death was caused by a disease, without any bodily injury inflicted by external, violent, and accidental means, as in the case of the malignant pustule (Bacon v. Accident Ass'n, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748), and as in the case of sunstroke (Sinclair v. Assurance Co., 3 El. & El. 478; Dozier v. Casualty Co. [C. C.] 46 Fed. 446, 13 L. R. A. 114), the association was free from liability by the express terms of the certificate. If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such a bodily infirmity that a short run, followed by stooping, which would not have injured a healthy man, produced apoplexy (Insurance Co. v. Selden, 42 U. S. App. 253, 78 Fed. 285, 24 C. C. A. 92), the association was exempt from liability, because the death was caused partly by disease and partly by accident. If the death was caused by bodily injuries effected by external, violent, and accidental means alone, the association was liable to pay the promised indemnity. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death; and the death is attributable, not to the disease, but to the causa causans—to the accident—alone. Insurance Co. v. Robbins' Adm'r, 27 U. S. App. 547, 560, 561, 65 Fed. 178, 186, 12 C. C. A. 544, 552, 27 L. R. A. 629; Railroad Co. v. Callaghan, 12 U. S. App. 541, 550, 56 Fed. 988, 994, 6 C. C. A. 205, 210; Railroad Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256, 259; Accident Ass'n v. Shryock, 36 U. S. App. 658,

663, 73 Fed. 774, 776, 20 C. C. A. 3, 5." In *Lawrence v. Insurance Co.*, 7 Q. B. Div. 216, the policy sued on contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured; but it does not insure in case of death arising from fits, * * * or any disease whatsoever arising before or at the time of or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury." It appeared that the insured, while in a railway station, was seized with a fit, and fell forwards off the platform across the railway, when an engine and carriages which were passing went over his body and killed him. It was held that his death was caused by an accident, within the meaning of the policy, and that the insurer was liable. Denman, J., said: "I think we are bound to hold that the death arose from the engine destroying the insured by coming across him, and not from the previous fact of a fit having attacked him, and so brought him there." And Williams, J., said: "The true meaning of this proviso is that, if the death arose from a fit, then the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation. * * * I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff."

The language contained in the clause of the policy now under consideration is altogether different from that which was contained in the policy in the *Lawrence Case*. It is distinctly provided in the policy now before us that if the injury is one resulting wholly or partly, directly or indirectly, from hernia, the company is not liable. When the plaintiff shows that his loss of time resulted from a bodily injury inflicted through external, violent, and accidental means, this imposes *prima facie* a liability upon the company under the terms of the policy, and if it seeks to avoid liability on the ground that the plaintiff's injury was received in such a manner as to bring the case within

one of the exceptions contained in the policy, the burden is upon the company to establish this defense. It was, therefore, in the present case, incumbent upon the defendant, in order to defeat liability, to show that the injury which the plaintiff had received resulted either wholly or in part, directly or indirectly, from the fact that at the time of the injury a hernia existed in his system. If the hernia that so existed did not substantially contribute to the injury which resulted from the accident, the plaintiff would be entitled to recover, notwithstanding the fact that the presence of the hernia might aggravate the consequences of the accident, and thus result in the plaintiff's disability continuing for a longer time than it would have continued but for the presence of the hernia. The fact that the plaintiff had a hernia would not alone relieve the company from liability if his injury was the result of the accident. The effect of the stipulation is simply that the company will not be responsible for injuries received as a result of an accident in which the existing hernia is either the sole or a contributing cause. That clause in the policy which excepts from the operation of the policy injuries resulting from disease, etc., properly construed, excepts an accident which is the result of disease, and not the consequences flowing from an accident which was entirely disconnected with the disease. To illustrate: If a policy holder should have a serious and long-continued illness, such as a fever of some nature, and while recovering therefrom, and in a condition unable to resist successfully any serious shock, should receive a blow upon the head from falling plastering, from which death ultimately, though not immediately, resulted, the proximate cause of the death would be, not the fever, but the blow from the plastering, although death may not have resulted but for the debilitated condition of the injured person resulting from the fever. In such a case the immediate cause of the death was the blow on the head, though the consequences might be the result of the disease from which he suffered. In order to defeat a recovery under such a clause in the policy, it must be shown that the disease was the substantial cause of the injury; and the mere fact that the disease may aggravate the consequences of the injury, and make them more serious than they would have been otherwise, does not bring the case within the exception stated in the policy. Many other illustrations might be used, but we think this sufficient to show that in a case like the one now under consideration the insured will not be precluded from recovering simply because he had a hernia, and while thus afflicted sustained an accidental injury, which any one, even in sound health, would have sustained under similar circumstances; the only effect of the hernia being to aggravate the consequences resulting from the accident. If upon an-

other trial of the case it should be made to appear that the fact that the plaintiff had at the time of the injury a reducible hernia did not substantially contribute to the injury, he will be entitled to recover, notwithstanding it might appear that the consequences resulting from the injury might have been more serious on account of the presence of the hernia than they would have been if the plaintiff had been free from this infirmity. On the other hand, if it should be made to appear that the existence of the hernia in the system of the insured was a substantial contributing cause in bringing about the injury, and the injury was the result, either in whole or in part, directly or indirectly, from the fact that at the time it was inflicted the insured had within his system the reducible hernia, then the defendant would have made out its defense, and the plaintiff would not be entitled to recover. We express no opinion upon the facts disclosed by the present record, as the case goes back for another trial, at which a different state of facts may be made to appear.

4. The plaintiff testified that he told the agent of the company to whom the application for the policy was made, at the time the application was made, that he had hernia, and that the agent told him that it was not necessary to state this in the application, that he did not want it in the application, that the company did not require it. The purpose of this testimony seems to have been to establish a waiver on the part of the company of its right to insist upon that provision in the policy that it would not be liable for injuries resulting from hernia. The policy delivered to the plaintiff had in it a stipulation that "no agent has power to waive any condition of this policy." Even if the evidence offered was sufficient in itself to show a waiver, the agent had no authority to make this waiver in behalf of the company; and when the policy was delivered to the plaintiff with this stipulation appearing in the face thereof, he was put on notice that this waiver by the agent was not binding on the company, and he is precluded from setting up the waiver claimed to have been thus made. *Porter v. Friendly Society*, 114 Ga. 937, 41 S. E. 45; *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908; *Cook v. Insurance Co.*, 84 Mich. 12, 47 N. W. 568.

5. The petition of the plaintiff, as originally filed, claimed indemnity for a total disability continuing for 10 weeks; it being alleged that, in accordance with the conditions of the policy, he had given to the company immediate notice in writing of the injury which he had sustained, and for which he claimed indemnity. At the trial an amendment was offered, in which the plaintiff claimed additional indemnity for 25 weeks of partial disability, at the rate of \$40 a week. The defendant objected to the allowance of this

amendment, upon the ground that the same added a new and distinct cause of action; and also for the reason that there was no allegation in the amendment that the plaintiff had given to the defendant immediate written notice of the full particulars of the accident and injuries sued for, and furnished it affirmative proof of the duration of such partial disability within 13 months of the time of the accident, as required by the conditions of the policy. The court overruled the objections to the amendment, and allowed the same, and to this ruling the defendant excepted. The petition alleged that the insured was injured on the 17th day of April, 1900, and the amendment was allowed on the 6th day of August, 1901. The policy, copy of which was attached to the petition, contained a provision that: "Immediate written notice, with full particulars, and full name and address of insured, is to be given said company at Hartford, Conn., of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb or sight, or duration of temporary disability, and of their being the proximate result of external, violent, and accidental means, is so furnished within thirteen months from time of such accident, all claims based thereon shall be forfeited to the company." We think the court erred in allowing this amendment. Under the stipulation in the policy it was incumbent upon the insured, as soon as he was injured, to give immediate notice of this fact to the company, and under the allegations of the petition this was done. A compliance, however, with this provision of the policy did not give him a right of action upon the policy. As a condition precedent to suit it was incumbent upon him, in addition to the immediate written notice provided for, to furnish to the company, within 13 months from the date of the accident, affirmative proof of the duration of the disability; and upon his failure to do this any claim that he had against the company would be forfeited. According to the allegations of the petition, the insured did furnish, within due time, affirmative proof showing a total disability for a period of 10 weeks, and made claim for indemnity for such disability. The company absolutely refused to pay this claim. He did not furnish to the company, within 13 months, proof of any other disability than a total disability for 10 weeks; nor did he, prior to the bringing of the suit, make any demand or claim against the company other than that for indemnity for a total disability. It is said that the absolute refusal to pay on the part of the company relieved the insured from the necessity of making this proof. Of course, it is well settled that an absolute refusal to pay, or a denial of liability, dispenses with the necessity of making formal proofs of loss under a policy of insurance. *Insurance Co. v. Wickham*, 110 Ga. 129, 35 S. E. 287 (2). We do not understand, however, that this rule applies to a case where the insured has two separate and dis-

inct claims of indemnity, and makes a demand for only one, and the refusal to pay is limited to the demand so made. It seems that the principle of the ruling made in the case cited would go no further than to relieve the insured from the necessity of making proper proofs of loss so far as the demand for indemnity made by him is concerned. The present case is an illustration of what a hardship would result if the rule were broader in its operation than that just indicated. The insured made a demand for a total disability of 10 weeks, and the company had no notice whatever of any other claim or demand on his part against it under the policy. For reasons satisfactory to it, it refused to pay this claim; and now it is contended that, as a result of this refusal, the insured is relieved from the necessity of making proper proofs of an entirely separate and distinct claim under the policy, of which the company has never had any notice. It had notice that the plaintiff was injured, and it had notice that the plaintiff claimed indemnity for a total disability of 10 weeks, but it has never had any notice that the plaintiff claimed, in addition to the total disability, a partial disability for 25 weeks, until after a suit had been brought upon the policy to recover indemnity for the total disability, and after the time for making proofs of loss under the policy had expired. We do not mean to hold that the plaintiff, by making proofs of loss for an indemnity of 10 weeks at a time when he did not know whether there would or would not be a partial disability following this total disability would be precluded from making a demand for indemnity for such partial disability. But we do hold that, even if he could make a separate demand for such partial disability, such demand must have been made within the time stipulated in the policy,—that is, within 12 months from the date of the injury,—and that no suit can be brought on the policy for indemnity for such partial disability until this proof has been made.

6. The foregoing deals with all of the questions involved in the present case which it is necessary to discuss at length. There was no error in admitting evidence relating to Thornton's ability to labor prior to the injury. This evidence might have some bearing upon the question as to whether the existence of the hernia substantially contributed to the injury received by him. There was no error in excluding the letters written by the plaintiff and his counsel to the defendant. The letters of counsel clearly showed that they were written for the purpose of inaugurating negotiations for a compromise, and there was nothing in the letter of the plaintiff which was at all relevant to any issue on trial. It simply showed that the plaintiff was irritated at the refusal of the company to pay his claim, and, as a consequence of this irritation, made a foolish and an idle threat to injure the company's

business in several states of the Union. The charge of the court, which instructed the jury substantially that if they believed that Thornton procured the insurance by falsely representing that he was free from bodily infirmity, and such representation was material and false, and he knew it was false at the time of making it, and if this fact was unknown to the company or its authorized agent, the plaintiff could not recover, was certainly not erroneous as against the company, and we are not called upon to decide whether it contained any error as against the plaintiff. Let the case be tried again in the light of what is contained in the foregoing opinion.

Judgment on main bill of exceptions affirmed; cross-bill reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

LUMPKIN, P. J. and LITTLE, J. (concurring specially). We concur in the judgments rendered upon both bills of exceptions, and in each of the rulings announced in the headnotes except the third. From that, and from the reasoning of the court in support thereof, we dissent. There cannot, in our opinion, upon the facts disclosed by the record in this case, be any lawful recovery against the insurance company.

(100 Va. 432.)

BURNHAM v. JAMES.

(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

ACTION ON NOTE—PAYMENT—EVIDENCE.

1. Evidence in action on note reviewed, and held insufficient to sustain defense of payment.

Appeal from corporation court of Bristol.

Action by Mary J. James against George Burnham, Jr. Judgment for plaintiff. Defendant appeals. Affirmed.

Fulkerson, Page & Hurt, for appellant. John W. Price, for appellee.

HARRISON, J. On the 1st day of September, 1887, W. W. James, Sr., sold and conveyed certain lots in the city of Bristol to John M. Bailey and W. D. Jones jointly. The two grantees executed their separate notes to the grantor, each for one-half the purchase money, and the deed was duly recorded, reserving on its face a vendor's lien to secure the purchase money. By deed dated January 23, 1888, W. D. Jones conveyed his undivided half interest in these lots to his joint owner, John M. Bailey. After passing through several successive alienations, the lots mentioned were conveyed, on the 19th day of September, 1898, by William McGeorge, Jr., and wife to the appellant, George Burnham, Jr.

This suit was brought in October, 1899, by Mary J. James, as assignee of her husband, W. W. James, Sr., to enforce the payment of two purchase-money notes executed by W. D.

Jones, one of the two original purchasers of the lots from W. W. James, Sr. It is not denied in this proceeding that the two notes executed by John M. Bailey, the joint purchaser with W. D. Jones, have been paid off and discharged.

There was no error in overruling the demurrer to the bill. A case calling for equitable relief was stated, and the grounds of demurrer suggested were matters of defense, rather than cause for denying relief in advance of the evidence necessary to be taken.

That the complainant, Mary J. James, was the lawful assignee for value of the notes sued on is supported by full and complete proof.

The court did not err in excluding the testimony of S. V. Fulkerson, A. Fulkerson, John M. Jones, and William McGeorge as to the statements they claim to have heard one William Wallace make about the transaction under consideration. This evidence was clearly hearsay, and inadmissible for any purpose. The chief defense relied on was that the two notes sued on, which were executed by W. D. Jones to W. W. James, Sr., had been paid, and that the complainant had been guilty of such laches in prosecuting her suit to enforce collection that a court of equity would not grant relief. A careful examination of the record discloses no circumstances that can be invoked to justify the presumption that the notes were paid; on the contrary, the preponderance of evidence is to the effect that they have not been paid. It is not pretended that any one of the successive purchasers of these lots from W. D. Jones has at any time paid these notes. The contention is that Jones at some time paid them. The notes themselves are in the possession of the appellee, Mary J. James, without credit or indorsement. The deed retaining the vendor's lien duly recorded is not marked satisfied, and the evidence shows that the appellant and his predecessors in title took a conveyance of the land in question, not only with constructive notice of this recorded vendor's lien, but with actual notice that the record disclosed such a lien not marked satisfied. Not one dollar is shown to have been set apart by any one for the payment of these notes, nor has one dollar been traced to their payment. Mary J. James, the owner of the notes, says they are not paid, W. W. James, the assignor of the notes, says they are not paid, and W. D. Jones, the maker of the notes, a short while before his death, said in the presence of three witnesses that the notes were not paid. The only direct evidence tending to establish their payment is the statement of McGeorge, the grantor of the appellant, that W. W. James had told him they were paid. This statement is emphatically denied by W. W. James, and is irreconcilable with the admission of the maker of the notes against his own interest, in the presence of three witnesses, that the notes were unpaid. W. D. Jones, the maker

of the notes, was the brother of the appellee, Mary J. James. While reputed to be a very rich man at the time he executed the notes sued on, the fact is abundantly established that he was a speculator in real estate, and a debt maker, and not a debt payer. It appears that at the time he made the purchase in question from W. W. James he was very heavily in debt, and hard pressed; that his large indebtedness continued to increase in volume until he died, in July, 1890, leaving many thousands of dollars due, and no assets with which to pay. During the three years that he lived after executing the notes in question, he was using the credit of his brother-in-law, James, in bank to raise money to aid in keeping him afloat. In brief, the whole record represents Jones as a hard-pressed person financially, and in a bankrupt condition. It could hardly be presumed, under such circumstances, that this debtor paid his sister, whose debt was well secured, and whom he could more easily postpone than his clamorous unsecured creditors.

The vendor's lien here sought to be enforced was not barred under the statute until 1907, and this suit was brought in 1899, eight years before the claim was barred. Equity will sometimes refuse relief where a shorter term than that prescribed by the statute of limitations has elapsed without suit, but no such laches appear in this case as would justify a denial of relief to the appellee. Mrs. James doubtless knew of her brother's embarrassed financial condition, as he was staying a large part of the time at her house, and did not care to enforce her claim during the three years that elapsed before his death. After his death, suits were brought involving a settlement of his estate, and an investigation into the extensive purchases of real estate made by him in several states, and it was not for some time that it was known that the real estate would not pay the purchase-money liens thereon, and that the estate was hopelessly insolvent.

For these reasons, the decree appealed from must be affirmed.

(100 Va. 516)

SPOOR v. TILSON et al.

(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

SPECIFIC PERFORMANCE — DEFENSES — DEFECTIVE TITLE.

1. In a bill for a specific performance of a contract to purchase land, it is no defense, on the ground of defective title, that the assessor without authority reduced the area of the land upon his books, as such act in no manner prejudiced the title of the owner.

Appeal from circuit court, Smyth county.

Bill by James Tilson and others against W. M. Spoor. From a decree for complainants, defendant appeals. Affirmed.

Jas. H. Gilmore, for appellant. J. H. Fulton and H. N. Bell, for appellees.

KEITH, P. This is the sequel of the case reported in 97 Va., at page 279, 33 S. E. 609.

James Tilson occupied and controlled a tract of land containing about 600 acres, the title to which was in a trustee, for the benefit of his wife and her children. Tilson had cultivated this property and paid the taxes on it for a number of years prior to July 11, 1890, upon which date he and his wife and his children entered into a contract with W. M. Spoor for the sale of the 300 acres of this land, more or less, at the price of \$3,500, to be paid in four equal annual payments. The purchase money not having been paid, the Tilsons filed their bill, praying the specific performance of the contract. Spoor answered this bill, stating that he purchased from the complainants a tract of land lying on the foothills of the Iron Mountain, in Smyth county, at the price of \$3,500, the vendors pointing out the boundary lines thereof, and representing the same to be unincumbered, except to the extent of a conflict of title with the heirs of George Douglas, there being an overlap of lines with these lands, and, as to this overlap, they desired to sell with covenants of special warranty; that the property was desirable as a whole, because of its showing for mineral deposits, and as such was purchased, but respondent ascertained that the representation of ownership and possession made to him was false and fraudulent, and that in fact, as far back as the year 1885, complainants had entered on the commissioner's book of Smyth county a disclaimer of right and title to 200 acres of the land sold by them. He further states that he would not have purchased the property except as a whole, and he denies the right of the complainants to require him to take the residue of the tract, sold after the surrender of 200 acres to the Douglas heirs.

When the case was before us upon a former occasion, we were of opinion that the circuit court erred in sustaining a demurrer to this answer, which was considered as a cross-bill; being of opinion that if its averments were sustained by proof, that the defendant would be entitled to a rescission of this contract. The case was remanded to the circuit court, where a decree was entered, in which it was held that the averments of the answer and cross-bill were untrue, and decreed that, unless Spoor, or some one for him, paid the balance of the purchase money within 30 days, the land should be resold.

The land in dispute was derived under a title from the commonwealth by virtue of a grant as early as 1787. It adjoined on the south and interlocked with a boundary of land known as the "Douglas survey," title to which is derived under a patent issued by the commonwealth in 1795. The Tilsons and those under whom they claim, it will thus be seen, had the older title and possession under it. By the terms of the contract of sale to Spoor, it was provided that a deed conveying the land "should contain all the usual cove-

nants of general warranty, except as to the Douglas land or big survey, and it with special warranty; possession given with the signing of this contract; a lien is retained for the purchase moneys."

It appears from the parol evidence that Spoor fully understood the nature of this contract, and the title which he was to acquire, and that he was to conduct, at his own expense, any litigation with respect to any controversy growing out of the interlock with the Douglas survey.

In 1885 James Tilson complained to the assessor, who was at his house for the purpose of assessing his land, that he was paying too much taxes thereon, and thereupon the assessor, without his knowledge, or that of his wife and children, reduced the area of the land assessed from 600 acres to 400 acres. This fact, unknown to the Tilsons at the time, did not come to their knowledge for a year or two, and at the next assessment, in 1890, they called the attention of the commissioner to it, but the correction seems not to have been made until 1895, when it was restored to 600 acres.

Soon after Spoor was put in possession of the land, he commenced to cut timber upon it. Thereupon an injunction issued by the circuit court of the United States, at the suit of the Douglas Company, was served upon him, forbidding him to cut any more timber, or to take away that which had already been cut. At the May term, 1896, the circuit court of the United States entered an order continuing this injunction until the 1st day of September, 1896, so as to give Spoor an opportunity to bring his action of ejectment, and providing that, unless such suit was instituted on or before that date, the injunction should stand perpetuated. Spoor, in order to acquire the legal title, and be in a position to maintain an action of ejectment, caused a deed to be prepared, which he presented to the Tilsons, and requested them to execute it, which they declined to do, because it did not conform to the contract of sale, in that it purported to convey 400 acres of land instead of 300 acres, more or less, and because Spoor did not pay, or offer to pay, the purchase money, all of which was then due. Under these circumstances, the Tilsons refused to execute the deed, and the result was that the injunction was perpetuated, and the land embraced in the Douglas interlock was lost.

There is nothing in the evidence to show that Tilsons made a false representation with respect to this interlock. What was done by the assessor seems to have been wholly unauthorized. His act, as shown by the proof, did not induce Spoor to make the purchase, for he knew nothing of it at the time, nor until 1896, a year after it had been entered, did not affect the title, was not relied upon by the Douglasses in the injunction, nor influenced the result in any degree. Spoor bought with special warranty as to this interlock, and expressly assumed the burden of any litigation that

might arise with respect to it. If he had paid the purchase money, or tendered it, he would have been entitled to receive from the Tilsons a deed which would have conveyed to him the undisputed legal title to the whole boundary, which the Tilsons undertook to sell, and armed with legal title, and clothed with possession under it, it cannot be doubted that he would have prevailed in an action of ejectment, notwithstanding the entry upon the assessor's books, of which he complains.

We are of opinion there is no error in the decree complained of, and it is affirmed.

(100 Va. 540)

TYREE v. HARRISON.

(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

LIBEL—PRIVILEGED COMMUNICATION—ABUSE —EVIDENCE—QUESTION FOR JURY— APPEAL—REVIEW.

1. A complaint of misconduct on the part of a policeman, addressed to the person charged with supervision over him, is a privileged communication.

2. Where a complaint is made by a citizen to the mayor of the city in relation to the conduct of a policeman, charging him with insolence and coarseness, and to have been under the influence of liquor, and on trial for libel, the testimony as to the difficulty between the parties and the conduct of the officer is conflicting, the question as to whether the privilege of the citizen to complain of the conduct of a policeman was abused is one for the jury on the evidence.

3. Strong, violent, or abusive language used in a complaint to a mayor as to the conduct of a police officer may raise an inference of malice, and destroy the privilege that would otherwise attach to the communication.

4. Where a verdict has been set aside, and a writ of error is taken from the order setting it aside, the case does not stand on a demurrer to the evidence, but the verdict is entitled to great respect, and should not be disturbed unless plainly against the evidence.

Error to circuit court of city of Roanoke.

Action by Peter R. Tyree against H. W. Harrison. Judgment for defendant, and plaintiff brings error. Reversed.

Scott & Staples, for plaintiff in error.
Cooke & Glasgow, for defendant in error.

KNITH, P. H. W. Harrison addressed the mayor of the city of Roanoke the following letter:

"Hon. James P. Woods—Dear Sir: I respectfully call your attention to the fact that a policeman named Peter R. Tyree came into my office to-day, and from his insolence and coarseness seemed to be under the influence of liquor of some kind. He summoned me to police court, as he said, because my horse got his front feet on sidewalk.

"He lied by saying that people complained of it, and when I questioned him as to the complainants, he confessed to an untruth. I at once removed my horse to the stable, though of great inconvenience to me, on ac-

count of my peculiar class of work, as you must know.

"He was angry from some cause, and was very rude in his manners. I have seen no such brutality exhibited without cause by any other policeman, and such creatures should be in some other position, and not take their spite out on gentlemen, as I certainly violated no law to my knowledge and will. He is a low-bred, vulgar man, and surely unacquainted with his duties, or overrides them.

"Respectfully, your obt. svt.,

"H. W. Harrison."

A few days thereafter Tyree brought suit against Harrison, and upon trial the jury gave him a verdict of \$1,000. This verdict was upon motion of the defendant set aside, to which action of the court the plaintiff filed his bill of exceptions. At another day the case was submitted to the court without a jury, and a judgment was rendered for the defendant. Thereupon Tyree obtained a writ of error from one of the judges of this court, and the error assigned is that the court should have rendered a judgment for the plaintiff upon the verdict of the jury.

There is no doubt that the letter which was addressed to the mayor is a privileged communication. It is not only the right, but the duty, of the citizen to make complaint of any misconduct upon the part of officials to those charged with the supervision over them, and it is for the court to say what communications are privileged, and for the jury to determine whether or not the privilege has been abused.

As was said by Judge Lewis in *Strode v. Clement*, 90 Va. 556, 19 S. E. 177: "Ordinarily the law implies malice from the use of words defamatory or insulting. But the presumption is the other way where the occasion of the publication is privileged, and the onus is then upon the plaintiff to prove malice in fact. Where the defendant acts in performance of a duty, legal or social, or in defense of his own interests, the occasion is privileged. * * * But the question of good faith, belief in the truth of the statement, and the existence of actual malice, remains for the jury." *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360.

In the same case it is said "that strong or violent language, disproportioned to the occasion, may raise an inference of malice, and thus lose the privilege that would otherwise attach to it."

These principles were embodied in the instructions given to the jury in the case under consideration. The court told the jury that the communication which was the foundation of the action was privileged, and left it to the jury to say whether the occasion had been used in good faith, and without malice.

The principal witnesses were the parties themselves. Tyree's account of what was said and done by him upon the occasion of his visit to Harrison's office which called forth the letter of August 10th is that he waited upon Dr. Harrison in the discharge of his

¶ 1. See *Libel and Slander*, vol. 22, Cent. Dig. § 124.

duty, and informed him that his horse was standing upon the sidewalk, in violation of one of the ordinances of the city; that he treated him with politeness, courtesy, and respect; that he was guilty of no rudeness of manner or language; that he did not threaten to arrest him, but merely notified him to appear before the police court.

Dr. Harrison's account of this interview is substantially a reproduction of what appears in his letter. He says that Tyree's first remark was that he would have to arrest him, because everybody was complaining about his horse upon the sidewalk, and that he was tired running after him; that his face was red, and his manner was violent, vulgar, coarse, and brutal.

Immediately after this interview, Dr. Harrison went to the office of the mayor to make complaint, but did not find him, and during the afternoon he met with Tyree upon the street, and some conversation took place between them, in which Harrison demanded to know who had lodged a complaint against him, to which Tyree says he replied: "I told him that complaint had been made. He insisted on my telling who it was. I did not tell him on account of the condition he was in,—mad. I did not want him to go back to see Mr. Greene. I said, 'You saw your horse on the sidewalk, and I saw it on the sidewalk.'" It may be as well to state that the Mr. Greene here alluded to was the owner of the premises in front of which the horse was found, and from whom Tyree ascertained that it belonged to Dr. Harrison. The letter, it will be recalled, states that "he lied by saying that people complained of it, and when I questioned him as to the complaints, he confessed to an untruth." This charge is based upon the interview in the street in the afternoon, to which we have just alluded, and in which Tyree states that he refrained from informing Dr. Harrison of what had occurred, because, as he says, "I did not want him to go back to see Mr. Greene;" in other words, Tyree did not wish to bring about a difficulty between these two gentlemen.

We have not attempted to state in detail the evidence in the case. Enough has been said to show that there is not only a strong conflict of evidence, but that the principal witnesses are almost wholly contradictory of each other. If Tyree's version of the occurrences which he narrates is to be accepted, his conduct was beyond reproach, and furnished no cause for any complaint whatever. If, on the other hand, Dr. Harrison's version be true, he would naturally have been justly irritated, and it might be said that the occasion would have excused him.

It is for the jury to pass upon the credibility of witnesses and upon the weight of evidence. When their verdict is rendered, courts have, it is true, a restricted power to review their findings as to the preponderance of the testimony; but the credibility of witnesses is exclusively for the jury.

In this case, as we have seen, the jury rendered a verdict with which the judge of the trial court was not satisfied, and it was set aside. Such a case does not stand upon a demurrer to evidence. As was said by this court in *Chapman v. Investment Co.*, 96 Va. 177, 81 S. E. 74: "If the trial judge is dissatisfied with the verdict, and grants a new trial, some latitude must be allowed to his discretion;" but in such a case the verdict of the jury "is entitled to great respect, and should not be disturbed, even by the trial court, unless plainly against the evidence" (*Marshall's Adm'r v. Railroad Co.*, 99 Va. 804, 34 S. E. 455); and in that case there being a strong conflict in the testimony, the judgment of the trial court, which had set aside the verdict, was reversed.

It is true that in *Strode v. Clement*, supra, the court reversed the judgment which awarded damages, because it was held that the communication complained of was privileged, and that the presumption that the defendant acted in good faith and without malice was not rebutted by the evidence, although the jury had found a verdict for the plaintiff; but that case is to be distinguished from the one under consideration in this decisive particular: In it only one witness was examined, and from his evidence the facts of the case appeared, "thus affording the appellate court the same opportunity to draw their conclusion as the trial court and the jury possessed"; while here the evidence is conflicting, the witnesses are contradictory of each other in every important particular, and just such a case is presented as is peculiarly within the province of a jury.

We are of opinion that the judgment of the circuit court should be reversed, and judgment rendered for plaintiff in error upon the verdict of the jury.

(100 Va. 533)

BOWERS v. BRISTOL GAS & ELECTRIC CO.

(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

NEGLIGENCE—BURDEN OF PROOF—DEMUR- RER TO EVIDENCE.

1. In an action to recover for the death of a lineman in the employ of defendant company, the burden rests on plaintiff to prove that defendant was negligent, and that such negligence was the proximate cause of the injury.

2. On a demurrer to evidence, demurrant is entitled to the benefit of all of his unimpeached evidence not in conflict with that of his adversary, and of all inferences that necessarily follow therefrom.

Error to corporation court of Bristol.

Action by M. J. Bowers, administratrix, against the Bristol Gas & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bailey & Byars, W. S. Hamilton, and J. H. Winston, for plaintiff in error. John W. Price, for defendant in error.

WHITTLE, J. This action was brought in the corporation court for the city of Bristol to recover damages for the death of W. T. Bowers, the husband and intestate of plaintiff in error, alleged to have been occasioned by the negligence of the defendant company.

The case made by the declaration is that deceased at the time of the accident, in September, 1900, was employed by the defendant company (a corporation owning and operating electric lights and lines in Bristol, Va., and Bristol, Tenn.) to trim with carbons the electric lights along its lines, and to replace and adjust carbons and keep the lights in proper condition. That at Anderson Park, Bristol, Tenn., Bowers, while attempting to reach a point on a pole supporting a lamp, to adjust and arrange the carbon in the lamp, "came in contact with electricity leaking or escaping from the lamp, fixture, frame, and appliances, and wire supplying the lamp with electricity, by reason of which he was shocked and thrown from the pole," receiving injuries which caused his death.

That the defects complained of were known to the company, but were unknown to Bowers.

The company pleaded "Not guilty," and, after the testimony was closed, demurred to the evidence. Thereupon the jury returned a verdict for the plaintiff, subject to the opinion of the court on the demurrer to evidence, and assessed her damages at \$3,500. The court sustained the demurrer and rendered judgment for the defendant, and the case is here upon writ of error to that judgment.

The accident occurred and Bowers died in Tennessee.

It appears that he, in company with his wife and children, was on his way to church on Sunday night, when he discovered that the arc light in question was not burning. Leaving his family at a street corner near by, he went to the park to start the light. He was soon afterwards found lying on the ground at the foot of the pole in an injured condition, and stated that he had received a shock which caused him to fall. He was carried to his home, and only survived some two hours. It is matter of conjecture as to just how the shock was occasioned. The evidence disclosed the fact that the insulation on one of the wires carrying the current of electricity to the lamp was worn off where it entered the left hood pole; and the forefinger and second finger on the right hand of deceased were badly burned,—the second finger on the inside, next to the forefinger.

In the argument much stress was laid on the fact that the pole was in a leaning position, but that circumstance was not made a ground of complaint in the declaration, nor was it proved to what extent, if any, it contributed to the accident. The burden rested upon the plaintiff to prove by affirmative evidence that the company was negligent, and that its negligence was the proximate cause of the injury complained of. *Railway Co. v. Sparrow's Adm'r*, 98 Va. 640, 37 S. E. 302;

Railroad Co. v. Cromer's Adm'r, 99 Va. 763, 40 S. E. 54.

Conceding that it may have been negligent in failing to properly insulate its wire, it nevertheless plainly appears that that omission could not have been the primary cause of the accident. The evidence shows that contact with the wire at the hood pole, where the insulation was worn off, would not of itself have produced shock, but in order to bring about that result there must also have been connection with the carbon of the lamp, thereby shunting the electrical current from its true course and causing it to make a short circuit through the body of deceased.

It is not pretended that the insulation was defective, except at the one point. It must follow, therefore, that the other point of contact, necessary to form a circuit, was the carbon of the lamp.

When the carbon electrodes are in contact the current is continuous, and in order to produce light they must be slightly separated. The theory of the arc light is that, by separating the carbon electrodes, some of the carbon, or the volatile constituents not expelled by previous baking, become volatilized, and the interrupted electrical current passes from the one to the other in the form of a curved flame or arc. Intense heat is generated by the current encountering an opposing electromotive force at the arc, and energy is transformed into heat. At the same time a brilliant light is emitted by the white-hot carbon electrodes.

It appears that the customary, proper, and safe way to adjust the carbons is to separate them with a dry stick,—a nonconductor,—a usage well known to the deceased, who had been engaged in that business for nine years.

So that the necessary inference from conceded facts is that the cause of accident was the failure of Bowers to take this obvious precaution for his own safety, coupled with the defective insulation of the wire at the hood pole.

In that aspect of the case, it appears that the contributory negligence of deceased was the proximate cause of the injury; and in such case, upon familiar and well-settled principles, there can be no recovery.

But there is another view of the case equally fatal to plaintiff's pretensions. The evidence showed that deceased, in addition to trimming lamps and doing inside wiring, was line inspector, and thereby charged with the duty of keeping the company apprised of the condition of the wires, poles, and lamps. It was through him alone that the company could have known of the defective insulation of the wire in question. It is insisted that there was a conflict of evidence on that point, and, under the rules applicable to demurrers to evidence, the doubt must be resolved in favor of the demurree. A careful consideration of the testimony shows that there was no such conflict. Mrs. Bowers, Mrs. Sullivan, and the witness Smith, in answer to a general ques-

tion as to what were deceased's duties, replied that he trimmed lamps and did inside wiring. But it is apparent that they did not undertake to give a comprehensive statement of all his duties. For, in answer to another question, Mrs. Bowers conceded that it was his duty, in addition to what had been enumerated, to perform the service in which he was engaged when the accident that caused his death befell him; and Smith admitted that he did not know what his duties were.

On the other hand, Gannon, the general manager of the company, testified that, at the time of the accident, Bowers was employed in the capacity of lineman, lamp trimmer, and line inspector; that he had been engaged in the two former capacities, as witnesses for the plaintiff declared, but left the service of the company, and, after an absence of about two months, in the latter part of August or the first of September, returned, and was employed by him as lamp trimmer, lineman, and inspector; that by the former contract he was paid \$20 per month for trimming lamps, and 10 cents an hour for extra work and repairing, while under the latter he received a fixed salary of \$40 per month. The business of a lamp trimmer is to replace burned carbons, and this is done in the daytime, when the current is off, and when, of course, there is no danger. As line inspector, deceased had entire charge of the line, and it was his duty to inspect the line, and, if out of order, to repair it, if he could; otherwise to report the defect to the company.

The company had no way to inspect its lines and lamps, and no means of ascertaining their condition, except through its agent, and no report was made of this defect.

Ferguson testified that Bowers repeatedly told him that it was his duty to trim the lamps and inspect the line. And Wiley, who succeeded him, said that that was his business.

No attempt was made by the plaintiff to contradict the statements of the company's witnesses as to the duties of Bowers under the second contract. Under these circumstances, it would be, indeed, an unreasonable and narrow view of the subject to hold that the general statements of plaintiff's witnesses as to the duties of deceased were in conflict with those of the company, who gave in detail the precise stipulations of the second contract. Especially is that true in the light of the evidence on both sides that by the original contract the duties of deceased were those of lamp trimmer and inner lineman, and the additional duty to inspect was imposed by the second contract, when his wages were increased in consequence from \$20 per month, and 10 cents per hour for extra work, to \$40 per month.

The witnesses of the company did not deny the correctness of plaintiff's version of the terms of the first contract, but affirmed that there was a second contract by which those duties were increased. The plaintiff heard

their testimony, and did not contradict it. The testimony on behalf of the company was in the nature of a confession and avoidance, and the matter of avoidance was not controverted. A conflict of evidence cannot be reasonably and fairly predicated of such conditions.

In many of the states of the Union—possibly in all except Virginia and West Virginia—the demurrant waives all his evidence. But the rule is otherwise in this jurisdiction, and, as is well understood, the demurrant is entitled to the benefit of all his unimpeached evidence not in conflict with his adversary's, and to all inferences that necessarily flow therefrom.

The fact that deceased was line inspector having been established, it follows that any injury arising from defective insulation of wires which it was his duty to inspect was a risk incident to the employment which he assumed, and cannot be made the ground of an action for damages.

Still another question was raised and discussed,—one of more than ordinary interest.

As remarked, the declaration averred and the evidence showed that the alleged cause of action arose in the state of Tennessee. At common law the maxim, "*Actio personalis moritur cum persona*," prevails, and it is insisted that it was incumbent upon the plaintiff to allege and prove her right to maintain this action under some statute of Tennessee.

That this court will take judicial notice of the fact that the territory of which Tennessee is composed constituted a part of the original English colonies of America, and, in the absence of evidence to the contrary, will presume that the common law obtains there. *Nelson v. Railroad Co.*, 88 Va. 976, 14 S. E. 838, 15 L. R. A. 533; *Stewart v. Conrad's Adm'r* (Va.) 40 S. E. 624.

Inasmuch, however, as the views already taken of the case are conclusive of it, a decision of that question is unnecessary.

The judgment of the trial court in sustaining the demurrer to the evidence was plainly right, and must be affirmed.

(100 Va. 526)

DICKENSON et al. v. GRAY.

(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

DOWER—ACTION TO RECOVER—ELECTION BY ALIENEE—DEFAULT IN PAYMENTS.

1. Where, in a suit by a widow to recover her dower, the alienee has elected, under Code, § 2278, to pay her interest on one-third of the value of the land, and a decree to that effect is rendered, her right to dower in kind, like a vendor's lien or lien for owelty of partition, is not merged in the decree, and she is entitled to have her dower assigned on the failure of the alienee to pay the interest.

2. If a second election to pay interest on one-third of the value of the land, instead of dower, as allowed by Code, § 2278, is permissible to an alienee who has once elected to pay interest on such third, and has failed to do so, it should be only upon the terms that he pay all interest re-

maining unpaid at the time of the institution of the suit in which the second election is made, as well as the actual interest thereafter.

3. Under Code, § 2278, allowing a widow payment of interest on one-third of the value of the land, against an alienee electing so to do, the interest runs only from the institution of the suit.

Appeal from circuit court, Russell county.

Bill by Mrs. Gray against one Dickenson and others. Decree for plaintiff, and defendants appeal. Affirmed.

Wm. E. Burns and W. W. Bird, for appellants. E. S. Finney, for appellee.

BUCHANAN, J. About the year 1858 Harvey Gray, the husband of the appellee, aliened a tract of land by a conveyance in which she did not unite. After her husband's death, in the year 1872, she filed her bill against the alienee of her husband to have dower assigned her, or, if the alienee preferred it, to allow him, as provided by section 2278 of the Code, to retain the whole land upon the terms of his paying her annually for her life legal interest on one-third of the value of the land at the time of her husband's death. The alienee electing to pay such interest in lieu of having dower in kind assigned, the court so decreed, and the cause was stricken from the docket. During the lifetime of the alienee, and for some years afterwards, the annual interest decreed was paid; but, not having been paid for the years 1896 and 1897, executions were issued therefor, and returned "No property found." The appellee thereupon instituted her suit in chancery to subject the tract of land in the hands of the heirs of the alienee to the payment of the interest then due and in arrears, and which was alleged to be a lien upon the land. The defendants made defense, and it appearing upon a hearing of the cause that the decree for interest upon which the bill was based had not been revived against the personal representatives of the alienee, and that more than five years had elapsed since their qualification and before the institution of the suit, the court sustained the plea of the statute of limitations, under section 3577 of the Code, and dismissed her bill.

The appellee then filed her bill against the heirs at law of the alienee to have dower in kind assigned her in the land, but did not mention the former proceedings had in reference to her dower, as hereinbefore described.

The defendants in their answer to that bill set up the proceedings in the former suits, and relied upon them as a complete bar to the appellee's right of recovery, but asked, in the event the court was of opinion that her right to dower was not barred by the decrees in those cases, that they might retain the land, and the appellee be required to take in lieu of dower in kind the interest on one-third of the value of the land as it was at her husband's death, as provided by section 2278 of the Code.

Upon a hearing of the cause the court held that the decrees in the former suits did not bar the appellee's right to recover, and de-

creed that unless the defendants, within a time named, should elect to pay her the annual interest as fixed by the decrees in the first dower suit, including the interest then in arrears, dower in kind should be assigned her, and damages be decreed her for its detention from the institution of the suit. The appellants failing or declining to make such election within the time fixed, the court appointed commissioners to assign dower in kind, and rendered a decree for damages for its detention. From those decrees this appeal was granted.

The first question to be considered is whether, as appellants contend, the plea of former adjudication relied on in their answer is a bar to the appellee's recovery of either dower in kind, or of annual interest in lieu thereof.

Section 2278 of the Code was enacted for the benefit of the alienee of lands in which the alienor's widow is entitled to dower, and permits him to retain possession of the whole land "on the terms of his paying to the widow during her life lawful interest from the commencement of her suit on one-third of the value, at the husband's death, of the estate so aliened, deducting the value of such permanent improvements then existing as may have been made [after the alienation] by the alienee or his assigns." This right is independent of the widow's wishes in the matter, and depends solely upon the election of the alienee, or those who claim under him, to take advantage of and comply with the provisions of the statute. To entitle him to continue in the possession of the widow's interest in the land, he must not only elect to pay the annual interest on its value, but he must actually pay it. The payment of the interest is the condition and the consideration upon which his right to the continued possession of her interest in the land depends. The fact that the decrees in the suit for dower show the alienee's election to pay interest, and determine the amount and time of its payment, does not bar the widow of her right to dower in kind if the alienee fails or refuses to comply with the terms upon which he is permitted to defeat such recovery. Her right to dower in kind is not absolutely merged in such decree, and she is not compelled to look alone to the remedies which she may have by execution or bill upon it to subject the alienee's personal and real property to the payment of the interest decreed her. If she were, she might be deprived of her dower rights without the payment of any consideration, for at the time of the rendition of such decree there might be judgments and executions against the alienee for amounts more than sufficient to exhaust both his real and personal estate. It was not, we apprehend, the intention of the lawmaking power, in the enactment of section 2278 of the Code, to deprive the widow of her right to dower in kind by merely giving her a personal decree against the alienee for annual interest on its value. It is the payment of the annual interest, which interest is, in a sense, the purchase price of her property, and not merely a per-

sonal decree against the alienee, which bars her right to have dower in kind assigned. It is well settled that a vendor's lien and a lien for owelty of partition, which partakes of the nature of a vendor's lien, each constitutes a prior incumbrance upon the land on which it is charged, and follows the land into whosoever hands it may come. Such a lien is not released by taking the personal obligation of another or other security for its payment. Neither is it merged by a judgment or decree therefor, but subsists until it is clearly shown to have been waived, released, or satisfied. *Jameson v. Rixey*, 94 Va. 342, 344, 26 S. E. 861, 64 Am. St. Rep. 728, and cases cited; *Jordon v. Buena Vista Co.*, 95 Va. 285, 288, 28 S. E. 321.

If a vendor's lien or a lien for owelty of partition is not merged in a judgment or decree therefor, and such lien continues until it is waived, released, or satisfied, even though the judgment or decree for it be barred or annihilated, clearly it would seem that a widow's right to dower in kind ought not to be merged in a decree which provides, in accordance with the statute, that her husband's alienee may retain possession of her dower interest upon his paying her annually legal interest on the value of her dower, when he and those who claim under him have failed and refused to pay such interest. The widow is entitled to dower in kind, or the interest provided in lieu thereof. The appellants having failed and refused to comply with the terms of the statute and the decree which gave them the right to prevent a recovery of dower in kind by the appellee, she was entitled to have dower assigned her, and the court did not err in so decreeing.

Notwithstanding the failure and refusal of the appellants to pay the annual interest provided for in the first suit for dower, the court in this, the case under consideration, permitted them to elect to retain the whole land upon the payment of the annual interest fixed by the decree in the first suit, and their assuming to pay the interest then due and in arrears under that decree. This action of the court, in so far as it required the appellants to assume the payment of interest which had accrued prior to the institution of this suit, is assigned as error.

If the appellee had instituted no proceedings for the assignment of her dower prior to this suit, the contention of the appellants would have to be sustained, for under the statute the widow is not allowed, as against the alienee or those who claim under him, to recover damages prior to the institution of her suit. Code, §§ 2277, 2278. But that is not this case. The appellee's right to dower had been settled in the first suit. The alienee had availed himself of the provisions of section 2278, and elected to retain the whole land upon the terms of paying the annual interest on its estimated value. In failing and refusing to pay such interest as it accrued, the appellants were in fault. To allow them, after having failed and

refused for years to pay such interest, to escape its payment, and to hold and use the whole land without any compensation to the widow, would allow them to take advantage of their own wrong, and offer a premium for the violation of an agreement or election of which they were claiming the benefit. It may well be doubted whether, in a case like this, an alienee of land, or those who claim under him, has the right a second time to prevent a recovery of dower in kind by paying annual interest on its value. The statute does not seem to provide but for one election, and, as it is in derogation of the widow's rights, the statute ought to be construed strictly; at least, it ought not to be so construed as to deprive the widow of both dower in kind and interest in lieu thereof. If a second election be permissible at all, it ought, we think, as the circuit court decreed, to be upon the terms that the alienee, or those who claim under him, pay all interest remaining unpaid at the time of the institution of the suit in which the second election is made, as well as the annual interest which has accrued or shall accrue after the institution of the suit.

But as the appellants failed or refused to make an election upon the terms prescribed by the decree of the circuit court, the remaining question, raised by appellee's assignment of error under rule 9 of the court, is the amount of damages which the appellee is entitled to recover for the detention of her dower.

As the appellee in her bill in this case made no reference to her first suit for dower, or to her suit to enforce the lien of the decree rendered in that case, and did not rely upon those proceedings for any purpose in her pleadings in this case, her rights to damages must be determined as if those proceedings had not been had. This being so, she was only entitled to damages for the detention of her dower from the institution of this suit in accordance with the terms of the statute. The annual rental value of the whole land during that period being shown to have been \$375, the circuit court properly held that the appellee was entitled to \$125 (one-third thereof) annually from the institution of her suit until dower should be assigned, and so decreed.

We are of opinion that there is no error in the decrees appealed from, and that they should be affirmed.

(100 Va. 507)

NEW RIVER MINERAL CO. v. PAINTER.
(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

APPEARANCE—WAIVER OF OBJECTIONS—DECLARATION—AMENDMENT—WATER RIGHTS—RELEASE OF DAMAGES.

1. Where, before a motion to quash the return of the sheriff upon a process, defendant had appeared and consented to the continuance of the case, it was a waiver of any objection to the return.

2. Where the declaration was for damages resulting from the negligent doing of a lawful act, an amendment, after an appearance claim-

ing that the damages were caused by the committing of the same act, but alleging it to be unlawful, was not a setting up of a new cause of action, or a bringing into the case of a substantive cause of action different from that originally declared upon.

3. Where, in an action for injury to land, plaintiff testified that a sketch made by him of the premises was substantially correct as to the location of plaintiff's dwelling house and store, and the street laid out upon it, its introduction could not have harmed defendant, especially where it afterwards introduced a map made by one of its witnesses, and examined him upon it.

4. Evidence is admissible to identify the particular property mentioned in a deed.

5. The construction of a deed and a written agreement is for the court and not for the jury.

6. Plaintiff granted to defendant a perpetual right to the free use of a certain spring branch, running through plaintiff's property, for the purpose of washing iron and other ores, and released defendant from all damages which might be sustained by such use of the water, whether they arose from the pollution of the water, or from its overflowing on lands of the grantor, or from any other use of the water. By a later agreement, plaintiff covenanted with defendant that it could lay troughs through certain lots for the purpose of carrying off the water and refuse material. *Held* not to give the defendant the right to pump water from other streams,—one of them many times as large as the water right given,—and to turn those added waters from the channel of, or over the land adjacent to, the stream, the use of which was granted, without any liability to the plaintiff because of the release of all claim of damages in the deed.

Error to hustings court of Radford.

Action by William M. Painter against the New River Mineral Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Blair & Blair and M. M. Caldwell, for plaintiff in error. J. O. Wysor and Longley & Jordan, for defendant in error.

BUCHANAN, J. William M. Painter instituted his action of trespass on the case to recover damages for injuries to his property resulting from an overflow of water, sediment, and mud thrown upon his premises by the New River Mineral Company.

1. The refusal of the court to quash the return of the sheriff upon the process issued upon the amended declaration is the first error assigned. Before the defendant made its motion to quash, it had appeared and consented to a continuance of the case. Objections which do not go to the substance of an action are treated as waived if not made when the occasion for them arises. It is a well-established rule of practice that by appearing to the action the defendant waives all defects in the process and in the service thereof. The decisions go further, and imply such a waiver from the defendant's taking or consenting to a continuance as fully as they do from his pleading to the action. The object of the writ is to apprise the defendant of the nature of the proceeding against him. His taking or agreeing to a continuance is evi-

dence of his having made himself a party to the record, and of his having recognized the case as in court. It is too late for him afterwards to say that he has not been regularly brought into court. *Harvey v. Skipwith*, 16 Grat. 410, 414; 5 Rob. Prac. 101, 103.

2. The defendant moved the court to strike out the amended declaration upon the ground that it made an entirely new case from that stated in the original declaration, in this: that it charged the defendant with doing an unlawful act, whilst the original declaration charged it with doing a lawful act negligently. Upon the court overruling this motion, the defendant demurred to the amended declaration, and each count thereof, upon the same ground, which was also overruled. The action of the court both in overruling the motion to strike out and in refusing to sustain the demurrer is assigned as error.

If it were conceded that the case made by the original declaration was for damages resulting from the negligent doing of a lawful act, and that made by the amendment or amended declaration was for damages caused by the doing of the same act which was alleged to be unlawful, the rulings of the court both upon the motion to strike out and upon the demurrer were correct.

Counsel have not cited, nor have we in our investigation found, any decision of this court which indicates what amendments of the declaration the court may allow after appearance; but there are many decisions upon the question in other jurisdictions. The rule generally prevailing seems to be that such amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action, different from that declared on, and different from that which the plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action. In such cases the original and amended declarations, and the count or counts in each, are regarded as variations in the form of liability to meet the possible scope and varying phases of the testimony, which is one of the very objects and purposes of adding several counts and of making amendments to a declaration. *Snyder v. Harper*, 24 W. Va. 206, 211; *Smith v. Palmer*, 6 Osh. 513, 519; *Yost v. Ely*, 23 Pa. 327, 331.

The injuries complained of in the original and in the amended declaration in this case were the same. The form of action was not changed. The amendment only varied the

¶ 4. See Evidence, vol. 20, Cent. Dig. § 2112.

mode of demanding the same thing; that is, damages done the same property by the same causes.

3. The plaintiff was permitted, over the defendant's objection, to introduce in evidence a pencil sketch or map of the injured premises, made by one of its witnesses who was not an engineer or surveyor, and examined him upon it. This is assigned as error. The witness testified that the sketch was substantially correct as to the location of the plaintiff's dwelling house and store, and the streams of water and street laid down upon it. The drawing, no doubt, enabled the jury better to understand the location of the damaged premises and the evidence of the witness. We are unable to see how its introduction, and the witness' examination upon it, could have injured the defendant, especially as it afterwards introduced a map of the premises by one of its witnesses, and examined him upon it.

4. There was no valid objection to the evidence of the plaintiff offered for the purpose of identifying the spring branch mentioned in the deed of November 8, 1884, made by the plaintiff and others to the defendant. There was some controversy as to the identity of the branch. Evidence aliunde is always admissible where there is a question as to the application of a grant to its proper subject-matter. It is not a question of construction, but of location. It is a question of fact to be determined by the jury by the aid of extrinsic evidence. *Reusens v. Lawson*, 91 Va. 228, 235, 21 S. E. 347.

5. Another error assigned is the court's action in giving instruction numbered 1 asked for by the plaintiff, and in refusing to give instructions 3 and 4 asked for by the defendant, and in giving in lieu thereof the instructions numbered 5 and 6 given by the court.

The objection made to the plaintiff's instruction numbered 1 is that it took the construction of the deed and agreement under which the defendant claimed from the court, and referred their interpretation to the jury. If this had been the only instruction given, there would have been much force in the defendant's objection, for no rule is better settled than that the construction of written contracts is for the court, and not for the jury. But instructions 5 and 6 given by the court in lieu of instructions numbered 3 and 4 offered by the defendant construed the said deed and agreement, and did not, in fact, leave their construction to the jury, as the defendant contends. The jury by their verdict show that they accepted and followed the court's construction of the deed and agreement, so that, if any injury was done the defendant in the construction of these papers, it did not result from giving the plaintiff's instruction numbered 1, but in giving the court's instructions numbered 5 and 6 in lieu of the defendant's instructions 3 and 4. Did the court properly construe the deed and agreement?

By the deed of November 8, 1884, the plaintiff and others granted to the defendant and its successors the perpetual right to the free and unobstructed use of the waters of a certain spring branch running through the plaintiff's property, for the purpose of washing iron and other ores, and of operating such machinery as the defendant had already erected or might thereafter erect on the spring branch, and agreed and covenanted to release the defendant for all damages which the grantors or those claiming under them had or might thereafter sustain by reason of the use of the waters of said branch by the defendant and its successors for washing iron and other ores, and in operating machinery necessary for their manufacturing purposes, whether such damages arose from the pollution of the waters of the stream, or from its detention or overflowing the lands of the grantors, or from the deposit of mud or sediment or other things thereon by said stream, or "from any use of said spring branch" by the grantee (defendant).

By the agreement of June 25, 1891, the plaintiff and others, parties of the first part, agreed and covenanted with the defendant and the Lobdell Car Wheel Company that they, the parties of the second part, should have the right to construct and lay troughs through certain lots for the purpose of carrying off the water, tailings, and refuse material from the washers then erected and to be thereafter erected by the parties of the second part on the waters of the branch mentioned in the deed of November 8, 1884, for the purpose of washing iron and other ores. In consideration of this right to lay troughs through and over the lands of the plaintiff and others, parties of the first part, the parties of the second part agreed and bound themselves that the troughs should be of sufficient size and dimensions to carry off all the water, tailings, and other waste material from the washers, and that the troughs should be kept open and unobstructed, so as not to overflow and damage the lands of the parties of the first part any more than they were then liable to be overflowed and damaged by the waters of the spring branch.

At the time this agreement was entered into, the defendant had ascertained that the waters of the said spring branch were not sufficient to wash all the iron ores that it wished to wash, and it was preparing, or perhaps had already commenced, to pump water from two other streams, viz., New River and Powder Mill Branch, to its washers located on the said spring branch, which increased greatly the flow of water from its washers, thus rendering it necessary to acquire the right from riparian landowners below to convey water over or through their lands, unless, as the defendant claims, it had this right as to the plaintiff, at least, under the deed of November 8, 1884. The language relied on in that deed as giving the right in question is that which releases the defendant from all dam-

ages "from any use of said spring branch" by the defendant. If the language quoted, standing alone, be susceptible of the construction contended for by the defendant, it clearly has no such meaning when read, as it must be, in connection with the other provisions of the deed. The object of the deed, as shown by its granting clause, was to grant to the defendant the perpetual right to the free and unobstructed use of the waters of the spring branch for the purpose of washing iron and other ores, and of operating such machinery as the defendant had then erected or might thereafter erect on that stream, and to release the defendant from all damages which the grantors thereof had sustained or might thereafter sustain by reason of the use of the waters of the branch for the purposes for which they were granted. This is the clear meaning of the deed when read as a whole. If it had been the intention of the parties to the deed that the defendant was to have the right to pump water from other streams (one of them many times as large as the spring branch) to its washers, and that those added waters should find their outlet through the channel of, or over the land adjacent to, the branch, and that the grantors in the deed, the owners of such lands, were to release all claims for damages which might result to them from such extraordinary use of the stream, language better suited for such purpose would have been used than the expression relied on. Besides, if that were the intention and effect of the deed, the agreement of June 25, 1891, was wholly unnecessary, as to the plaintiff.

We are of opinion that the court properly construed the said deed and agreement in its instructions numbered 5 and 6, and that the defendant was not prejudiced by the court's action in giving and refusing instructions.

6. The remaining assignment of error is to the action of the court in refusing to set aside the verdict of the jury because the damages found were excessive.

The evidence tends to show that within one year prior to the institution of the plaintiff's action the quantity of ore washed was increased from less than 100 tons in the dirt to more than 1,000 tons; that the troughs erected under the agreement of June 25, 1891, failed to accomplish the purposes for which they were built, and were filled with mud, overflowed, and flooded the low ground upon which the plaintiff's store was standing, and in which he was conducting a mercantile business, seriously damaging the building, which had cost \$2,000 or more, covering the public road in front of it with thick mud, which rendered the approach to it from that direction disagreeable and at times difficult; that two or more springs owned and controlled by the plaintiff were flooded, and the waterworks by which the plaintiff supplied his dwelling house, storehouse, and other buildings with water were greatly damaged, if not rendered

useless, during much of that year. Five or more witnesses testified as to the damages suffered by the plaintiff. They varied in their estimates. The lowest placed the damages at \$2,500, and the highest at \$5,000 or over. The jury fixed them at \$1,700. The trial court approved the verdict, and we cannot say that it is not sustained by the evidence.

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

(100 Va. 498)

BANK OF RADFORD v. KIRBY.

(Supreme Court of Appeals of Virginia. Sept. 12, 1902.)

USURY—PAYMENT—ACTION TO RECOVER.

1. Where there is an assignment of a security, with an absolute guaranty of its payment at a discount greater than the legal rate of interest, the transaction is usurious.

2. Where payments have been made upon a usurious debt, and the borrower applies the payments to the interest, or the lender makes the application with the assent of the borrower, the appropriation will not be disturbed, unless the borrower within one year thereafter, as provided by Code, § 2823, brings an action to recover the same.

Appeal from circuit court, Pulaski county.

Suit by Elizabeth Kirby against the Bank of Radford. Judgment for plaintiff. Defendant appeals: Reversed.

D. S. Pollock, for appellant. I. H. Larew, for appellee.

OARDWELL, J. The facts out of which this appeal arises are as follows:

On the 1st day of January, 1895, H. S. Kirby made an assignment by deed to J. D. Chumbley and J. A. Pratt, trustees, of all his property, both real and personal, to secure his various creditors. Among the assets conveyed was a debt against one L. T. Jennings for the sum of \$6,500, evidenced by eight notes dated August 14, 1894; the first seven of the notes being for the sum of \$900 each, and the last for \$900, and all bearing interest from the 1st day of September, 1894, and being for a part of the purchase money for a tract of land conveyed by the said H. S. Kirby and wife to Jennings. This tract consisted of 605 acres, but to secure the payment of the aforesaid notes a vendor's lien was retained by Kirby on only 100 acres of the tract; Kirby covenanting in the deed to look alone to the vendor's lien retained upon the 100 acres for the payment of the sum of \$8,500 evidenced by the said notes.

One of the debts for which H. S. Kirby made provision in his assignment to Chumbley and Pratt, trustees, was a debt due to the Bank of Radford for the sum of \$1,700, evidenced by a note, and the sum of \$1,500, evidenced by another note, which had been re-

newed, and was not yet due; and Elizabeth Kirby, the mother of H. S. Kirby, was one of the indorsers on these two notes and some other notes also secured by the deed of assignment.

In March, 1895, after the bank had brought suit on the \$1,700 note against H. S. Kirby as maker, and Elizabeth Kirby and others as indorsers, Elizabeth Kirby concluded that she would take an assignment of the property of H. S. Kirby which he had conveyed to Chumbley and Pratt, trustees, for the benefit of his creditors, and make herself responsible for the debts thereby secured. The object she had in view was to get time within which to meet the debts for which she was bound as indorser, and protect her own property against liability therefor in case the trust property should prove insufficient to pay them.

To effect this arrangement ultimately agreed to by the creditors thereby secured, including the Bank of Radford, H. S. Kirby and wife, Chumbley and Pratt, trustees, and all of the creditors provided for in the trust deed, joined in a deed to her (which is spoken of in this record as a "composition deed") conveying all of the trust property; and she by the same deed created a charge upon 600 acres of her own land as security for the payment of the debts of the creditors of H. S. Kirby provided for in his deed to Chumbley and Pratt, trustees, with interest on these debts from March 1, 1895.

In this deed the debt of the Bank of Radford, evidenced by the two notes,—the one for \$1,700 and the other for \$1,500,—is provided for, and stated to be \$3,250, with interest from March 1, 1895; the difference being on account of accrued interest on the \$1,700 note and costs in the suit brought thereon previously. By this deed Elizabeth Kirby covenanted and bound herself to take the property conveyed to her in trust for the payment of the debts mentioned therein, and to sell, collect, and apply the proceeds therefrom to that purpose alone.

About the time, or shortly before, "the composition deed" of March 5, 1895, was executed, Elizabeth Kirby applied to the Bank of Radford, through a friend, as her agent, to find out whether, in the event she perfected the arrangement then contemplated, it would buy from her the Jennings debt, and the bank at that time stated that it did not desire such paper; but after some delay, and insistence on the part of Mrs. Kirby's agent, it finally agreed to purchase the debt, and made her a tentative offer therefor, which was thereafter to be more accurately stated. Some days afterwards the sale and transfer of the Jennings debt by Mrs. Kirby to the Bank of Radford was effected. Up to this time Jennings had not executed the bonds, but they were then executed by Jennings to H. S. Kirby, and Mrs. Kirby indorsed her name in blank upon each of them and

delivered them to the bank; the bank agreeing to pay her the sum of \$5,090.13, and she to execute, acknowledge, and have admitted to record a deed of trust to one R. L. Gardner, trustee, reciting the fact that she had sold, transferred, and assigned the Jennings bonds to the bank for value received, and that, as the vendor's lien retained on only 100 acres of the Jennings' land was deemed insufficient security for their payment, she conveyed a tract of 200 acres of land in trust as further security for the payment of the said bonds, and to secure their prompt payment to the bank at maturity, and for no other purpose, provided that, if Jennings should make default in the payment of either of the bonds, she was to have 120 days' notice of such default before the trustee (Gardner) was authorized to proceed to sell the land thereby conveyed. This deed to Gardner, trustee, was duly executed by Mrs. Kirby and admitted to record.

In making this sale of the Jennings debt to the bank, it was agreed between Mrs. Kirby and the bank that the debt payable to the bank, above mentioned, which Mrs. Kirby had assumed and provided for the payment in the "composition deed," should be allowed as part of the purchase price of the Jennings debt, and the balance of the purchase price placed to the credit of Mrs. Kirby at the bank, which was done, and that balance was shortly thereafter drawn out by her.

When the first of the series of the Jennings bonds became due and payable, and Jennings failed to pay the same, the bank brought suit at law thereon against him, and recovered the amount thereof; and when the second of the series became due and payable, and Jennings failed to pay, the bank brought a suit in equity to enforce the vendor's lien retained on the 100 acres of the Jennings land. To this suit Mrs. Kirby was made a party, and she filed her answer to the bill, practically admitting the bank's ownership of the Jennings bond, and its right to have the 100 acres of land subjected to the payment thereof. Under the decree of sale in that suit Mrs. Kirby became the purchaser of the 100 acres of land at the price of \$2,000, and paid the purchase money to the commissioner of the court; and, by the same decree which confirmed the sale and directed a conveyance to her, it was decreed that the commissioner pay the costs of the suit out of the purchase money, and then pay off the Jennings bond for \$800, with interest, which fell due September 1, 1896, and the bond for \$800 and interest, due September 1, 1897.

At the next term of the court, in March, 1898, the commissioner having made his report, a final decree was entered in the cause, stating that, "it appearing to the court from said report that after the payment of costs there remained the net sum of \$1,890.78 to be applied to the payment of the Jennings bond; that said net sum was sufficient to pay off

the bond, with its accrued interest, which became due September 1, 1896, and leaves a net balance of \$927.98 to be credited on the bond due September 1, 1897, as of November 5, 1897; and that the commissioner so applied the said sum, showing a balance due on the latter bond of only \$24.82 as of November 6, 1897,—there being no exceptions to said report, the same is confirmed, and, all the purposes of this suit having been accomplished, the same is stricken from the docket."

On the 10th day of April, 1900, the bank, having previously exhausted the resources against Jennings, and the fourth of his bonds being due and payable, gave notice to Mrs. Kirby of Jennings' failure to pay as provided for in the deed of trust given by her to Gardner, trustee; and the trustee having on August 30, 1900, advertised the land conveyed by her for sale to pay the bonds then due and payable, on the first Monday in November Mrs. Kirby filed her bill at rules in the clerk's office of the circuit court of Pulaski county against the bank and Gardner, trustee, alleging usury in the transaction with her by which the bank became the purchaser of the Jennings bond, and praying that the sale of the land by the trustee be enjoined. To this bill the bank filed its answer, denying it had loaned any money to the complainant, and asserting that the transaction between it and the complainant was a bona fide sale of the Jennings bonds to the bank.

The cause having been matured, upon a final hearing thereof the circuit court by its decree held that the transaction was usurious; that the bank was only entitled to the sum of \$5,090.13, without interest (being the amount received by the complainant for the Jennings bonds); and that the complainant was entitled to have the sum of \$2,728.78 paid by Jennings and applied to these bonds as they fell due deducted from said principal sum of \$5,090.13; thus allowing the bank for its debt against the complainant only the sum of \$2,361.35, with interest from the date of the decree, and requiring the bank to pay the costs of the suit. From this decree the bank obtained an appeal to this court.

The legislation in this state on the subject of usury is reviewed at length in the opinion of this court by Keith, P., in *Munford v. McVeigh's Adm'r*, 92 Va. 446, 23 S. E. 857, and requires no further discussion here. As was there said: "Hereafter it would seem that in cases involving the charge of usury the only questions to be considered are: First, was there usury in the transaction? And, second, where payments have been made upon an usurious transaction, how should those payments be applied?" There, also, many of the decided cases involving these questions are reviewed; and they, as well as the numerous cases cited in the argument of this case, agree that whether or not there was usury in a transaction is to be determined from the facts

and circumstances of the particular case under consideration.

"If the usury be established, the measure of relief will be that the lender can only recover the principal sum loaned or forborne, subject, of course, to the rule laid down in *Munford v. McVeigh*, supra, touching the application of payment." *Greer v. Hale*, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814.

Mr. Minor, in discussing the "Doctrine of Usury" (3 Minor, Inst. pt. 1, pp. 306-308), cites a number of cases in which it was held that the particular transaction under review was or was not usurious, and says: "It should further be observed that an apparent assignment of a security may sometimes in fact amount to a loan, as where the assignor, having parted with a security at a greater discount than the legal rate of interest, becomes by law or by special agreement liable for the full amount due on its face. Indorsers of negotiable securities are thus liable by law, and the assignor of a common-law security may assume a similar responsibility by special contract; and in these cases, therefore, an indorsement or assignment at a discount exceeding the prescribed rate of interest is usurious." In support of this statement of the law the cases of *Whitworth v. Adams*, 5 Rand. 333, and *Bell v. Calhoun*, 8 Grat. 22, are cited, and the correctness of those decisions has never been questioned.

In words other than those employed by the learned author just quoted, no matter by what shift or device a lender of money is to receive therefor a rate of interest or profit greater than is allowed by law, the transaction is to be regarded as usurious.

What, therefore, is the transaction we have under review? It cannot be questioned (in fact, it seems not to be controverted) that the undertaking of appellee is an absolute and unconditional guaranty of the payment of the several installments of the Jennings debt, principal and interest, at maturity. The provision in the contract that she was to have notice of the default of Jennings before her land was advertised for sale to pay what was due the appellant in no way qualifies that guaranty, and appellee's liability for the Jennings debt, regardless of his solvency or his ability or willingness to pay, attached immediately on entering into the contract. In effect, the appellant said to appellee, "I will not buy the Jennings debt at any rate of discount, but if you will guaranty the payment of its several installments at maturity and without condition, and make your guaranty good by deed of trust on real estate, I will pay you \$5,090.13 for the debt so guarantied and secured." This was exactly the transaction between the parties, and the result of it was that the appellee received from the appellant the sum of \$5,090.13, for which she gave her unqualified and unconditional guaranty, made good by deed of trust on her

land, to pay back to the appellant the amount of the Jennings debt, with accrued interest at maturity; the difference between the amount she received from appellant and the amount of the Jennings debt, with interest, at maturity, being, as is conceded, 9 per cent. per annum on the \$5,090.13. This was nothing more nor less than a device or shift by which the appellant, for \$5,090.13, loaned or advanced, was to receive from the borrower, the appellee, \$6,500, and interest thereon at 6 per cent., in installments,—3 per cent. per annum in excess of the rate of interest allowed by law,—and therefore the circuit court did not err in so treating the transaction.

The transaction being a loan, and usury thereon established, the appellant can only recover the principal sum loaned; but, as to the application of the amounts received by the appellant on account of the Jennings debt, the rule laid down in *Munford v. McVeigh's Adm'r*, supra, is to govern, viz., that "where payments have been made upon a debt upon which a greater rate of interest than that allowed by law is reserved in the contract, or received in order to procure the forbearance of the lender, and the borrower himself applies the payment to the interest, or the lender makes the application with the assent of the borrower, the appropriation so made will not be disturbed unless within one year thereafter a suit be instituted by the borrower for its recovery. * * *

The appellant received the amount due on the first of the series of Jennings bonds—\$848—in 1895, and on November 6, 1897, it received the further sum of \$1,880.78 from the sale of the 100 acres of land upon which a vendor's lien had been reserved to secure the payment of those bonds, making a total of \$2,728.78 received; and these payments were applied to the payment of the Jennings debt pursuant to the agreement between the appellant and the appellee, and by authority of the court, in a suit to which appellee was a party. The application of these payments so made cannot be disturbed, since this suit in which, for the first time, the appellee asks relief from the usury in her transaction with the appellant, was not instituted till November, 1900,—much more than one year after the last of the payments were made. Section 2823, Code; *Bank v. Fugate*, 93 Va. 821, 23 S. E. 884.

Leaving undisturbed the application of these payments to the satisfaction of the debt due from appellee, the appellant was entitled to a decree against her for the balance of the debt remaining unpaid, with interest only from the date of the decree, together with the benefit of the security for its payment afforded by the deed to Gardner, trustee, above mentioned. The decree appealed from, in so far as it is in conflict with this view, is erroneous, and will in this respect be reversed and annulled, and the cause remanded to be further proceeded with in accordance

with the views herein expressed; but, as the appellant is the party substantially prevailing in this court, costs of this appeal will be decreed in its favor against appellee.

(100 Va. 552)

FITZPATRICK v. FITZPATRICK et al.
(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

WILL—CONSTRUCTION—FEE-SIMPLE ESTATE.

1. Where testator by his will devised to his "dear wife and our sweet little children all that I possess," it does not create a fee simple in the mother, where that is the only provision in the will, and there was nothing else to show that the mention of the children was but an expression of the motive of the gift.

Appeal from circuit court, Nelson county.

Suit between Fitzpatrick and Fitzpatrick and others to construe the will of Thomas P. Fitzpatrick. From the judgment Fitzpatrick appeals. Affirmed.

Caskie & Coleman, for appellant. W. K. Allen, for appellees.

HARRISON, J. We are called upon to construe the following brief will, dated December 21, 1897:

"I, Thos. P. Fitzpatrick, of Nelson county, Va., do this day make my last will. I leave to my dear wife and our sweet little children all that I possess. I am nervous about my condition. I had intended to make a long will to-day. I barely can write."

It is contended on behalf of appellant that, under the line of decisions beginning with *Wallace v. Dold's Ex'rs*, 3 Leigh, 258, and ending with the recent case of *Tyack v. Berkeley*, 40 S. E. 904 (not yet officially reported), the children take nothing under this will; that a devise to a mother and her children vests the fee-simple estate in the mother, the mention of the children being merely the expression of the motive for the gift to her. The decisions relied on to sustain this proposition do not hold that the language, to "the mother and her children," is alone sufficient to create a fee simple in the mother. Such a conclusion would ignore the cardinal rule in the construction of wills that the intention of the testator must be ascertained, and made to prevail. In some of the cases mentioned, unguarded expressions are used; but upon the whole, the doctrine clearly established is that, where the language of the gift is to "the mother and her children," the children are excluded, and the mother given a fee simple only when it appears from the context or the whole instrument, taken together, that such was the intention of the testator. In these cases, as in all others, the effort was to ascertain and give effect to the intention, and the whole instrument was looked to for such light as it might shed upon the particular language under consideration. This is well illustrated by the case of *Vaughan v. Vaughan's Ex'rs*, 97 Va. 322, 33

S. E. 603, in which Judge Riely says: "If the testator had stopped at the end of the first clause, 'I do hereby bequeath to my wife, Emma Lee Vaughan, and to my children all my property of every kind, real and personal,'—if this stood alone, and constituted all that related to the gift,—it could not be doubted that she and the children would have taken a joint estate in all of the property." But the learned judge does not stop with the first clause. The whole will is read, and from the context the conclusion is reached that the testator intended to give a fee simple to his wife.

The view we have taken—that the language to "the mother and her children," standing alone, does not create a fee simple in the mother—is vigorously maintained by the late Judge E. C. Burks in a note to *Nye v. Lovitt*, 2 Va. Law Reg. 29 (s. c. 24 S. E. 345), in which he says: "All the Virginia cases on this subject, we believe, are cited by Judge Lewis in *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. 252. We invite an examination of each one of them, and we think it is safe to say that in no one of them is the decision that the children take no interest rested on the language alone that the gift is to 'the woman and her children.' The intention to give exclusively to the woman is deduced from the context and the language of the instrument taken as a whole. We submit that if the language is to 'the woman and her children,' they take (the woman and her children) a joint estate, unless there is some other language in the instrument manifesting the intention that the woman shall take the whole estate and the children nothing. 'It was resolved in *Wild's Case*, as reported in 6 Coke, 16b, and has been hitherto treated as an undeniable position, that under a devise to a parent and children, the children, if there be any, and if no manifest and certain intent appears in the will to the contrary, will take jointly with their parent by purchase.' Judge Moncure in *Nickell v. Handly*, 10 Grat., at page 344. It is true it is broadly stated by Judge Lacy in *Selbel v. Rapp*, 85 Va., at page 30, 6 S. E. 479, that 'from the case of *Wallace v. Dold's Ex'rs*, 3 Leigh, marg. p. 258, it has been held, with some respectable dissent at first, that the gift to the wife and her child was a gift to the wife. The reference to the children indicated the motive for the gift.' The cases cited by him do not support the proposition as stated by him. They only show, as has been before mentioned, that when the gift is to the woman and her child or children, or is in trust for them, or like phraseology is used, the children are excluded only when it appears from the context of the whole instrument taken together that it was the intention to exclude them. We insist that the resolution in *Wild's Case*, above cited, is still the law of Virginia, and that the decisions do not go counter to it, although some incautious expressions of the judges in delivering their opinions may give color to

the contrary doctrine. We challenge the examination in detail of the cases to this point."

These observations of Judge Burks have been adopted with approval by this court in the case of *Lindsey v. Eckels*, 99 Va. 688, 40 S. E. 23.

In the case at bar, the testator, in disposing of his estate, employs the following language: "I leave to my dear wife and our sweet little children all that I possess." This is the whole will. There is no other word to look to for aid in ascertaining the intention. Where the gift of a joint estate is proposed, it would be difficult to express that purpose in clearer or more explicit terms than are here employed. To hold that this brief but apt and expressive language for creating in the mother and children a joint estate was intended to vest a fee simple to the whole estate in the mother would be to destroy the testator's will, and substitute one of our own making in its place.

For these reasons the decree appealed from, which holds that the appellant and her four children took a joint estate in equal portions under the will in question, must be affirmed.

(100 Va. 562)

BROCK v. BEAR et al.

(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

BILL OF EXCEPTIONS—OFFER OF EVIDENCE—HARMLESS ERROR—ADVERSE POSSESSION—INTENT.

1. Where an answer to a question asked of a witness is excluded, the bill of exceptions must show what the party asking the question expected to prove.

2. Where from the whole record a different verdict could not have been rightly found, the fact that instructions were improperly given or refused is no ground for reversal.

3. The intent to hold land adversely may be shown by the acts of the parties and the erection of costly buildings on the land up to the line claimed, and their use and occupation for years in the face of all persons who could question the right is sufficient to show manifest intent.

Error to circuit court, Rockingham county.

Action by Mrs. E. C. Brock against one Bear and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Winfield Liggett, for plaintiff in error. Sipe & Harris, O. B. Roller, and Mr. Martz, for defendants in error.

HARRISON, J. This action of ejectment was brought to recover a narrow strip of land abutting 4 feet on Federal alley, and running out to nothing on Main street, in the town of Harrisonburg, Va., alleged to contain 538 square feet. The controversy is between the respective owners of two adjoining lots, improved with substantial brick buildings, used for business purposes. The plaintiff bought one of these improved lots in 1898, and the conveyance to her contains a specific descrip-

¶ 2. See Appeal and Error, vol. 2, Cont. Dig. §§ 4226, 4227.

tion by metes and bounds of her purchase, which conforms to the dimensions of the lot with the buildings as at present constructed. Her deed, however, concludes with the statement that the property conveyed is part of the property conveyed by Gray and wife to trustees by deed dated March 12, 1861, and she insists that a reference to this deed shows that the buildings of the defendants are erected on her land to the extent of the strip she seeks to recover.

The result of the controversy in the lower court was a verdict and judgment in favor of the defendants.

The defendants relied upon a continuous adverse possession for a period beyond that required by statute to perfect their title if it were otherwise defective.

On the other hand, the plaintiff insists that those under whom the defendants claim took possession of the controverted strip without the intention of claiming or occupying more than their own boundary, and that therefore they occupy the strip in question by mistake, and that such holding cannot ripen into a title by adverse possession.

The first three bills of exception are to the action of the court in refusing to allow a witness to answer certain questions propounded on cross-examination by the plaintiff.

These assignments cannot be considered, because the bills of exception do not show what was expected or proposed to be proved by the witness. Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party asking the question expected to prove. This is necessary, because it may be the witness had no knowledge upon the subject, or what he knew was irrelevant or immaterial. *Insurance Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 86 L. R. A. 271, 64 Am. St. Rep. 715; *Driver v. Hartman*, 96 Va. 518, 31 S. E. 899; *Greever v. Bank*, 99 Va. 547, 39 S. E. 159.

The action of the court in giving and refusing certain instructions is assigned as error.

It is unnecessary to consider this assignment of error, for if it were conceded that the action of the court was erroneous, as claimed, it is immaterial, for under the facts of this case, upon instructions admitted to be correct, a different verdict could not have been rightly found by the jury. It is the settled rule of this court, recognized and acted upon in numerous cases, not to reverse where the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the action of the court in giving or refusing instructions. *Electric Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 830; *Wright v. Bank*, 96 Va. 728, 32 S. E. 459, 70 Am. St. Rep. 889; *Winfree v. Bank*, 97 Va. 83, 33 S. E. 375.

There is no evidence tending to show that those under whom the defendants claim occupied this disputed strip without any intention

of claiming it as their own. On the contrary, their undisputed acts, which speak louder than words, demonstrate that they did intend to claim it. The record shows that in November, 1898, Mrs. E. C. Brock, the plaintiff, purchased of C. A. & N. Sprinkel an improved lot fronting on the east side of Main street, in the town of Harrisonburg, and running back 269 feet eastward to Federal alley. The adjoining lot on the north is owned by Joseph Ney, and that on the south by the defendants, who derived the same, shortly before the institution of this suit, from their father, Abner Shacklett. These three lots, fronting on Main street, and running back to and abutting on Federal alley, are each improved with valuable buildings, used for business purposes. Abner Shacklett acquired the lot now owned by the defendants from Jacob Gassman in 1878. At that time, and for many years prior to that date, the dividing line between the two lots now owned by the parties to this controversy, recognized and acted upon by their predecessors in title, appears to have been marked at Federal alley, its eastern extremity, by the north wall of a warehouse on the Shacklett lot, and, continuing in the line of this wall, a fence extending westward to Main street. The narrow strip of ground in controversy was then covered by the old warehouse, and within the Gassman side of the fence mentioned. In 1878 Gassman, before his sale to Shacklett, erected a large warehouse by extending the old warehouse westward to within a few feet of the rear of the storehouse on Main street. The north wall of this new warehouse took the place of the partition fence, and was located on a continuous line of the north wall of the old warehouse, extended to the north corner of the Shacklett lot at Main street; thus continuing the disputed strip in the possession and occupancy of Gassman and his allenees. Up to the date of the institution of this suit in 1898, no question had been raised by any one as to the location of the building erected by Gassman. The Sprinkels, who owned and occupied the lot now owned by the plaintiff, were present all the time, saw the buildings erected, and continued as the owners and occupants of the premises without questioning their location, until they sold their property to the plaintiff in 1898.

It is true that adverse possession depends upon the intention with which the possession is taken and held; but while the intention to claim title must be manifest, it need not be expressed. The intention to hold and claim title is often best shown by the acts of the parties and their manner of occupancy. It would be difficult to conceive a more unequivocal determination to take and hold title to land up to a given line than to erect costly buildings upon the land up to that line, and use and occupy the same for years in the face of all persons who could question the right. In such a case, the intention is explicit, and the acts open and notorious.

There being no other evidence in the record to throw light upon the intention with which the defendants took possession than the unequivocal acts mentioned, and their possession having been open and notorious for more than 15 years, no other verdict could have been properly found, under the facts of this case, than that which was reached by the jury.

For these reasons, the judgment must be affirmed.

(100 Va. 548)

WHITTEN et al. v. BANK OF FINCASTLE.
(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

**EXECUTORS—NOTE—LIABILITY OF ESTATE—
AUTHORITY OF AGENT.**

1. Where an estate is devised to testator's wife for life, and she acts as executrix under the will, a note given by such executrix to a bank creates no cause of action against the estate.

2. The power to make or indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred, and an agent who has been given charge of an entire business is presumably authorized to give a note when necessary for the purposes of the business.

Appeal from circuit court, Botetourt county.

Action by James and J. R. Godwin to settle the estate of M. M. Godwin, deceased. From an order determining the rights of the Bank of Fincastle, Ella G. and Robinson Whitten appeal. Reversed.

W. M. & J. T. McAllister, for appellants.
Benj. Haden, for appellee.

KEITH, P. James Godwin and J. R. Godwin filed their bill in the circuit court of Botetourt county as administrators de bonis non of Thomas G. Godwin and administrators of M. M. Godwin, deceased, who was executrix of Thomas G. Godwin, in which they show that their father, Thomas G. Godwin, died in September, 1885, having first made his will, in which he devised his whole estate to his wife, M. M. Godwin, for her natural life, with remainder to their children, and named her as executrix. She took possession of the estate bequeathed to her, and died in November, 1891.

The estate of Thomas G. Godwin at his death amounted to \$9,067.46, and that of M. M. Godwin nominally to the sum of \$6,917.59, but the bill charges that all of the property in the possession of M. M. Godwin at the time of her death, and which passed into the hands of her administrators, was a part of the estate of Thomas G. Godwin, and that she had no separate estate.

The bill was filed to settle the two estates, to ascertain any debts that might be outstanding, and to distribute what remained after their payment among those entitled. All of the heirs and distributees of Thomas G. God-

win and M. M. Godwin were sui juris except Ella G. Whitten and Robinson Whitten, children of a deceased daughter, who were under 21 years of age. They filed answers by their guardian ad litem, submitting their interest to the care of the court, and the bill as to the others was taken as confessed.

A decree was entered as of the May term, 1894, directing a commissioner to ascertain the indebtedness of the estates of Thomas G. and M. M. Godwin, deceased, and on what portion of their respective estates the same is to be charged, to settle an account of the executrix of Thomas G. Godwin, deceased, and the accounts of the plaintiffs as administrators of Thomas G. and M. M. Godwin, and also an account of the advancements made by Thomas G. Godwin and M. M. Godwin to their several children and heirs at law, and certain other accounts with which we are not now concerned.

The commissioner reported that the only debt of the estates of either Thomas G. Godwin or M. M. Godwin was one to the Bank of Fincastle amounting to \$5,000. This note was made in the fall of 1891 by James Godwin, acting under a power of attorney from his mother, which is in the following words: "Know all men by these presents, that I have this day appointed James Godwin my agent for the transaction, generally and particularly, of all my business, and I hereby ratify and confirm his acts as such agent. Given under my hand and seal this 28th day of May, 1888. M. M. Godwin. [Seal.]"

A short time after the execution of this note Mrs. Godwin died. There is no satisfactory evidence that she knew of the existence of this note at any time during her life, nor is it necessary at this time that we should pass upon its validity, in the view we have taken of the case. This note was presented to the Bank of Fincastle, was by it discounted, and the proceeds, it is alleged, were passed to the credit of Mrs. Godwin, and its payment secured by the deposit of 61 shares of the capital stock of the Bank of Fincastle, which was part of the estate of Thomas G. Godwin, deceased, in the hands of his executrix to be administered.

The court, by its decree of November 2, 1894, recites "that the estates of Thos. G. Godwin and M. M. Godwin having been treated as one estate, and therefore both made liable for the debt reported as due the Bank of Fincastle, it is therefore adjudged, ordered, and decreed that I. R. Godwin and James Godwin, administrators of Thos. G. Godwin and M. M. Godwin, do make sale of the bank stock as well as other stocks belonging to both estates, and collect the choses in action, and apply the proceeds thereof—

"(1) To the payment of the costs of administration, including the costs of this suit, and a fee of one hundred and twenty dollars to plaintiff's counsel.

"(2) To the discharge of the debts due by both estates, including the debt of \$5,000 to

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 415.

the Bank of Fincastle, with interest thereon from the 21st day of October till paid."

All of the adult heirs and distributees of Thomas G. and M. M. Godwin approved of that decree, and the only persons objecting thereto are the infant defendants, Ella G. and Robinson Whitten, who, after they became of age, filed their joint and separate answer to the original bill in this case. They insist that M. M. Godwin took only a life estate under the will of her husband; that she changed some of the investments which came into her hands as executrix, and converted them into bonds, notes, and other evidences of debt in her own name; that she had no estate of her own; and that all of the bonds, notes, stocks, and other evidence of indebtedness reported as belonging to her really constituted a part of the estate of her deceased husband. They charge that the \$5,000 borrowed from the bank was not a debt due by the estate of Thomas G. Godwin; that his estate was not responsible for it; that the money which was paid to the Bank of Fincastle in discharge of this debt was a part of the estate of Thomas G. Godwin; and that the bank should be required to restore at least their share of it, which should be paid over to them.

They pray that the decree of November 2, 1894, may be reheard and set aside; that proper accounts may be taken; that the assets, if any, belonging to M. M. Godwin's estate, be separated from those belonging to Thomas G. Godwin's estate; that the Bank of Fincastle be required to refund to a receiver, to be appointed in this case, the sums of money which have been paid out of Thomas G. Godwin's estate on any debts due said bank from M. M. Godwin's estate; that an account be stated, showing the assets of Thomas G. Godwin; and that distribution be made of his estate to the parties entitled thereto, including the petitioners.

There is not enough in this record to enable us to dispose of the whole controversy, but we are of opinion that there is error in the decree of November 2, 1894, for which it should be reversed. The indebtedness of the estate of Thomas G. Godwin, deceased, for which it is liable, is such as existed at the time of his death. The executrix could not, as such, create a cause of action against her decedent. Said Judge Daniel in *Fitzhugh's Ex'rs v. Fitzhugh*, 11 Gratt., at page 301: "It seems to be well settled, as a general principle, that contracts made with an executor or administrator are personal, and do not bind the estate of the testator or intestate. The representative has no power to charge the estates in his hands by contracts originating with himself."

So strictly was the principle applied in that case that it was held that an action will not lie against the personal representative for the funeral expenses of his decedent. It was error, therefore, for the court to hold that the estate of Thomas G. Godwin was liable for

the debt to the Bank of Fincastle. We shall remand this case, with instructions to the circuit court to direct the accounts asked for in the answer of Ella G. and Robinson Whitten, so that the two estates involved in this litigation may be separated. The court should then inquire more particularly into the circumstances attending the execution of the note in question, and the disposition that was made of its proceeds. If it was passed to the credit of M. M. Godwin, and used in the purchase of any part of the property in her possession at the time of her death, it is but proper that the bank should be allowed to appropriate to its debt whatever was purchased with its proceeds. Inquiry should also be made into the power of James Godwin to bind the estate of M. M. Godwin by a negotiable note. The power to make or indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred. Where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. He has implied authority to do whatever is ordinarily incidental to the conduct of such business, whatever is necessary to the efficient execution of the duties, or whatever is customary in a particular trade. For all contracts made within these limits the principal is liable, but not for contracts outside of these limits. *Offcut, Ag. § 107.* It would be proper, therefore, to inquire, in the light of the principles here announced, whether the agent had, under all the circumstances of the case, authority to bind his principal. If he had due authority, then, of course, the note executed by him will bind any estate belonging to M. M. Godwin; but if the note was not within the scope of this authority, then only the property purchased with its proceeds should be devoted to its payment.

The decrees appealed from should be reversed as to the appellants, Ella G. and Robinson Whitten, but remain in full force and effect as to the parties who did not appeal, and the cause remanded to the circuit court of Botetourt county, to be proceeded in in accordance with this opinion.

(100 Va. 585)

UNITED STATES FIDELITY & GUARANTY CO. v. PEEBLES.

(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

OFFICIAL BOND—RELEASE OF SURETY—MANDAMUS.

1. Under Code, § 2887, and Acts 1895-96, p. 284, a corporation which has for a consideration become surety on an official bond has the arbitrary right to be relieved on filing a petition in the proper court, and giving reasonable notice of the motion to be relieved.

2. Mandamus is the appropriate remedy to compel the court to comply with Code, § 2887, authorizing the release of a surety company on an official bond on petition for that purpose, such duty being ministerial.

Error to Nelson county court.

Action by the United States Fidelity & Guaranty Company against J. R. Peebles. Judgment for defendant, and plaintiff brings error. Writ dismissed.

Harrison & Long, for plaintiff in error.
Caskie & Coleman, for defendant in error.

BUCHANAN, J. In June, 1899, the United States Fidelity & Guaranty Company became surety on the official bond of J. R. Peebles, treasurer of Nelson county, for the faithful performance of his duties as treasurer for his term of office of four years, commencing July 1st of that year. At the June term, 1902, of the county court of that county, the surety company, having given the treasurer notice thereof, tendered its petition to be relieved as surety on the bond. The treasurer appeared, and denied the right of his surety to be relieved, upon the ground that it had for a valuable consideration become his surety on the bond for the full term of his office, and was not, therefore, entitled to the relief sought. Upon the hearing, the court, being of opinion that the surety company did not have the right to be relieved, declined to grant the prayer of the petition. The judge of the circuit court for that county, having in vacation refused a writ of error to that order, this writ of error was awarded by one of the judges of this court.

The defendant in error insists that if the surety company had, as it claims, the arbitrary right to be relieved as surety on the bond, then its remedy for the refusal of the county court to grant that relief was by mandamus, and not by writ of error, and that this writ should be dismissed as improvidently awarded.

By section 2887 of the Code it is provided, among other things, that "when the surety * * * of any officer * * * required to give bond shall petition the court in which the bond is taken * * * to be relieved from the suretyship, such court shall on proof of reasonable notice of his intended motion, require such officer * * * to give a new bond in the same manner as if none had been given by him. * * *"

It is clear from this section of the Code that a surety upon the official bond of a treasurer has the absolute right to be relieved from his suretyship upon petition to the proper court to be so relieved, after reasonable notice to his principal; and that when he has complied with the terms of that section, the court must require the principal to give a new bond in the same manner as if none had been given by him. The surety is not required to show cause as a condition precedent to the relief sought, and the court has no discretion in the matter. No distinction is made by the statute between the rights of one who has received a consideration for becoming surety and one who has assumed that obligation gratuitously. The statute applies to both

classes of sureties alike, and the courts, in construing and enforcing it, can make no distinction between them, without disregarding the plain and unambiguous language of the statute.

At the time that section was enacted, courts and other tribunals upon whom the duty of taking or approving official bonds was imposed were not authorized to accept surety companies as sureties on such bonds. The authority to do this was first conferred by an act approved March 5, 1894 (Acts 1893-94, p. 764). That act was amended and re-enacted by an act approved February 6, 1896 (Acts 1895-96, p. 284), and confers authority upon the courts, judges, and other officers authorized to approve certain bonds (embracing bonds of county treasurers) to accept as surety thereon, upon certain conditions, any company with a paid-up cash capital of not less than \$250,000, incorporated and organized under the laws of any state of the United States or foreign country, for the purpose of transacting business as surety on obligations of persons and corporations, and which has complied with all the requirements of law regulating the admission of such companies to transact business in this state.

It further provides that "such surety shall be relieved from its liability on the same terms and conditions as are by law prescribed for the release of individuals and have all the rights, remedies and reliefs of an individual guarantor, indemnitor, or surety, it being the true intent and meaning of this act to enable corporations created for that purpose to become the surety on bonds required as aforesaid, subject to all the rights and liabilities of private parties."

If only gratuitous sureties could be arbitrarily relieved of their suretyship under section 2887 of the Code, the provisions for the release of surety companies were useless. The courts were only authorized to accept such surety companies as were incorporated and organized for the purpose of transacting business as sureties. The legislature could not have contemplated that such companies would become gratuitous sureties. Indeed, it must have known that such companies could not transact business as sureties without receiving compensation; and by section 2 of the act it authorizes the tribunal which passes upon or settles the accounts of the principals in the bonds upon which such companies become sureties, except where the principals are state, county, or municipal officers, to allow a reasonable sum for the expenses of securing such surety.

Section 2887 of the Code, as we have before seen, gives to individual sureties the arbitrary right to be relieved from their suretyship upon filing their petition in the proper court, and giving reasonable notice of the motion to be relieved.

It follows that the plaintiff company has the same arbitrary right as an individual or private party to be relieved from its sure-

ship by filing its petition for that purpose, and giving the required notice.

If the act to be performed by the court was a ministerial, and not a judicial, one, the means of testing the action of the county court in refusing to relieve the plaintiff company of its suretyship is not by writ of error or supersedeas, but by mandamus.

It often happens that duties are devolved upon courts or judges, either by operation of law or by express statute, which partake more of a ministerial, than a judicial, nature, and where the duty is so plain and imperative that no element of discretion can enter into its performance. While the courts uniformly refuse to interfere with the discretion of inferior tribunals in the performance of their duties, yet as to acts to be performed by a court or judge in a merely ministerial capacity, or as to duties which are imposed upon them by statute, and as to which there can be no dispute, and no element of discretion, mandamus is the appropriate remedy. High, Extr. Rem. §§ 230, 231; Broadus v. Supervisors, 99 Va. 370, 372, 38 S. E. 177.

In the cases of *Dawson v. Thruston*, 2 Hen. & M. 182, and of *Manns v. Givens*, 7 Leigh, 689, the question involved in each was the refusal of the court to admit a deed to record. The statute provided that, upon proof that the deed was properly executed, the county court should admit it to record. It was held that, if the proof was sufficient to authorize it to be recorded, it was the imperative duty of the court to admit it to record, and for a refusal to do so mandamus was the proper remedy.

In the case of *Delaney v. Goddin*, 12 Grat. 266, one of the questions involved was whether the duty imposed by section 15, c. 37, Code 1849 (page 203), was judicial or ministerial. The authority of the courts under that section was limited to the inquiry whether the report of the surveyor was in conformity with the provisions of the section under which the report was made. It was held that the duty imposed upon the court by that section was ministerial, and not judicial, and that a writ of error would not lie to the action of the court refusing to admit the surveyor's report to record, and that the remedy of the party aggrieved was by mandamus.

The same question arose in the case of *Randolph Justices v. Stalnaker*, 13 Grat. 523, 525, and was decided in the same way. Judge Allen, who delivered the opinion of the court, said: "The principal questions presented by the record have been settled by the decision of this court in the case of *Delaney v. Goddin*, 12 Grat. 266. That case was elaborately argued and maturely considered, and all the judges were of opinion that the authority of the county court was limited to the inquiry, whether the report of the surveyor is in conformity with the provisions of the section under which it was made, and if free from objection in this respect, it becomes the imperative duty of the court to order the report to

be recorded; and a majority of the court held that in passing on such question the county court is vested with no judicial power, but acts in a capacity purely ministerial, and that an error in refusing to order the report of the surveyor to be recorded can only be corrected by mandamus."

In the cases cited the court had to determine whether or not the deeds were properly proved or acknowledged, or the report of the surveyor in proper form. In this case, it had to determine whether or not the notice required had been given. In this, as in those cases, if the fact existed which made it the court's duty to act, it had no discretion in the matter. It was its imperative duty to require the plaintiff to give a new bond.

We are of opinion, therefore, that the remedy of the plaintiff company for testing the correctness of the action of the county court in refusing to require the defendant to give a new bond, and thereby release the plaintiff company as surety, is not by writ of error, but by mandamus, and that this writ of error must be dismissed as improvidently awarded.

(100 Va. 556)

GROVE v. GROVE et al.

(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

DEED—WANT OF CONSIDERATION—RIGHTS OF GRANTEE—PARTITION—JURISDICTION—INCUMBRANCE—DISCHARGE BY CO-TENANT—CONTRIBUTION.

1. A grantee in a voluntary deed has no greater right in the property than had his grantor.

2. Under the direct provision of Code, c. 114, courts of equity have jurisdiction of suits for partition, and have power, where there are liens, by judgment or otherwise, on the interest of any party, to apply the dividends of such party in the proceeds of sale to the discharge of such lien.

3. Where a co-tenant discharges an incumbrance upon the common property, and pays more than his share of the purchase price, he is entitled to ratable contribution from his co-tenants.

4. Right of a co-tenant, who has paid more than his share of the purchase price, to contribution does not accrue until suit for partition is brought.

Appeal from circuit court, Frederick county.

Bill by Virginia Grove against Franklin C. Grove and William B. Grove. Decree for defendants, and plaintiff appeals. Affirmed.

Barton & Boyd and W. M. Atkinson, for appellant. W. Roy Stevenson, for appellees.

WHITTLE, J. This is a suit in equity, brought by Virginia Grove, widow of John R. Grove, deceased, against Franklin C. Grove and William B. Grove, brothers of decedent, to compel partition of real estate.

The property in question was conveyed to the brothers jointly. One-third of the purchase price was paid in cash, and for the deferred installments the parties made promissory notes, executing a coterminous deed

of trust upon the subject to secure their payment.

The case made by the bill is that the property was paid for by the grantees, each contributing his one-third part of the purchase price. That afterwards, John R. Grove, for a valuable consideration, conveyed his share to complainant.

By their answer the defendants admit the joint purchase and conveyance of the property, but insist that John R. Grove was admitted as co-purchaser under an express agreement, and upon condition that he would contribute one-third part of the purchase money, and, in pursuance of that understanding, was included as a grantee in the deed; that he paid no part of the purchase price, asserted no claim to any beneficial ownership of the property, and abandoned all connection with the transaction; that, notwithstanding the foregoing facts, before the last installment of purchase money was due, he conveyed all his supposed interest in the property to his wife, which conveyance was purely voluntary.

Subsequently John R. Grove removed with his wife to the city of Washington, where he died in May, 1895, and she has ever since been a nonresident of the state.

Iterating their denial that John R. Grove paid any part of the purchase money, and the averment that Virginia Grove was a mere volunteer, they pray that the deed to her may be canceled, and the share in the property conveyed to her husband declared to be in trust for them, and the bill dismissed.

At the June term, 1901, the court below decreed that Franklin C. Grove and William B. Grove owned jointly a two-thirds undivided interest, and Virginia Grove a one-third undivided interest, in the real estate in controversy; but gave leave to the defendants to file an amended answer and cross-bill, which the decree recites was accordingly done. The personal representative of John R. Grove was admitted a party to the litigation, and he and Virginia Grove by answer interposed the statute of limitations as a defense to the demand asserted in the cross-bill. The three-year bar and the limitation of five years, so far as the claim was intended to affect the estate of John R. Grove, deceased, were both relied on.

In the decree appealed from, the trial court adhered to the conclusion reached in the former decree as to the quantum of interest of the parties in the property, but established an equitable lien in favor of appellees for one-third of the purchase price on the share of Virginia Grove, and, subject to the usual provision for redeeming, directed a sale of that share to satisfy the lien. It was also held that the defense of the statute of limitations had no application to the equitable lien which the court had established, but did constitute a bar to a personal recovery against Virginia Grove. The plea was likewise sustained to the demand against the estate of John R. Grove, deceased, and the cross-bill dismissed as to his personal representative. It is not

perceived, therefore, how that appellant is aggrieved or prejudiced by the decree appealed from.

Appellant further insists that the cross-bill is amenable to the objection that it is not in aid of any defense relied on in the original pleadings, but undertakes to introduce new and independent matter, which did not arise since the institution of the suit, and that it makes a new party, and is multifarious.

So far as these assignments of error are concerned, it is only necessary to observe, whatever intrinsic merit they may possess, that the original pleadings in the cause were quite sufficient to warrant the court, under the evidence, in granting the relief accorded by the decree complained of.

The evidence sustains the conclusions of the court below:

(1) That, while the property in controversy was conveyed to appellees and John R. Grove jointly, neither he nor his grantee, Virginia Grove, paid any part of the purchase price, and that both were insolvent; and,

(2) That the conveyance from John R. Grove to his wife of an undivided one-third interest in the subject was not upon a consideration deemed valuable in law, but voluntary.

She could occupy, therefore, no higher plane in relation to the property than did her grantor. *Lockhart v. Vandyke*, 97 Va. 363, 83 S. E. 618.

While proceedings for partition had their origin in the common-law courts, it is a subject over which courts of equity have for more than a century assumed almost exclusive jurisdiction. So thoroughly has that jurisdiction been established, that an application for its exercise is not now addressed to the sound discretion of the court, as in cases for specific performance, and other remedies of like nature, but it is said to be due *ex debito justitiæ*.

Mr. Minor says, in that connection, that "it is a remedy substituted for the difficult and perplexed remedy by writ of partition, the necessity of discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and sometimes indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all intermediate obstructions against complete justice; having led to a general concurrent jurisdiction on the part of those courts with courts of law in all cases of partition." 2 Minor, Inst. (2d Ed.) 416.

And Judge Story remarks that "in all cases of partition, a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties, who have a right to partition, but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree, adjust all the equitable rights of the parties interested in the

estate." 1 Story, Eq. Jur. (11th Ed.) § 656b; Freem. Co-ten. (2d Ed.) § 505.

In enumerating the equities which may be adjusted and enforced in such proceedings, the latter author says: "If one of the co-tenants has paid more than his just share of an incumbrance on the common property, or has advanced more than his proportion of the purchase money, the court may decree that payment of the excess be made to him, and, in default of such payment, that the moiety of the tenant in default may be sold to satisfy the amount equitably due from it." Freem. Co-ten. (2d Ed.) § 506; *Tompkins v. Mitchell*, 2 Rand. 428; *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

Jurisdiction of suits for partition is conferred by statute upon courts of equity in this state, and they are clothed with authority, where there are liens by judgment or otherwise, on the interest of any party, to apply the dividends of such party in the proceeds of sale to the discharge of such lien. Code Va. c. 114.

The right of a co-tenant, who discharges an incumbrance upon the common property, or pays more than his share of the purchase price, to ratable contribution from his co-tenants, is said to arise out of the trust relationship which exists among joint owners of property, rather than by way of subrogation. But whatever may have been its origin, the doctrine is firmly established by the authorities, and was properly applied by the circuit court to the facts of this case.

The contention of appellant that the equitable lien established in behalf of appellees is barred by the statute of limitations is without merit. Indeed, the question has been decided adversely to that view by this court in the recent case of *Ballou v. Ballou*, cited above, where it was held that the right to enforce demands of that character does not accrue until suit for partition is brought, and that statutes of limitation have no application to such suits.

There is no error in the decree appealed from, and it must be affirmed.

(100 Va. 521)

NEFF v. RYMAN.

(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

ADVERSE POSSESSION—DISCLAIMER BY TENANT—REMOVAL OF CLOUD.

1. In order that possession by a tenant against his landlord should be deemed adverse, it is not necessary that there should be first a surrender of possession, but there must be a clear, positive, and continued disclaimer and disavowal of the landlord's title, and knowledge of the fact must be brought home to the landlord before a foundation can be laid for the operation of the statute of limitations.

2. Where the relation of landlord and tenant has once been established, it continues as to all who may succeed to the possession through or under the tenant.

3. A bill to remove a cloud on title cannot be maintained if the complainant is out of possession; he having an adequate remedy at law.

Appeal from circuit court, Rockingham county.

Bill by one Ryman and others against Michael Neff and others. Decree for plaintiffs, and defendants appeal. Reversed.

D. O. Dechert and G. A. Winfield, for appellant. Roller & Martz, for appellee.

WHITTLE, J. The object of this suit is to quiet title of complainants, appellees here, to the land in controversy, and to remove a cloud cast upon the title by having canceled a deed from Elenora Neff to her brother and codefendant, Michael Neff, by which she undertook to convey the lot to him.

The bill charges that the female complainant acquired title to the property by descent from her father, George Will; that in the year 1879 his heirs at law made partition in parts of the land of which he died seised, and the lot in controversy was allotted and conveyed to complainants as their share of the inheritance; that they have since that time held it in uninterrupted possession, within their inclosure, occupying, cultivating, and paying taxes thereon.

The insistence is that neither the defendants, nor any one under whom they claim, have ever had any right or title to the land, and that the deed from Elenora Neff to her brother is fraudulent.

The answer of Michael Neff, who alone appeared, admits that complainants are in possession of the land, but denies that they have title thereto, or that their possession was adverse. On the contrary, he maintains that until the institution of this suit complainants had continuously recognized and admitted his ownership and that of his predecessors in title. He denies the charge of fraud, and sets forth circumstantially his chain of title.

By the decree appealed from, the trial court sustained the contention of complainants and canceled the deed.

The evidence warrants the following findings:

(1) That the lot in question did not belong to the estate of George Will, deceased, but was included in a royal grant, bearing date September 10, 1755, of 130 acres to Jacob Bear.

(2) That this land descended to Jacob Bear, Jr., a son of the original patentee, and in the year 1842 was partitioned among his heirs at law; but that the lot in controversy was not embraced in that division.

(3) That in the year 1856 Henry Neff, father of appellant, and one of the heirs of Jacob Bear, Jr., took possession and claimed ownership of the omitted lot by a parol agreement with the other heirs.

(4) That Henry Neff afterwards delivered the possession to George Will as tenant at will. That George Will asserted no other

¶ 1. See *Landlord and Tenant*, vol. 22, Cent. Dig. §§ 203, 204, 205.

claim to the property, and that the character and extent of his title were known to appellees.

And (5) that when the land of George Will was partitioned, in the year 1879, Henry Neff's lot was included in the allotment and deed to appellees, and has ever since been in their possession.

That appellees promptly put their deed to record, but made no change in the physical markings of the boundaries of the lot, which consisted of stones planted at each corner, and they never informed Henry Neff, or those claiming under him, of any disclaimer on their part of his title, but from time to time, during the continuance of their possession, made proposals to purchase the lot.

It is settled law in this state that a tenant may dis sever the relations existing between himself and his landlord without first surrendering possession of the leased premises; but in order for his possession to be deemed adversary, there must be a clear, positive, and continued disclaimer and disavowal of the landlord's title, and knowledge of the fact that the possession is adverse must be brought home to the landlord before a foundation can be laid for the operation of the statute of limitations against him. *Erskine's Ex'rs v. North*, 14 Grat. 60, 66; *Creekmur v. Creekmur*, 75 Va. 480.

The principle is elementary, and has received the repeated approval of this court, that when the relation of landlord and tenant has been once established, it attaches to all who may succeed to the possession, through or under the tenant, whether immediately or mediately; and the succeeding tenant is as much bound by the acts and admissions of his predecessor as if they were his own. *Emerick v. Tavener*, 9 Grat. 224, 58 Am. Dec. 217.

"The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it without full notice of his disclaimer, or assertion of adverse title." *Reusens v. Lawson*, 91 Va. 226, 237, 21 S. E. 347; *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233.

The ground upon which jurisdiction of courts of equity to quiet possession and remove clouds from a title rests is that it is inequitable that a party in possession with a good title should be embarrassed by having a hostile claim outstanding against his property, which, although not actively asserted, and not of any validity, is nevertheless calculated to affect the marketability of the title.

But a bill in such case can only be maintained upon allegations and proof that the plaintiff has both the possession and a good title. *Story*, Eq. Pl. (10th Ed.) § 603, note b; *Carroll v. Brown*, 28 Grat. 791; *Stearns v. Harman*, 80 Va. 48; *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277.

A plaintiff in possession cannot resort to an action of ejectment, and is therefore without a complete and adequate remedy at law. *Steinman v. Vickers*, 99 Va. 505, 39 S. E. 227.

In the light of the foregoing principles, applied to the facts of this case, it is apparent that appellees succeeded to the title and possession of George Will, tenant of Henry Neff, to the lot in controversy, and that until the institution of this suit there had been no such disseverance of the privity of title existing between them as to render their possession adverse.

There was a failure to prove the essential elements to give the circuit court jurisdiction, and the bill ought to have been dismissed at the hearing, with costs.

The decree appealed from is therefore erroneous, and it must be reversed.

(116 Ga. 64)

GEORGIA R. & BANKING CO. et al. v. MADDOX et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

RAILROADS—LEASE OF FRANCHISE—TRAFFIC CONTRACT—VALIDITY—USE OF TERMINAL YARD—NUISANCE—IMPROPER OPERATION—INJUNCTION.

1. Under the charter of the Georgia Railroad & Banking Company and the amendment thereto, it had lawful authority to lease its franchises, as to the transportation of both freight and passengers, to another, and in such franchises were included all rights and privileges necessary to conducting the business for which the company was incorporated, among which was the right to maintain yards at terminal points for the manipulation of trains. Such franchises of the company passed, by lease, to the Louisville & Nashville Railroad Company, and in part to the other defendants. The Louisville & Nashville Railroad Company had lawful power to lease part of the right of way of the Georgia Railroad & Banking Company, in Atlanta, to the Atlanta Belt Line Company, to be used as a terminal yard. The charter of the Atlanta Belt Line Company authorized it to accept from the Louisville & Nashville Railroad Company, as lessee of the Georgia Railroad & Banking Company, the right to use such terminal yard.

2. The Atlanta Belt Line Company had the statutory power to lease its road, property, and franchises to the Atlanta & West Point Railroad Company, and the latter company had, by its charter as amended, the right to accept such lease.

3. The traffic contract entered into between the Atlanta & West Point Railroad Company and the Louisville & Nashville Railroad Company, under the terms of which each of these companies acquired the right to use certain property of the other in the city of Atlanta, to facilitate the transportation of freight, was legal.

4. Where a railroad terminal yard is located, and its construction authorized, under statutory powers, if it be constructed and operated in a proper manner, it cannot be adjudged a nuisance. Accordingly, injuries and inconveniences to persons residing near such a yard, from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, soot, and the like, which result from the ordinary and necessary, therefore proper, use and operation of such a yard, are not nuisances, but are the necessary concomitants of the franchise granted. The terminal yard the operation of which is sought to be enjoined in this case was located, and its operation authorized, under statutory powers.

5. A railroad terminal yard, though authorized by statute, may become a nuisance by im-

proper construction, or by subsequent improper operation.

6. Though the evidence in this case, both as to construction and operation, was conflicting, the granting generally of the injunction was erroneous; for properly interpreting the language used in the opinion filed by the trial judge, in the light of the strong and decided preponderance of testimony showing that the construction of the yard upon a grade was proper, it is manifest that he did not grant the injunction solely because the yard was not laid out upon a level. This being so, and the effect of the injunction being to entirely prevent even the proper carrying on of a lawful business, instead of pointing out and restraining particular acts which, because unnecessary or unlawful, were nuisances, the judgment excepted to cannot be upheld; and moreover, save as to operations on the Sabbath, there was no evidence sufficiently clear and distinct to enable the court to designate any such acts as those just indicated, and specifically enjoin the commission of the same.

(Syllabus by the Court.)

Error from superior court, Fulton county; Geo. F. Gober, Judge.

Action by J. E. Maddox and others against the Georgia Railroad & Banking Company and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Jos. B. & Bryan Cumings, Sanders McDaniel, Dorsey, Brewster & Howell, and King & Spalding, for plaintiffs in error. H. E. W. Palmer, G. L. Bell, and B. H. Hill, for defendants in error.

FISH, J. The record shows that 24 residents and owners of dwelling houses at Inman Park, in the eastern portion of the city of Atlanta, and the trustees of 2 churches located there, filed a petition, with various amendments thereto, for an injunction against the Georgia Railroad & Banking Company, the Louisville & Nashville Railroad Company, and the Atlanta & West Point Railroad Company, to restrain the operation of a terminal yard, located on the right of way of the first-named company, adjoining Inman Park. The grounds upon which the injunction was sought were that such yard and the manner in which it was conducted was a nuisance, and that the damage resulting therefrom to the petitioners was special and irreparable. Inman Park was laid out in 1887 and 1888 as a residential, church, and school site, upon which valuable residences and churches were soon afterwards erected, and the park can be used for no other purposes. This park is bounded on its entire southern frontage by the right of way, 200 feet wide, of the Georgia Railroad & Banking Company. This company was incorporated, in 1833, as the Georgia Railroad, and its name changed to the Georgia Railroad & Banking Company by an amendment to its charter in 1835. Its railroad franchises, roads, rolling stock, etc., were leased to William M. Wadley and his assigns in 1881, and the Louisville & Nashville Railroad Company became the lessee through an assignment of the Wadley lease.

On October 17, 1899, the Atlanta Belt Line Company was incorporated, under the general railroad law of this state, to construct a steam railroad from Oakland City, on the Atlanta & West Point Railroad, to a point on the Georgia Railroad at or near the eastern corporate boundary of the city of Atlanta. The road was so built. Its western terminus was about two miles west of the eastern terminus of the Atlanta & West Point Railroad, and its eastern terminus was about one mile and three-quarters east of the western terminus of the Georgia Railroad. On November 30, 1900, the Louisville & Nashville Railroad Company leased to the Atlanta Belt Line Company a part of the right of way of the Georgia Railroad & Banking Company, at the junction of the two roads, for terminal facilities; and it is upon this leased land that the terminal yard in question is now located. On September 12, 1900, the Atlanta & West Point Railroad Company, which was incorporated by the legislature before the enactment of the general railroad law of this state, had its charter amended so as to include three parts of the provisions of the general railroad law, to wit: First. The sixth paragraph of section 2167 of the Civil Code, which reads as follows: "To cross, intersect, or join or unite its railroads with any railroad heretofore or hereafter to be constructed, at any point in its route, or upon the ground of any other railroad company, with the necessary turnouts, sidings and switches, and any other conveniences necessary in the construction of said road, and may run over any part of any railroad's right of way necessary or proper to reach its freight-depot, in any city, town or village through or near which said railroad may run." Second. The 2173d section of the Civil Code, the power given by this section being: "To lease or purchase the property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest." Third. The 2179th section, by which plaintiffs in error claim the Atlanta & West Point Railroad Company was empowered to purchase or lease the property and franchises of any other railroad company whose railroad shall connect with, or form a continuous line or system with, the railroad of such company, upon such terms as may be agreed upon. On November 30, 1900, the Atlanta & West Point Railroad Company leased the Atlanta Belt Line, with all its rights, property, and franchises, including the lease of that part of the right of way of the Georgia Railroad & Banking Company upon which the terminal yard in question is located. The Atlanta & West Point Railroad Company began its transportation business over the Atlanta Belt Line, and its use of the terminal yard, on or about January 1, 1901. Under a traffic contract between the Louisville & Nashville Railroad Company and the Atlanta & West Point Railroad Company, the

latter was granted the joint use of the Georgia Railroad & Banking Company's terminals in and near Atlanta, and of its offices, station buildings, freight depot, coal chutes, water tanks, platforms, and yards, and the Atlanta & West Point Railroad Company granted to the Louisville & Nashville Railroad Company the equal use, in common, of its warehouses and grounds near Decatur and Butler streets, its freight warehouse near Loyd street, and its tracks and terminal yard, on the right of way of the Georgia Railroad & Banking Company, at and near Inman Park.

The petition for injunction, and the amendments thereto, aver that the original lease of the Georgia Railroad & Banking Company to William M. Wadley was void because unauthorized by that company's charter; that, for the same reason, the lease by the Louisville & Nashville Railroad Company of the part of the right of way of the Georgia Railroad & Banking Company to the Atlanta Belt Line for terminal facilities was void; that there was no physical connection between the Atlanta & West Point Railroad and the Georgia Railroad, as the eastern terminus of the former road was at Nelson street bridge, in the western part of the city of Atlanta, and the western terminus of the Georgia Railroad was in the center of the city; and that, therefore, the terminal yard at Inman Park was located in a place not authorized by law, which made it a nuisance per se. The petitioners also contended that the yard could be located on the Atlanta Belt Line where there were no residences; that the yard as constructed is partly on a steep grade, which intensifies the noises from locomotives and moving trains, and increases the volumes of smoke and cinders that are cast into their houses; that work in this terminal yard, which consisted of dissecting trains and switching cars and making up and moving off freight trains by inefficient and overloaded engines, was carried on almost unremittingly every day and night, including Sundays; and that these annoyances, with the unnecessary blowing of whistles, ringing of bells, and screaming of trainmen produced irreparable injury to their property, and made comfort in the daytime and sleep at night almost an impossibility to themselves and the members of their families. The petitioners submitted affidavits tending to support the various averments and contentions made in their pleadings.

The defendants answered that the terminal yard was located in pursuance of statutory powers, was skillfully and properly constructed, and caused less noise and inconvenience, in switching cars and other work thereon, than if it had been entirely on a level grade, and was not negligently or injuriously operated in any respect. These averments were supported by affidavits and other documentary evidence. The judge of the court below granted a preliminary injunction on July 13, 1901,

restraining the use of the terminal yard altogether on and after October 1, 1901, and until that date enjoined its use, as such, on Sundays and between the hours of 9 p. m. and 6 a. m. on other days. The defendants excepted to the grant of such injunction, and just before he certified the bill of exceptions presented by the defendants, on August 1, 1901, the judge modified such injunction so that the same, "without reserve, is suspended after the first of October [1901] until the remittitur is entered, and shall not take effect until five [5] days after entry of the remittitur from the supreme court, in the event such judgment is affirmed. The restraint from switching as granted in said order of July 13th, 1901, on Sundays and from 9 p. m. to 6 a. m. on other days, will continue until said injunction without reserve goes into effect."

1. The Atlanta Belt Line Company was incorporated under the general railroad law of this state. Its eastern terminus, according to its charter, was to be at a point on the Georgia Railroad at or near the eastern corporate boundary of the city of Atlanta. This gave it a large discretion in selecting the point for such terminus, and the company's exercise of such discretion "will not be revised unless it has clearly exceeded its limits or acted in bad faith" (3 Elliott, R. R. § 919, p. 1264; Fall River Iron Works Co. v. Old Colony & F. R. R. Co., 5 Allen, 221); and such revision, whatever might be the private remedies of individuals to prevent the location at the point selected, cannot be made, certainly, in a collateral proceeding, after the completion of the work (Railroad Co. v. Speer, 56 Pa. 325, 94 Am. Dec. 84). The Atlanta Belt Line Company possessed the statutory power to acquire by condemnation, purchase, or lease any land necessary for its terminal facilities at its eastern terminus. Civ. Code, § 2187, par. 8. And, when terminal yards are necessary, they must be provided by a railroad to facilitate its business of transportation. 4 Elliott, R. R. § 1479. It acquired the land needful for this purpose on a part of the right of way of the Georgia Railroad & Banking Company, by lease from the Louisville & Nashville Railroad Company, which was, and still is, the sublessee of the Georgia Railroad & Banking Company. To make this lease valid, the lessor must have had the power to make the lease, and the lessee the power to accept it, for if the lease was beyond the power of either, it was as invalid as if beyond the power of both. *St. Louis, V. & T. E. R. Co. v. Terra Haute & I. R. Co.*, 145 U. S. 393, 402, 12 Sup. Ct. 953, 36 L. ed. 748; 2 Elliott, R. R. §§ 430, 432. See, also, *Central R. & Banking Co. v. Mayor, etc., of Macon*, 43 Ga. 644. The Atlanta Belt Line Company, as shown above, had the statutory power to accept the lease. The question then arises, did the Louisville & Nashville Railroad Company possess the power to make the lease? The Georgia Railroad & Banking Company was leased to William M. Wadley

and his assigns on May 7, 1881, and an assignment of this lease was duly procured by the Louisville & Nashville Railroad Company, and the Georgia Railroad & Banking Company has ever since acquiesced in the subletting by Wadley. By such acquiescence, the Georgia Railroad & Banking Company occupies the same position as if it had originally leased directly to the Louisville & Nashville Railroad Company. Moreover, if the charter of the Georgia Railroad & Banking Company confers the power of leasing in the manner above referred to, then such power passed, as a part of the franchise, to the lessee, in the absence of any restricting clause or provision in the lease. See 19 Am. & Eng. Enc. Law (1st Ed.) 897. The sections of the charter of the Georgia Railroad & Banking Company applying to the power of leasing are section 12 (Acts 1833, p. 262) and section 14 (Acts 1833, p. 263). Section 12 is as follows: "That the said Georgia Railroad Company shall *at all times* have the exclusive right of transportation or conveyance of persons, merchandise or produce, over the railroad and railroads to be by them constructed, *while they see fit to exercise the exclusive right; provided* that the charge of transportation or conveyance shall not exceed fifty cents per hundred on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: *provided always*, that the said company may, *when they see fit*, rent or farm out *all or any part* of their said exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privilege to *any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned.* And the said company in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers." (Italics ours.) And section 14 provides: "That whenever the company aforesaid shall see fit to farm out *as aforesaid*, to any person or persons, or body corporate, *any part* of their exclusive right of conveyance and transportation," (Italics ours), they may provide for the character of the locomotives and cars that the lessee shall use. It is violative of all rules of interpretation to select one sentence or clause of a section in a charter, and shut one's eyes to the rest of the section, with the view of getting the sense of the whole section. And it is equally unwarranted to pass over altogether a succeeding section which contains words conclusively showing a direct reference to and connection with a prior section on the same subject-matter. "Special charters and general incorporation laws are, like other legislative acts, within the rule that, in

construing a statute, the whole act must be looked into, and all its parts harmonized if possible." 7 Am. & Eng. Enc. Law (2d Ed.) 713. It is true, as was said in the case of Railroad v. Smith, 70 Ga. 700, that the powers given to a corporation must appear in its charter in plain words or by necessary implication, and that all reasonable doubts shall be resolved, against the corporation, in favor of the public. This is but an iteration of an oft-repeated principle. "The true meaning of the doctrine is that grants to corporations are construed most favorably to the public when there exists a reasonable doubt as to the extent of the privileges conferred. But it does not follow from this that such a grant is to be construed so strictly as to wrest the meaning of words from their common and well-understood significance; but such a grant, like every other instrument, public or private, is to be construed according to the plain meaning of the words, where they are free from ambiguity and doubt." 4 Thomp. Corp. § 5345.

Now, let us construe sections 12 and 14 of the charter of the Georgia Railroad & Banking Company according to law, which requires it to be done without beginning and ending in the middle of either section, or arguing in a circle. In the first place, the company has at all times the exclusive right of transportation or conveyance of persons or property, "while they see fit to exercise the exclusive right." If they do not see fit to exercise it after possessing it, the necessary implication is that they would or could farm it out in whole or in part. This conclusion passes from the state of a necessary implication to that of an express grant to lease such right, upon a consideration of the subsequent words in the same section, and by connecting and construing this part of section 12 with section 14, as we will show further on. Next, there are two rates specified for the transportation of two classified species of property, and one single rate for the conveyance of persons. Then immediately follows the right of the company, when they see fit, to farm out to any person or persons, or other company, the whole or any part of their exclusive right of transportation or conveyance of persons on the railroad or railroads, with the privileges, for such term as may be agreed on. Almost an identical right as is given by these words alone is found in the charter of the Monroe Railroad Company, granted in 1833 (Acts 1833, p. 243), and the words were construed in the case of Central R. & Banking Co. v. Mayor, etc., of Macon, 43 Ga. 605, to confer upon the company the right to lease its road, in whole or in part, for the transportation of persons and property. Such leasing by the Georgia Railroad Company is to be "subject to the rates above mentioned." The word "rates" here clearly relates to the charges fixed for the transportation of property and the conveyance of persons, for there is only one rate as to passengers; and hence the power to lease, in

whole or in part, the exclusive right of transportation of property, is thus further shown by express and apt words. Again, the company while exercising its "right of carriage or transportation of persons or property, or the person so taking [leasing] from the company the right [such right] of transportation or conveyance, shall be regarded as common carriers." These words show that the lessee of the company, as well as the company itself, while exercising the rights conferred, would be a common carrier, with the "right of carriage or transportation of persons or property." And in section 14 the power is expressly given to the Georgia Railroad Company, when it sees fit, to farm out as aforesaid (that is, as specified in section 12), to any person or persons, or other company, "any part of their exclusive right of conveyance and transportation." Such "exclusive right of conveyance and transportation" is expressly stated in section 12 to be the "exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad or railroads to be by them constructed."

The act of December 18, 1835 (Acts 1835, p. 180), amending the charter of the Georgia Railroad Company, besides changing its name to the Georgia Railroad & Banking Company, empowered it "to have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects of whatsoever kind, nature or quality the same may be, sufficient for the construction of banking houses and the erection of the railroad only, and the same to sell, grant, demise, alien or dispose of." The word "demise," used in the enumeration of the powers of the company under this amendment, means, technically, to lease for a term of years. 5 Am. & Eng. Enc. Law (2d Ed.) 538. Thus, by express words which do not admit of any reasonable doubt, the charter of the Georgia Railroad & Banking Company clearly confers the power to lease its exclusive right of transportation of property or conveyance of persons, in whole or in part, to any person or persons, or other company, and for such term as may be agreed upon. See, also, the following cases bearing on the right of the Georgia Railroad & Banking Company to exercise such power of leasing: *Arnold v. Banking Co.*, 50 Ga. 804; *Banks v. Banking Co.*, 112 Ga. 655, 37 S. E. 992. It is contended by the defendants in error that "all right" of the Georgia Railroad & Banking Company "to lease anything" expired in 36 years, and, therefore, it had no power to make the lease to Wadley in 1881; and section 15 of the charter of the company is cited in support of this contention. It seems to us that the mere reading of this section shows that this contention is not sound. The section provides: "That the exclusive right to make, keep up and use the railroads and transportations authorized by this act, shall before and during the term of thirty-six years, to be computed from the time when the said

road from Augusta to either of the points hereinbefore designated, shall be completed for transportation. * * * And after said term of thirty-six years shall have elapsed, though the legislature may authorize the construction of other railroads, for the trade and intercourse contemplated herein; nevertheless, the Georgia Railroad Company shall remain incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up and use railroads over and through such parts of the country, that shall so have expired by the foregoing limitation." Construing these two sentences together, it is evident that the intention of the general assembly was that, until the period of 36 years therein provided for had expired, the company chartered by this act should have "the exclusive right to make, keep up and use" railroads between certain points designated in the charter, and that the legislature should have power, during this period, to authorize any other company or person to construct and operate any other railroad, or railroads, between such points; but, after the expiration of this period, the legislature might "authorize the construction of other railroads for the trade and intercourse contemplated" by the act; and that even when the designated period of 36 years should have elapsed, and when other railroads had been constructed, under legislative authority, between these points, the Georgia Railroad Company should, nevertheless, remain incorporate, and be "vested with all the estate, powers and privileges as to their own works" granted by the charter, "except the exclusive right to make, keep up and use railroads over and through [the] parts of the country" in which the act granted such company the exclusive privilege of so doing for the term of 36 years from the time the road was completed from Augusta to any of the other points designated in the charter. That this is the meaning of this fifteenth section is very clear when we take into consideration the provision that, after the expiration of the limitation period, the company was to remain a corporation, and to be "vested with all the estate, powers and privileges as to their own works" granted and secured in the act. When the period of limitation should be completed, all the estate, powers, and privileges of the company, as to its own works, granted and secured by the act were to remain in full force and effect, but the right to prevent the construction and operation of other works of a like character within its hitherto exclusive territory was to terminate. If the company, after the lapse of the 36 years, was "to be vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up and use railroads over and through such parts of the country," we cannot conceive what right, power, or privilege granted by the charter, save the right to prevent the construction and operation of competing

railroads in the territory designated, the Georgia Railroad & Banking Company lost by the completion of the period of limitation. If, at the completion of such period, it was still to survive as a corporation, and to be vested with all the estate, powers, and privileges as to its own works except the exclusive privilege indicated, it was, when the 36 years had expired, still vested with the power to lease its road, franchises, etc., to any individual, or individuals, or other company.

It follows from the foregoing that the lease of the Georgia Railroad & Banking Company to William M. Wadley, in 1881, was legal; that he had the power to assign the right thus acquired; and the present lessee or assignee of that right, namely, the Louisville & Nashville Railroad Company, possessed the power to lease a part of the right of way of the Georgia Railroad & Banking Company to the Atlanta Belt Line Company for the latter's terminal facilities.

2. The Atlanta Belt Line Company also possessed the statutory power to lease its road, property, and franchises to another railroad company with whose road its own connected or formed a continuous line. Civ. Code, § 2179. It made such lease, on November 30, 1900, to the Atlanta & West Point Railroad Company, with whose line its own connected at Oakland City, in Fulton county, about two miles west of the eastern terminus of the Atlanta & West Point Railroad, and thus formed a continuous line from Oakland City eastward. Did the Atlanta & West Point Railroad Company have the statutory power to accept this lease? On September 11, 1900, its stockholders, to the end that it might be legally authorized to purchase or lease the Atlanta Belt Line road, duly and regularly adopted, by a large majority vote, the resolutions that its charter be amended by adopting the provisions of the general act for incorporating railroads, as contained in sections 2167 (6), 2173, and 2179 of the Civil Code. Accordingly, on September 12, 1900, the charter was amended, under section 1840 of the Civil Code, so as to make the provisions of such sections a part of the same. On October 18, 1900, at an annual meeting of the stockholders of the company, a resolution was unanimously adopted which, after reciting that the charter of the company had been amended, granting it power to buy or lease the Atlanta Belt Line Railroad, authorized and empowered the board of directors of the Atlanta & West Point Railroad Company to buy or lease the Atlanta Belt Line Railroad, if they should deem such action advisable; the terms of the purchase or lease being left by the resolution to the wise discretion of the board. The lease, as we have seen, was made on November 30, 1900. It is true, as was ruled in *Alexander v. Railroad Co.*, 108 Ga. 151, 33 S. E. 866, that these amendments to the charter of the Atlanta & West Point Railroad Company, being fundamental, radical, and vital, to be valid should have been based on the unanimous consent

of the stockholders. We think, however, that the resolution adopted by a unanimous vote of the stockholders on October 18, 1900, reciting that the amendments had been made, and empowering the board of directors to buy or lease the Atlanta Belt Line road, was such an acceptance and ratification of the amendments, by all the stockholders, as operated to legally make the amendments part of the charter of the company, just as if the unanimous consent of the stockholders had been obtained prior to securing the amendments. See 7 Am. & Eng. Enc. Law (2d Ed.) 682, and note 1, where it is said: "The general rule as to the acceptance of amendments to charters is that acts of user under an amendment to a corporate charter for which no authority can be found except in such amendment, and which amendment is supposed in good faith to be beneficial to the corporation, are evidence of an acceptance of such amendment by the corporation, and make it the law of the corporation, and binding upon all its members;" citing *Railroad Co. v. Zimmer*, 20 Ill. 654; *Foster v. Bank*, 16 Mass. 245, 8 Am. Dec. 135. See, also, *Railroad Co. v. Cole*, 29 Ohio St. 128, 23 Am. Rep. 729. In 2 Elliott, R. R. § 446, that author says: "In some of the states the statutes grant a right to lease to connecting lines. * * * It is held that under such a statute it is not essential to the validity of a lease that the leased road shall be an extension from either terminus of the main line, but it may be merely a collateral branch forming a continuous road, by way of the junction, to either terminus of such main line, in as direct a route as the average railroad. The pivotal question under such statutes is whether the line to which the lease is executed is a connecting line." *Hancock v. Railroad Co.*, 145 U. S. 409, 12 Sup. Ct. 969, 36 L. Ed. 755. Our general railroad law authorizes one railroad company to lease its road, etc., to another company with whose road "it shall connect or form a continuous line." Civ. Code, § 2179. When enacting such law, the legislature manifestly had in view and meant a connecting line of railroad as then defined in our Code. The definition of a connecting line is found in sections 2212 and 2213 of the Civil Code, which are the same as sections 719 (q) and 719 (r) of the Code of 1882. These sections were construed in *Logan v. Railroad*, 74 Ga. 693, 694, as follows: "Section 719 (q) declares the connecting line to be any line 'at the terminus, or any intermediate point'; and section 719 (r) describes the connecting line by prescribing that 'where any railroad, in this state, joins another at any point along its line, or where two of such roads have the same terminus, either line having the same gauge may, at its own expense, join its track by proper and safe switches.' So that it must be only an adjacent road capable of being joined by switch to the other, and this may be at the terminus or anywhere on the line where they meet or converge or connect, at village or depot or city." The At-

lanta & West Point Railroad and the Atlanta Belt Line were, therefore, connecting lines at the time of the latter's lease to the former. By this lease, the Atlanta & West Point Railroad Company succeeded to all the rights, property, and franchises of the Atlanta Belt Line Company, among which was the leasehold to that part of the right of way of the Georgia Railroad & Banking Company upon which the terminal yard, the subject-matter of this litigation, is located. And the Atlanta & West Point Railroad thus became a connecting through line with the Georgia Railroad, because the Atlanta Belt Line connected, at its eastern terminus, with the Georgia Railroad. This legal conclusion is clear, for the Atlanta & West Point Railroad Company is as much a common carrier over the Atlanta Belt Line, leased by it, as over its own line. *Logan v. Railroad*, 74 Ga. 685 (4).

3. After this connection of the Atlanta & West Point Railroad with the Georgia Railroad, and the location and construction of the terminal yard, had been secured under statutory powers, the Atlanta & West Point Railroad Company and the Louisville & Nashville Railroad Company entered into a mutual traffic contract, by which the Atlanta & West Point Railroad Company was granted trackage rights over the right of way of the Georgia Railroad & Banking Company, into Atlanta, and the joint use of the depot, warehouses, yard, offices, and other railroad appurtenances of the Georgia Railroad & Banking Company in the city; and the Louisville & Nashville Railroad Company was granted the joint use of property held by the Atlanta & West Point Railroad Company in the city, and also of the terminal yard at or near Inman Park. This contract facilitated, not only the transportation of freight to the consignees of the Atlanta & West Point Railroad Company in Atlanta, but shipments from Atlanta westward over the Atlanta & West Point Railroad, and eastward over the Georgia Railroad, and also through shipments, eastward and westward, over both roads. Instead, therefore, of disabling either road to transact its own business, the facilities of each road for the transportation of freight were thus materially increased, and the general public correspondingly benefited. The law upholds such a contract. 1 Elliott, R. R. § 42; 2 Elliott, R. R. §§ 356, 357, 358, and cases cited. See *Banking Co. v. Friddell*, 79 Ga. 489, 7 S. E. 214, 11 Am. St. Rep. 444.

4. From what we have said above, it is seen that the terminal yard, the operation of which the defendants in error seek to enjoin, was located, and its construction authorized, under statutory powers. In such cases the general rule, supported practically by an almost unbroken line of authorities, is that a work so located and constructed, if constructed and operated in a proper manner, cannot be adjudged a nuisance. This applies with special force to works thus authorized to facilitate transportation on railroads, which are of a quasi public nature. 19 Am. & Eng. Enc. Law (1st

Ed.) 923, 924, and notes; 4 Walt, Act. & Def. p. 784; 2 Elliott, R. R. § 718, and note; 1 Wood, R. R. § 212; 2 Wood, Nuis. § 753; 1 High, Inj. (3d Ed.) § 767; *Vason v. Railroad Co.*, 42 Ga. 631; *Burrus v. City of Columbus*, 105 Ga. 42, 31 S. E. 124; *Beldeman v. Railroad Co. (N. J. Ch.)* 19 Atl. 731; *City of Leavenworth v. Douglass (Kan. Sup.)* 53 Pac. 123; *Attorney General v. Railroad Co.*, 24 N. J. Eq. 49; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Watson v. Railway Co. (W. Va.)* 39 S. E. 193. See, also, *Bacon v. Walker*, 77 Ga. 336; *Railroad Co. v. Cox*, 93 Ga. 564, 20 S. E. 68; *Long v. City of Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363. From this rule, it follows that injuries and inconveniences to persons residing near such works from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are the necessary concomitants of the franchises granted. *Austin v. Railway Co.*, 108 Ga. 687-689, 34 S. E. 852, 47 L. R. A. 755; *Wood, R. R.* p. 722; *Whitney v. Railway Co.*, 69 Me. 208; *Beseman v. Railroad Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Costigan v. Railroad Co.*, 54 N. J. Law, 233, 23 Atl. 810; *Railroad Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84. We think these rules are based upon the soundest reason, and are clearly distinguishable from cases like that of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, where railroads erect engine houses, coaling stations, or workshops, on their rights of way, from which the emission of ordinary noises, smoke, soot, and cinders may be a nuisance to owners and residents of abutting property, like other cases of lawful business not partaking of a public nature, and not having legislative sanction. See *Sawyer v. Davis (Mass.)* 49 Am. Rep. 27; *Romer v. Railroad Co. (Minn.)* 77 N. W. 825, 74 Am. St. Rep. 455. To make such rules uncertain is to invite a mass of litigation, and clog the wheels of commerce. The contention of the defendants in error that this terminal yard of switches and side tracks is a nuisance at Inman Park because dwellings were erected there before the construction of the yard, and it could have been located at another point, where there were no residences, without being a nuisance to any one, is without modern legal precedent to sustain it, and is unsound for at least two reasons. In the first place, the terminal yard was located at the terminus of one railroad, on an existing right of way of another railroad, and under statutory power. We have adverted in paragraph 1 of this opinion to the power of the Atlanta Belt Line Company to locate its eastern terminus on the Georgia Railroad at or near Inman Park, and to the defendants in error being remediless to change that location after the work was completed, even if they had any right to stop

the work at all. We also referred to the power of that railroad company to acquire, by lease, land for its necessary facilities, at such eastern terminus. It had the power to put in all the side tracks it needed, and side tracks cannot be put in without switches. "A power to build side tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing the trains or of leaving the track for the shifting of cars, and without standing room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and utility, and would be vain and nugatory. * * * A switch is but a mechanical contrivance or movable opening to pass cars from one track to another. * * * The spot where the openings in the main track should be placed falls within the absolute discretion of the company, and cannot be readjudged by a private citizen who lives along the line of the road." *Railroad Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84. In the second place, it is obvious, if the terminal yard is a nuisance because located near dwellings, that it would clearly be a nuisance wherever it might be put, even in the woods or in a field, as soon as the owners of the adjacent land built houses on their land; for the old rule, maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded. 16 Am. & Eng. Enc. Law (1st Ed.) 934; *Railroad Co. v. Woodruff*, 86 Ga. 94, 13 S. E. 156 (3); *People v. Detroit White Lead Works* (Mich.) 46 N. W. 735, 9 L. R. A. 722; 2 Wood, Nuis. § 574.

5, 6. While the rule above stated is undoubtedly correct in view of the authorities, it does not follow that railroad works authorized by statute cannot become nuisances by their improper construction, on by their negligent and improper use after a proper construction. 2 Wood, Nuis. 761; 19 Am. & Eng. Enc. Law (1st Ed.) 925; 4 Walt, Act. & Def. p. 785. The reason is that such exceptions do not fall within the legislative grant. It is, therefore, correct, in such qualified cases, to hold railroad companies to an accountability; for the legislative power given to them to construct a work, which relieves them from all liability for the ordinary and necessary incidents flowing therefrom, though causing annoyance to others, does not invest them with an unbridled license to use their own property as they please, without any consideration for, and to the great detriment of, the rights and property of others. Some of the instances under which it is generally held that a nuisance may arise from the improper conduct of a railroad work authorized by statute, and which points are involved in this case, are: (1) Using defective engines which scatter unnecessary quantities of sparks, cinders, and smoke (*Austin v. Railway Co.*, supra); (2) the improper management of proper locomotives by using a greater amount of steam than is reasonably necessary, by which an unusually large number

of sparks are emitted, in attempting to draw too heavy a load up grade (3 Elliott, R. R. § 12,225); (3) the sounding of whistles, ringing of bells, and blowing off of steam, at improper times, and in an unnecessary manner (*Austin v. Railway Co.*, supra); (4) the running of trains or cars, or using locomotives, on Sundays, by which churches are rendered less valuable for the purposes to which they are devoted, and divine worship therein on such days is greatly and unreasonably disturbed from noises, smoke, and cinders, not to speak of the like discomfort on these days to individuals residing at such points (3 Wood, R. R. pp. 1615, 1616; 4 Walt, Act. & Def. p. 758; *First Baptist Church v. Schenectady & T. R. Co.*, 5 Barb. 79).

From what we have heretofore said, it will be seen that the defendants had, under statutory powers, the lawful right to locate and operate at Inman Park, on the right of way of the Georgia Railroad & Banking Company, a properly constructed and properly operated terminal yard, and, if they did no more than this, the operation of the yard could not be prevented by an injunction, for they could not be enjoined from doing that which the law authorized them to do; but the statutory power to locate and operate the yard at the point in question was impliedly and necessarily qualified by the limitation that it could only be lawfully exercised by constructing and operating the yard in a proper manner,—that is, with due regard to the rights of others. So, while a properly constructed and properly operated yard at this point could not be a nuisance, a railroad terminal yard thus located might be a nuisance if so improperly constructed as to produce, even when carefully operated, noises, smoke, cinders, etc., in greater quantities than would be produced by such operation if it were properly constructed; and, though properly constructed, its negligent and improper operation might produce noises, smoke, cinders, etc., largely in excess of what would result from its proper operation, and thus create specific nuisances which the plaintiffs would have the right to enjoin. There was some evidence tending to show that the yard was improperly constructed in that it was built upon a grade, and not upon a level, and also evidence tending to show that the noises, smoke, etc., complained of, and which resulted from the operation of the yard, were greater than necessary to a proper conduct of the business. On both these points there was much and strong evidence to the contrary, and as to the first there was a very decided preponderance of testimony to the effect that the construction of the yard was proper. Reading the opinion of his honor below in the light of this fact, and carefully considering the same, together with the terms of the order granting the injunction, we have no hesitation in concluding that he did not grant the injunction upon the theory of improper construction of the yard. In other words, if the evidence had been precisely as it is, save that it had affirma-

tively appeared that the yard had been built upon a dead level, no one reading Judge Gopher's opinion in the case could have the slightest doubt that his judgment would have been just as it was. This being so, can the granting of the injunction be sustained upon the view that the noises, smoke, etc., were greater than necessary, and that, as a consequence, the entire operation of the yard was a nuisance? We think not. The order provided: "That on and after the first day of October, 1901, the defendants, and each of them, their officers, agents, and servants, be and are hereby restrained and enjoined from doing any of the acts complained of on the tracks, road-bed, right of way, or premises of the Georgia Railroad & Banking Company, opposite Inman Park and the residences of petitioners, in switching and using the same for terminal purposes, and from doing the acts complained of, at said places, as set forth in their original and amended petition." In the light of what has been laid down above, this order was too broad, in that its necessary effect was to enjoin the prosecution of a lawful business, even though properly and legitimately carried on. If, in the carrying on of this business, there were features rendering it, to a greater or less extent, a nuisance, the evidence should have been sufficiently clear to enable the judge to ascertain with some degree of definiteness in what respect there were excesses in the matter of making noises, emitting smoke, etc., so that he could, in the order of injunction, point out and prevent whatever acts over and beyond those necessary did constitute nuisances. The evidence in this case falls very far short of coming up to this requirement. If there were unlawful features connected with the operation of the yard, the evidence fails to separate them from those that were lawful, and to so point them out that the judge could, by injunction, prevent their repetition. As to the inconveniences, annoyances, and disturbances complained of as a continuing nuisance resulting from the operation of the terminal yard on Sundays, and forming the fourth excepted instance hereinbefore specified, we think the plaintiffs' case is sustained by the facts and the law. Sunday is not an ordinary working day. It is "a day observed by the Christian world as holy, and set apart for the purposes of rest and worship." 24 Am. & Eng. Enc. Law (1st Ed.) 528, 529. This is, in part, shown by the interdiction put by the statute upon the starting of freight trains in this state after 12 o'clock midnight on Saturdays, or the arrival of such trains at their destination, after 8 o'clock a. m. on Sundays, that had been started at a proper time, excepting freight trains of live stock, fruit, vegetables, and other perishable articles. Pen. Code, § 420. It has been held that a railroad company is not bound to carry passengers or freight on Sunday, even when a statute per-

mits it to do so, and if it contracts to do so, and afterwards fails to carry out the contract, it is not an infraction of the company's general duty as a common carrier. See note in 24 Am. & Eng. Enc. Law (1st Ed.) 540, and cases there cited. The pastors and the trustees of two churches located in Inman Park testified, in common, that the loud noises on Sundays, from the blowing off of steam, ringing of the bells of engines, and the moving of the engines and trains back and forth over the tracks beside and near the churches, cause intolerable noises, jar, and inconvenience to all worshipping in the churches; that the dense volumes of smoke, soot, and cinders which are emitted from the engines, and pervade the church buildings during church services on Sundays, cause the greatest discomfort and annoyance to the pastors and the congregations; and that it is often impossible to hear what is being said by the pastors in the churches. It is to be noted, too, that these inconveniences are confined to the locality of the churches and terminal yards, and that the general public do not share in them. These facts are not denied by the railroad companies. They merely state that it is "occasionally" necessary to use the yard for switching purposes on Sundays, although the evidence shows that the yard is so used on Sundays very frequently. In no part of the evidence for the railroad companies is it stated that such work on Sundays is a necessity, except, as above mentioned, "occasionally." The evidence, then, shows that such work is carried on, on Sundays, more as a matter of convenience to the railroad companies than of necessity, and, therefore, is done unnecessarily. The exception usually made in favor of works of necessity on Sundays does not embrace work which is merely convenient, but not necessary. 24 Am. & Eng. Enc. Law (1st Ed.) 542. Consequently, what is done in this regard unnecessarily is a nuisance. See, also, *Village of Pine City v. Munch* (Minn.) 44 N. W. 197, 6 L. R. A. 763. The remedy for this objectionable feature, so far as the defendants in error are concerned, is to enjoin that, and nothing else, which is the procedure adopted by this court in the case of *Hill v. Fertilizer Co.*, 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398, where only the unnecessary blowing of the factory whistle was restrained. We therefore conclude, after a careful consideration of this case in all its bearings, that the judgment of the court below, granting an interlocutory injunction, should be reversed, except only as to restraining the use of this terminal yard for switching purposes on Sundays, and direction is given that the judgment be so modified as to apply only to the Sabbath day.

Judgment reversed with direction. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 393)

SUMPTER et al. v. CARTER.

(Supreme Court of Georgia. April 1, 1902.)

WILL—CONSTRUCTION—VESTED REMAINDER—CONVEYANCE—INTEREST ACQUIRED.

1. A testator, who died in 1864, left a will, in which, so far as material to this case, he disposed of his estate as follows: "I give, bequeath, and devise to my beloved wife * * * all of my property and effects * * * during her natural life or widowhood, * * * and, in case of my said beloved wife not intermarrying, then in that event my will is that at her death that my whole estate be then equally divided between my six children, to wit, my five daughters [naming them] and my son [naming him]. My said effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children to be controlled in the same way as first above directed." Neither of the testator's children had married when he died, and his widow never married again. **Held:** (1) That, the intention of the testator is to be followed, unless clearly in conflict with the law existing at his death, and this intention is to be ascertained in the light of the whole will, and the attendant circumstances of the testator; and where there are devastating clauses, especially of a remainder, they are to operate so as to vest the estate indefeasibly at the earliest possible period of time. (2) That upon the death of the testator each of his children took a vested remainder interest, subject to be divested in favor of the testator's other children, as substituted devisees and remaindermen, upon such child dying during the existence of the life tenancy, without leaving a child who survived the life tenant; that, the son having died before the life tenant, leaving children who survived the latter, his remainder share became indefeasible upon the death of such life tenant; and that, therefore, under a deed executed during the life tenancy, by which the son conveyed to another all his life interest in described realty, which belonged to the testator at the time of his death, the grantee, upon the death of the life tenant, became indefeasibly entitled to the son's remainder share therein. (3) That children of a daughter of the testator, who, with her, survived the life tenant, were entitled to share, in common with their mother, in the remainder interest, which, upon the death of the testator, vested in the mother, subject, however, to open and let in such children; and that hence a deed executed by a daughter of the testator, which conveyed to another all her interest in described realty which belonged to the testator at his death, did not affect the interests therein of her children who were in life when the life tenant died.

(Syllabus by the Court.)

Error from superior court, Hall county; J. B. Estes, Judge.

Action by Laura Sumpter and others against S. S. Carter. Judgment for plaintiffs, and defendant brings error.

Albert & Hughes and H. H. Dean, for plaintiff in error. H. H. Perry and Howard Thompson, for defendants in error.

FISH, J. The will of John M. Carter, Sr., who was the grandfather of the plaintiffs in error, was executed August 26, 1863, and is, so far as material to this case, as follows: "I give, bequeath, and devise to my beloved

wife, Amella Carter, all my property and effects, just during her natural life or widowhood, * * * and, in case of my said beloved wife not intermarrying, then in that event my will is that at her death my whole estate be then equally divided between my six children, to wit, my five daughters, Lucinda, Almada, Sarah Elizabeth, Teresa, and Thena Allea, and my son, Sanders Taylor Carter. My said effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed." The testator died in the year 1864. His wife, the life tenant, died in 1898, without having intermarried. The son executed a deed to his interest in certain described land which belonged to the testator at the time of his death to the defendant in error, and died before the life tenant, leaving children surviving her. The five daughters, on the same day the son executed his deed, also made deeds conveying all of their interests in the same property to the defendant in error, and each survived the life tenant, with children surviving her, born after the testator's death. Plaintiffs in error brought an equitable petition against the defendant in error, praying for a construction of the will of their grandfather, John M. Carter, and for a joint and several recovery of whatever interests they were entitled to under the will in this land, conveyed by their respective parents to the defendant in error, and that the land be sold, and the proceeds be partitioned between the different owners thereof according to their respective interests therein. The petition, after amendment, was dismissed on demurrer, the court holding that none of the plaintiffs were entitled to recover under the allegations of the petition. To this ruling the plaintiffs excepted.

1. In construing wills, as they rarely use exactly the same language, each case is to be determined on its own merits (*Cook v. Weaver*, 12 Ga. 47; *Olmstead v. Dunn*, 72 Ga. 850-857), and the intention of the testator is to be diligently sought for and followed, if consistent with law (*Civ. Code*, § 3324; *Usry v. Hobbs*, 58 Ga. 33; *Bailey v. Ross*, 66 Ga. 363, 364; *Morton v. Murrell*, 68 Ga. 145; *Hudgens v. Wilkins*, 77 Ga. 556). This law is that which existed at the death of the testator (*Hertz v. Abrahams*, 110 Ga. 707, 86 S. E. 409, 50 L. R. A. 361), and his intention only yields to the law when it clearly and decidedly conflicts therewith (*Williams v. McIntyre*, 8 Ga. 87). The intention of the testator must be gathered from the whole will. *Edmondson v. Dyson*, 2 Ga. 312; *Benton v. Patterson*, 8 Ga. 151; *Cook v. Weaver*, supra; *Robert v. West*, 15 Ga. 123 (4); *Felton v. Hill*, 41 Ga. 554 (2); *Tennille v. Phelps*, 49

Ga. 540; *Olmstead v. Dunn*, supra; *Gaboury v. McGovern*, 74 Ga. 140. All the attendant circumstances of the testator and his family are to be considered. *Cook v. Weaver*, *Williams v. McIntyre*, *Tennille v. Phelps*, *Olmstead v. Dunn*, above cited. And all divesting clauses, especially as to remainders, are to be strictly construed, so as to vest the estate absolutely at the earliest possible period of time. 29 Am. & Eng. Enc. Law (1st Ed.) 467, 468, note 2; *Bailey v. Ross*, 66 Ga. 364.

2. The words of the testator devising the remainder, "In case of my said beloved wife not intermarrying, then in that event my will is that at her death my whole estate be then equally divided between my six children, to wit, my five daughters, Lucinda, Almeda, Sarah Elizabeth, Teresa, and Thena Alieva, and my son, Sanders Taylor Carter," standing alone, would undoubtedly give an absolute or indefeasible estate in remainder to each of the said children, which would vest in interest at the testator's death and in possession at the life tenant's death (*Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196); and the remainder share of a child who should die before the life tenant would descend to that child's heirs at law, whoever they might be (Civ. Code, § 3101), or vest in such child's assigns by his or her deed thereto, made during the life tenancy (Id. § 3601). And the superadded words of the testator, "And in case either of my said six children should depart this life without leaving issue, then their part in my estate to be equally divided between my other children," do not change the vested remainder, previously and explicitly given to each child, into a contingent remainder to only those children of the testator who survive the life tenant, but merely designate the contingent event upon which such remainder to each child may become vested prior to the time of its vesting in possession at the period of distribution, namely, at the death of the life tenant, in favor of the testator's other children and remaindermen then living as substituted devisees. When we bear in mind that the entire estate given in remainder to the testator's six children was to be equally divided among them at the death of the life tenant, and that each child's vested remainder interest by subsequent words was simply made defeasible, upon the mere contingency of such child dying without leaving issue, in favor of the others as survivors, we then have the key to the intention of the testator, which is clearer than in devises to A., and upon his death to B., C., and D., and the survivors of them. The dying of a remainderman in the case in hand without leaving issue—which is the sole contingency upon which such remainderman's vested share otherwise distributable to him or her at the death of the life tenant is to be divested—cannot be referred to a death before the testator, whereby the whole remainder is to vest in the other children and remaindermen as survivors at his death, because he fixed a later period, namely, at the

death of the life tenant, for the distribution or vesting in possession of his whole estate among the remaindermen then entitled indefeasibly; and as the time when his "other children" and remaindermen, as survivors, were to be ascertained to take the share of a child dying previously without leaving issue living at the life tenant's death, and because the life tenant, who was not incapacitated from taking the estate given to her, neither died nor renounced her life interest before the testator's death, which events alone would have accelerated the vesting in possession of the remainder interest at the testator's death, and fixed the persons then entitled thereto indefeasibly. 20 Am. & Eng. Enc. Law (1st Ed.) 896; 29 Am. & Eng. Enc. Law (1st Ed.) 489. And it cannot be made referable to the dying of either remainderman after the life tenant, because, instead of one division taking place at one fixed period, as the testator directed, there would then be partial divisions, occurring one after another, as often as a remainderman died after the life tenant without leaving children; or all the remaindermen might die without leaving children, and in that event, when the last child died, the whole estate would have to revert to the testator's heirs at law. This construction would not only prevent the free alienation of the property, and violate the rule of the law that divesting clauses, especially as to remainders, must be strictly construed, so as to absolutely vest the estate at the earliest possible period of time, and not postpone the vesting of estates in possession indefinitely, but would simply make a will for the testator. Hence the irresistible conclusion is that the words, "dying without leaving issue," as applying to a divestment of any child's vested remainder share in favor of the other children of the testator and remaindermen, as substituted devisees, clearly refer to a dying within the lifetime of the life tenant, so as to vest the remainder in the whole estate indefeasibly at the death of the life tenant, as the testator directed. It is just the same as if the testator, as to his son's remainder interest, had said: "At the death of my wife, the life tenant, my son, is to have an equal share in my whole estate absolutely; but, should he die before the time I thus fix for him to have his share vested indefeasibly in possession, without leaving children in esse at that time, then, and then only, I give his share to my other children and remaindermen who survive the said period of distribution." A vested remainder may be absolutely or defeasibly vested. And "a vested remainder subject to a divesting contingency has, until the contingency happens, all the incidents of an indefeasible interest, and, if the contingency never happens, the estate becomes absolute." 20 Am. & Eng. Enc. Law (1st Ed.) 854. The vested remainder share of the testator's son was subject to be divested, upon the sole contingency of the son dying without leaving issue in esse at the life tenant's death, in fa-

vor of his sisters and other devisees then living. This contingency never happened. Therefore, in consonance with the testator's intention and the soundest reason, there being no devise to the children of the son, the latter's vested remainder share became absolute and indefeasible upon his dying before the life tenant, leaving issue in esse at the life tenant's death (*Besant v. Cox*, 6 Ch. Div. 604,—which is directly in point), or upon his surviving the life tenant, with or without children, which supports the immediate preceding principle (*Id.*; *Barker v. Cocks*, 6 Beav. 82; *McGraw v. Davenport*, 6 Port. 319; *Williamson v. Chamberlain*, 10 N. J. Eq. 373, approved in *Baldwin v. Taylor*, 37 N. J. Eq. 83; *McCormick v. McElligott*, 127 Pa. 230, 17 Atl. 896, 14 Am. St. Rep. 837, and the cases cited in the circuit judge's opinion in said Reporter; *Lee v. Mumford*, 44 S. W. 91, 19 Ky. Law Rep. 1585; *Weakley v. Hanna*, 51 S. W. 570, 21 Ky. Law Rep. 450; *Forstye v. Lansing's Ex'rs* [Ky.] 59 S. W. 854). And, even if the will in this case had made the vested remainder interest of the son defeasible by an express devise to his children in case of his death, his death would mean a dying within the lifetime of the life tenant, and hence his children could not take under the express contingent devise to them if he survived the life tenant, because his remainder share would then vest in him indefeasibly. *Bartlett v. Bartlett*, 33 Ga. Supp. 174 (construing the third item with the fourth, fifth, and sixth items of the will in that case); *Bailey v. Ross*, 66 Ga. 354, 363-365, and the cases cited on latter page; *Hervy v. McLaughlin*, 1 Price, 264, 16 Rev. Reports, 713; *Galland v. Leonard*, 1 Swan. 161, 18 Rev. Reports, 44; *Ollivant v. Wright*, 1 Ch. Div. 346; *Vidal v. Verdier*, 1 Speer, Eq. 402; *Galway v. Brice* (Sup.) 30 N. Y. Supp. 985. And the cases of *Usry v. Hobbs*, 58 Ga. 32; *Doty v. Wray*, 66 Ga. 153; *Lufburrow v. Koch*, 75 Ga. 448; *Clark v. Henry*, L. R. 11 Eq. 222, 227, 228; *Bishop v. McClelland's Ex'rs*, 44 N. J. Eq. 450, 16 Atl. 1, 1 L. R. A. 551; *Wolfe v. Van Nostram*, 2 N. Y. 438-442; *Fields v. Whitfield*, 101 N. C. 305, 7 S. E. 780, together with 3 Jarm. Wills (R. & T. Ed.) 611; and *Smith, Ex. Int.* § 658,—also give light in support of the principles here discussed.

The children of the testator's son take no estate under the will, either expressly or by implication; and the latter class of estates are not favored. *McCord v. Whitehead*, 98 Ga. 385, 25 S. E. 767. This rule as to estates by implication applies with especial force to the case at bar, as there is no intent whatever on the part of the testator to give his son a lesser estate than a remainder in fee in his whole share, which was only to be divested, in favor of the testator's other children and remaindermen, upon the contingency hereinbefore explained, which never happened. The existence of the son's children at the time of the death of the life tenant, he having died before, simply fulfills one of the provisions in

the testator's will, whereby the son's remainder share, which was defeasibly vested, would then become indefeasible. If he had made no deed to his remainder interest, his children in life at the time of the death of the life tenant would have taken his then indefeasible remainder share by inheritance from him. But his deed, on account of his leaving children in esse at the death of the life tenant, which then made his remainder absolute, passed that absolute interest to his grantee. This principle is upheld in *Chewning v. Shumate*, 106 Ga. 752, 753, 32 S. E. 544, *Davis v. Hollingsworth*, 113 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 233, and *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826. It is only when the defeasible remainder interest of a testator's child, who dies before the life tenant, is expressly given in that contingency to his children, that his deed made during the life tenancy would not convey the absolute fee at the life tenant's death as against his children surviving the latter period. *Galway v. Brice* (Sup.) 30 N. Y. Supp. 985, 986.

3. We are thus brought to a consideration of the remainder interests of the five daughters, who married after the testator's death, and survived the life tenant, with children then living. After first giving to these daughters, together with his son, each by name, a vested remainder in his whole estate, to be equally divided among them at the death of the life tenant, the testator says: "My effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed." The vital question here presented is, does this devise in remainder create an estate tail in the daughters, which would give them the fee under our act of December 21, 1821 (*Cobb, Dig.* 169), or does it create a tenancy in common between the daughters and their children born up to and living at the time of the vesting of the remainder in possession at the death of the life tenant? The answer to this question depends upon whether the word "children" in the phrase "and their children" was used in the sense of a word of limitation—that is, as an indefinite failure of issue—or not. There is no middle ground. We think that the testator clearly intended to create the estate last mentioned, and that such intention violated no rule of law in force at his death or at any other time. If the devise had been of an immediate estate, to vest in interest and in possession at the death of the testator, as directly, in the first place, to a daughter and her children (the daughter having no children when the will took effect), there could then be no doubt that such devise would create an estate tail in the daughter. One of the rules in *Wild's Case* and its meaning is thus

stated in 3 Jarm. Wills (R. & T. Ed.) 174: "Where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it is said, 'The intent of the deviser is manifest and certain that the children (or issues) should taken, and as immediate devisees they cannot take, because they are not in *reum natura*, and by way of remainder they cannot take, for that was not his (the deviser's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation.'" The modification of this rule, as suggested by Jarman (Id. 177), so that children living at the death of the testator, when the will takes effect, would not be excluded as purchasers in an immediate devise in interest and possession at the testator's death to A. and his children, has been approved in this state, whereby such children and their parent would take as tenants in common. *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Gillespie v. Schuman*, 62 Ga. 252; *Ewing v. Schropshire*, 80 Ga. 384, 385, 7 S. E. 554. As thus modified, and applying it to such immediate devises or grants in cases where A. has no child living at the testator's death or at the execution and delivery of the deed, the aforesaid rule, by which A. then takes an estate tail, has been followed by many decisions of this court and adopted into our Code. Civ. Code, § 3085; *Ewing v. Schropshire*, 80 Ga. 374, 7 S. E. 554; *Estill v. Beers*, 82 Ga. 608, 9 S. E. 596; *Baird v. Brooklin*, 86 Ga. 709, 712, 12 S. E. 981, 12 L. R. A. 157; *McCord v. Whitehead*, 98 Ga. 385, 25 S. E. 767; *Hollis v. Lawton*, 107 Ga. 102, 32 S. E. 846, 73 Am. St. Rep. 114. If the devise were to A. for life, and after A.'s death to B. and her children, without more (B. having no children at the testator's death), the devise might, though we are not called on by the facts in the case at bar to say it necessarily would, create an estate tail in B., on the assumption that "children" in the phrase "and her children," unexplained by preceding, associated, or super-added words, was used in the sense of "issue" generally, and therefore a word of limitation, as held in *Butler v. Ralston*, 69 Ga. 435. Jarman, in his work on Wills (R. & T. Ed.) 178, thus speaks of a principle which he thought ought to apply to devises in remainder to A. and his children simpliciter: "If the literal terms of the rule in *Wild's Case* can be departed from in the manner suggested in order to give effect to its spirit, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently, if the devise were future, so that all children coming in esse before the period of vesting in possession would be entitled, the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any such objects. In *Broadhurst v. Morris*, 2 Barn & Adol. 11, the rule seems to have been applied to a devise of

this description, but this peculiarity in the case does not appear to have attracted attention." And "this peculiarity in the case" was not considered in our own case of *Butler v. Ralston*. The principle thus referred to by Jarman is upheld in the recent case of *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325, and is intimated to be correct in the later case of *Childers v. Logan*, 65 S. W. 124, 23 Ky. Law Rep. 1239. But if this principle is not applicable in cases like *Butler v. Ralston* (and we do not now hold that it is), such cases are no authority in the case at bar, where the will contains associated and superadded words explaining the sense in which the word "children" was used. In *Gaboury v. McGovern*, 74 Ga. 146, the case of *Butler v. Ralston* is expressly referred to, and thus distinguished: "It is sufficient to reply that there were no superadded words to show that the maker of the instrument intended that the words used should be construed to be words of purchase, and not of limitation." The decision in *Butler v. Ralston* itself fully recognizes the principle that the word "children," in a devise to A. and his children, can be shown to be a word of purchase by explanatory words in other parts of the will.

It cannot be questioned, certainly in this state, that words of limitation in one particular clause of a will or deed, which, standing alone, create an express estate tail, under either the rule in *Wild's Case* or that in *Shelley's Case*, may be explained by other and superadded words in the instrument to mean a word of purchase, which will prevent an estate tail. *Dudley v. Mallery*, 4 Ga. 61-63; *Benton v. Patterson*, 8 Ga. 151, 152; *Kemp v. Daniel*, Id. 385, 387; *Dudley v. Porter*, 16 Ga. 615-619; *Williams v. Allen*, 17 Ga. 81, 82; *Sharman v. Jackson*, 30 Ga. 224; *Gaboury v. McGovern*, 74 Ga. 142-147. As is said in *Benton v. Patterson*, which exemplifies the rulings in the other cases, "The whole will must be considered together, and it will not do to rest the construction upon any particular clause." The principle referred to in 3 Jarm. Wills (R. & T. Ed.) 239, that a mere limitation over upon a definite failure of issue at the death of the first taker will not explain the word "issue" in the antecedent devise to A. and his issue if A. has no issue, but will ingraft a contingency upon the estate first devised, clearly applies to such devises which take effect in possession at the testator's death. In England such devises give A. an estate tail, with remainder over expectant upon the happening of the contingency (Id.); and, if only personalty is bequeathed, A. takes the fee, subject to be divested in favor of the executory legatees upon his dying without a child. *Lyon v. Mitchell*, 1 Madd. 467. The English rule as to personalty in such cases has been followed in Georgia as to realty also, and we have an illustration of this principle in the case of *Davis v. Hollingsworth*, 118 Ga. 210, 38 S. E. 827, 84 Am. St. Rep. 232. Yet even in such cases the vice chancellor

Lyon v. Mitchell (page 481) said that the extent of the estate given under the first devise is to be governed by the words in the limitation over, "where they bear upon, and unite with, and tend to affect the construction of the prior words, and which in many cases may enable us to come to a conclusion respecting it." He also said (pages 472, 473) that a devise to A. and his issue as tenants in common would be another mode of showing a legal intention on the part of the testator not to create an estate tail; but we think this would apply to estates vesting in possession at some period after the testator's death, rather than at his death. There are doubtless cases which hold that the principle last mentioned above by Jarman also applies where there is a remainder to A. and his issue, or heirs of his body, or children (A. having none), with a naked limitation over at his death, whenever that might occur, without issue or children; for, in such cases death would not be confined to a dying before the life tenant; there would be no substituted devisees to take the remainder indefeasibly at the death of the life tenant, and therefore no children of A. who could take an estate in common with him when the life estate terminated. That courts will lay hold of any legitimate facts or words to uphold the intention of the testator not to create an estate tail is also shown in the distinction made between an immediate devise in possession to A. and his children and a remainder to A. and his children, without a gift over, and A., in each case, has a child living when the will was made or the testator died. In an immediate devise (that is, to take effect in possession at the death of the testator) to A. and his children, and A. has a child living, A. and this child would take as joint tenants in England, under one of the rules or resolutions in *Wild's Case*, 6 Coke, 17, 18; 3 Jarm. Wills (R. & T. Ed.) 179; and as tenants in common in Georgia. *Gillespie v. Schuman*, 62 Ga. 252; *Ewing v. Schropshire*, 80 Ga. 384, 385, 7 S. E. 554. After-born children would be excluded. *Id.* The latter children, being in *rerum natura*, could not acquire the legal title to an immediate estate in possession, and they could not take a remainder, for such was not the deviser's intent. On the other hand, if the devise is to A. for life, and at A.'s death to B. and her children, and B. has a child living when the will was made or the testator died, not only that child, but all other children born up to and living at the death of the life tenant would take the remainder jointly or in common with their parent. *Oates v. Jackson*, 2 Strange, 1172; *Annable v. Patch*, 3 Pick. 363. This last ruling is made independent of any rule in *Wild's Case*. It is based upon the fact that, as there was a child in life when the will was made or the testator died, he intended all children of B. to take as purchasers when the remainder vested in possession, and that this intent is upheld by the well-known rules of law that a re-

mainder to unborn children is legal, and that all children born up to and living at the time fixed for the vesting of the remainder in possession are entitled to take as purchasers. Even in England, where the intention of the testator is presumed in favor of the creation of an estate tail, the courts in cases of a remainder to A. and his issue or children (A. having no child when the will was made or the testator died) give effect to other words in the will to restrict the word "issue" or "children" to a word of purchase. In *Hockley v. Mawbey*, 3 Brown, Ch. 82, the devise was to the testator's wife during her life; at her death to the testator's son and to his issue lawfully begotten or to be begotten, to be divided among them as he (the son) thought fit; and, if the son died without issue, then to the children of the testator's sisters. The lord chancellor said: "He [the testator] did not mean the estate to go as an estate tail, but that the children should take distributively, in which case they must take as purchasers; and the consequence is that Richard [the son] took only an estate for life. * * * In order to take, they [the children] must be alive at the death of Richard [the son]. * * * It is sufficient that the division must take place at the death of Richard [the son], which is within the rules,"—that is, as against a perpetuity. If it had been possible under the terms of the will in *Hockley v. Mawbey* to restrict children of the son to those living at the life tenant's death, when the son and his children, if any, would then take the remainder indefeasibly, could a reasonable doubt exist that the court would have held that the remainder absolutely vested in possession in the son and his children then living? We think not, because such devise including the children would not only be within the rule showing no perpetuity, but the children would be in existence to share in the division of the remainder indefeasibly at the life tenant's death. And such a construction would be more readily adhered to in this state, where, as held in *Dudley v. Mallery*, 4 Ga. 62; *Benton v. Patterson*, 8 Ga. 151; *Robert v. West*, 15 Ga. 145, 146; and *Dudley v. Porter*, 16 Ga. 616,—the intention of testators is not to be presumed in favor of the creation of estates tail.

In the case at bar the words of the testator, associated with the devise in remainder to his daughters, to belong to them and their children, and the superadded words immediately subjoined thereto, show beyond all doubt that the word "children" was used by him as a word of purchase, which utterly precludes an estate tail in the daughters. The testator first provides that at the death of his wife, the life tenant, his whole estate is to be equally divided among his six children, one son and five daughters, whom he specifically names. Then he adds: "My said effects thus going into the hands of my said daughters [that is, at the death of the life tenant] not to be subject to the control of any husband, but the same to belong to my said

daughters and their children." The testator here evidently meant that the property should belong to his daughters and their children living at the life tenant's death, for the distributive word "belong," which is a word of ownership, applies to the children as well as to their mothers, and the death of the life tenant is the time fixed by his preceding words for this distribution of his whole estate to be made indefeasibly. "The primary definition of the word 'belong' is 'to be the property of.'" 3 Am. & Eng. Enc. Law (2d Ed.) 915. "To be the property of" the children, they must take as purchasers, and the mode of their taking in this state would be in common with their mothers. The devise, then, down to this point, is certainly as strong as one made in remainder to A. and her children as tenants in common; and "the provision that they should take as tenants in common shows very distinctly that the testator was contemplating something very different from an estate tail." *Strong v. Goff*, 11 East, 671. Moreover, the legal estate in remainder is not devised directly to his daughters and their children. On the contrary, it goes into the hands of the daughters at the death of the life tenant, to belong to them and their children. These words create a trust, and make the daughters trustees for their children, if any. Civ. Code, § 4138; 27 Am. & Eng. Enc. Law (1st Ed.) 8, and note 8; *Gordon v. Green*, 10 Ga. 435 (6), 441. The will made provision for the daughters to hold the legal estate of their own portions, as well as the portions to belong to their husbands, free from the control of their husbands. They were capable of acting as trustees for their children. 27 Am. & Eng. Enc. Law (1st Ed.) 16, 20. And even if they were incompetent, for any reason, to act as such trustees, a court of equity would appoint trustees to execute the trusts. *Id.*; Civ. Code, § 3179. A trust for unborn children to take in remainder is legal, just as a remainder for unborn children without a trust is legal. And the trust would continue executory after the termination of the life estate only until the children became of legal age, when the law itself would execute the trust, and divide the property without any act on the part of the trustee. The fact that the husbands of the testator's daughters in *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118, were made trustees of the remainders devised to the daughters and their children was one of the reasons commented on in *Baird v. Brookin*, 86 Ga. 716, 12 S. E. 981, 12 L. R. A. 157, for holding that "children," in *Toole v. Perry*, was used as a word of purchase. Such reason certainly applies with much greater force in the case at bar, where the property is expressly directed to go into the hands of the daughters themselves at the death of the life tenant, to belong to them and their children, which, as best comporting with reason and the intention of the testator, means a trust for the daughters' immediate descendants in esse at the death of the life tenant, when the testa-

tor's whole estate was to be divided indefeasibly, and not a trust for the daughters to hold for their issue in infinitum. The words, then, of the testator thus far alone strongly indicate, if they do not conclusively show, that when he made his will "he had in mind a class of persons [to wit, children of his daughters] who might thereafter be born" (*Hollis v. Lawton*, 107 Ga. 106, 32 S. E. 846, 73 Am. St. Rep. 114), and within the period, too, fixed by him for the distribution of his entire property in remainder indefeasibly. But, to put his meaning beyond the pale of doubt, the testator shows by his superadded words how and to whom any such remainder share shall go at the life tenant's death, by substitution, if either of his daughters should die before the life tenant without a child surviving the life tenant's death. Immediately subjoined to the devise in remainder to go into the hands of his daughters at the death of the life tenant, to belong to them and their children, he says: "And in case either of my said six children should depart this life [that is, before the life tenant] without leaving issue [that is, in esse at the death of the life tenant], then their part of my estate to be equally divided between my other children;" that is, the testator's other children living at the death of the life tenant, which is the period fixed by the testator for the distribution of his whole estate indefeasibly, as shown by the construction hereinbefore placed upon this clause of the testator's will in deciding the nature of his son's remainder interest. And then the testator makes the final and important provision that any remainder share thus taken by his other children, as substituted devisees, at the life tenant's death is "to be controlled in the same way as first above directed"; that is, just as the remainder shares to the son and to the five daughters were previously given down to the divesting clause, to wit, if his son survived the life tenant, with or without children, he should then take an equal part of any divested remainder share by substitution, and also his own specific remainder share absolutely; if any daughter survived the life tenant, without children, she should then take an equal part of any divested remainder share by substitution, and also her own specific remainder share absolutely, although children might afterwards be born to her; and if any daughter survived the life tenant, with children, she should then receive into her hands an equal part of any divested remainder share by substitution, and also the specific remainder share first devised to go into her hands at the life tenant's death, to belong to her and her children (that is, her children then living) absolutely. No person who was intended by the testator to take could by law take any part of his property after its division, or the life tenant's death, for that division was to be of the testator's whole estate indefeasibly. The devise, then, in remainder to each daughter, to belong to her and her children, are to a collection of persons, uncertain in

number, to be ascertained at the death of the life tenant; and, whether such persons be called a class per se or not, the legal conclusion which we have reached would necessarily follow. "A number of persons are popularly said to form a class when they can be designated by some general name as 'children,' 'grandchildren,' 'nephews,' but in legal language the question whether a gift is one to a class depends, not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." 1 Jarm. Wills (R. & T. Ed.) 534. And while a remainder to A. and her children simpliciter (A. having none when the testator died) may not be a devise to a class, yet a devise in remainder to A. and her children living at the life tenant's death, or of an estate at an earlier period of distribution after the testator's death, may, in legal effect, be called one to a class (Mitchell v. Mitchell, 73 Conn. 303, 47 Atl. 326); and all living at the period of distribution will take equally, unless otherwise directed by the testator (Id.). One of the principal objections sometimes urged to construing "children," in such cases, as a word of purchase, namely, that the issue of the children would not take upon the latter's death before the period of distribution, finds no place or lodgment in the case before us, for two reasons: First, any divested remainder share goes to the testator's own children and his daughters and their children, if any, by substitution, at the life tenant's death, neither great-grandchildren nor other remote kindred being the objects of his bounty; secondly, in a case of substitution, like this one, the nonexistence of a daughter and her children at the death of the life tenant, though she might have had children before that time, would not pass that particular share to the heirs of such daughter or children, because the testator himself designates the persons who shall take at the life tenant's death as substituted devisees.

It is impossible to hold that the testator's daughters take an estate tail, which would result in giving to them the absolute fee, under our act of December 21, 1821, because such ruling could only be made by construing the devise as a simple and naked one to A. and her children or issue generally. And we cannot hold that the daughters take an estate tail, whereby, under the act of 1821, the fee given would be made determinable upon a mere limitation over on a definite failure of issue if a daughter died at any time without a child, because that construction would include a postponement of the vesting of the remainder in possession absolutely beyond the life tenant's death; and because there is no limitation over in this case, but a mere substitution, to take effect at the death of the

life tenant, if at all. Therefore the logical and legal conclusion is that the remainder shares to the daughters go into their hands at the death of the life tenant, to belong to them and their children then living as tenants in common; and that such remainder shares, which vested in interest in the daughters at the testator's death, consequently open to take in their said children at the period of distribution. We think this ruling harmonizes the whole will, and also upholds the rule of law favoring the vesting of remainders indefeasibly at the earliest possible period of time, which the intention of the testator in this case manifestly follows. We may add that "this belongs to a class of cases where one case seldom rules another, for the reason that each will must be interpreted by itself, and does not depend to any great extent on prior interpretations of other wills." The principles in the case of *Gaboury v. McGovern*, 74 Ga. 133, explaining the word "issue" in a prior clause to the testator's unmarried daughter and her issue during her life by the superadded words to mean "children" and a word of purchase, and in *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118, showing that a devise in remainder to the testator's daughter and her children included children born after the testator's death, and also by a second marriage, and living at the period of distribution, on the strength of subsequent words presuming that the testator meant children by her present or any future husband, apply as authority in the case under consideration. These cases are recognized as correct in *Hollis v. Lawton*, 107 Ga. 106, 32 S. E. 846, 73 Am. St. Rep. 114, and are therein distinguished from the facts in that case, which was the grant of an immediate estate in possession to A. and her children, without any explanatory words, and it was there correctly held that no child born after the estate vested in possession was entitled. In *Blankenbaker v. Woodruff*, 97 Ky. 276, 30 S. W. 614, the testator gave a life estate to his wife, with a remainder to three daughters by name (one of them being unmarried), to be equally divided among the daughters upon the widow's decease, "for their benefit and the benefit of the heirs of their natural bodies, up to the age of thirty years on the part of each of said heirs of their natural bodies." It was held that the latter words explained the preceding words "heirs of their natural bodies" to mean children in esse at the life tenant's death, and that, therefore, each daughter took a fee-simple estate in remainder jointly with her children, if she had any, upon the death of the life tenant.

Among the cases holding that a devise to A. for life, with remainder to B. and his children (B. having no child at the time of the devise), and, if B. dies without children or issue, then to C., gives B. an estate tail, are *Broadhurst v. Morris*, 2 Barn. & Adol. 11; *Wood v. Baron*, 1 East, 259; *Moore v. Gary*, 149 Ind. 51, 48 N. E. 630; and *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763. They are, however,

all clearly distinguishable in their facts from the case at bar, which, among other things, is not, like them, a case of a limitation over, but of a substitution, pure and simple, to take effect, if at all, at the life tenant's death. In *Broadhurst v. Morris* the remainder was to B. and his lawfully begotten children forever, and in default of such issue at his decease to C. The contention was that the limitation over should be construed as if a comma had been placed after "issue," and therefore as upon an indefinite failure of issue. The clause is so construed by Judge Story in *Parkman v. Bowdoin*, 1 Sumn. 369, Fed. Cas. No. 10,763. And this court construed the clause to mean an indefinite failure of issue in *Wiley v. Smith*, 3 Ga. 565. The English court, without apparently considering the principle as to what persons would be entitled at the time for the remainder to vest in possession, and there being nothing to show that the dying of B., the remainderman, was referable to a dying within the lifetime of the life tenant, simply delivered a four-line opinion that B. took an estate tail. In *Wood v. Baron* the remainder was to B., to hold as a place of inheritance, to her and her children or her issue, and, if she died leaving no child or children, or if the latter should die without issue, then to C. Lord Kenyon thought the words in the limitation over meant upon an indefinite failure of issue, and distinguished it from several cases he cited in which the words are different and upon a definite failure of issue, but said the court would consider it. Afterwards the court certified, in less than four lines, that B. took an estate tail, manifestly because, as Lord Kenyon had intimated, the words in the limitation over imported an indefinite failure of issue under the common-law rule of construction, and this was no doubt the reason, inasmuch as B. had a child in life when the will was made and when the testator died. In *Moore v. Gary* the remainder was to B. and his issue, being his own children lawfully begotten, forever, and, upon his dying without issue—that is, without heirs, being his own children lawfully begotten, living at his death—to C. The court held that both the antecedent and superadded clause meant an indefinite failure of issue, and therefore that B. took an estate tail. In *Parkman v. Bowdoin* the remainder was to B. and to his lawful begotten children in fee simple forever, but, in case he should die without children lawfully begotten, to C. The opinion was rendered by Justice Story, and is by far the best of its kind of which we have knowledge. Like the other cases here distinguished, there was nothing in that case confining the death of B. within the lifetime of the life tenant. Justice Story spoke of a remainder being an immediate estate, but he overlooked the wide distinction and consequent results between a remainder vested in interest and a remainder vested in possession. And he finally held that the limitation over meant an indefinite failure of issue, which

made the word "children" in the preceding clause, "and his children," retain its original sense as a word of limitation, and gave B. an estate tail. This construction, which was based on the common-law rule existing prior to the English wills act that went into effect on January 1, 1838, is contrary to what would be decided in this state since our act of 1851, which changed the meaning of all such phrases into a definite failure of issue, and therefore *Parkman v. Bowdoin*, as well as the preceding cases distinguished, would be no authority in this state as to a will made since said act, even on an identically phrased or worded will. There are other cases where estates were given to B. and his children to vest in B. at 21 years of age, and, if he died before 21, to C., in which it was held that B. took an estate tail,—as in *Davie v. Stevens*, 1 Doug. 321. Besides being wholly unlike the case at bar, a reading of that case will show that B. was never even married when the estate vested in him in possession at the age of twenty-one. From what we have said about these cases it is seen of what little value precedents are in construing a will, unless the facts are precisely or substantially alike, and the cases decided do not omit the consideration of well-established and apposite rules of construction.

It follows that in the case now in hand a deed executed by a daughter of the testator, which conveyed to another all her interest in described realty which belonged to the testator at his death, did not affect the interest therein of her children who were in life when the life tenant died. From the foregoing it follows that the trial judge correctly held that the petition set forth no cause of action in behalf of the plaintiffs who are the children of the testator's son, but that he erred in ruling that the other plaintiffs, who are the children of the daughters of the testator, were not entitled to recover, under the allegations of the petition.

Judgment reversed. All the justices concurring, except LITTLE and LEWIS, JJ., absent.

(131 N. C. 6)

ALLEGHANY CO. v. EAST COAST LUMBER CO. et al.

(Supreme Court of North Carolina. Sept. 9, 1902.)

INJUNCTION—REAL ACTIONS—RESTRAINING CUTTING OF TIMBER.

1. Where, in an action to try title to timber land, there was a bona fide contention, based on evidence, as to the location of the head of a river on which rested plaintiff's grant, and plaintiff showed a prima facie case, such issue should be submitted to a jury, and could not be determined on a motion to continue an order restraining the cutting of timber.

2. An order restraining trespass on timber was properly continued until trial, under Acts 1901, c. 666, § 1, providing that when, in such actions, there is a bona fide contention on both sides, based on evidence constituting a prima facie title, no order shall be made, pending the action, permitting the cutting of timber, except by consent, until the title is determined.

Appeal from superior court, Beaufort county; Brown, Judge.

Action by the Alleghany Company against the East Coast Lumber Company and others. From an order continuing a preliminary injunction restraining the cutting of timber on certain land, defendants appeal. No error.

H. F. Aydlett and F. H. Busbee, for appellants. Rodman & Rodman and Small & McLean, for appellee.

CLARK, J. It is admitted that the defendants are cutting timber around the southern side of Endless Bay; and, if the head of the northeast prong of Long Shoal river is located as contended by plaintiff, then (for the purposes of this motion only) it is further admitted that said cutting is being done upon the lands described in the complaint, and covered by the John Hall grant. There is a bona fide and serious contention as to the true location of the head of the northeast prong of Long Shoal river, upon the determination of which rests the location of the John Hall grant, under which plaintiff claims, and defendants do not, and which grant, if located by plaintiff's contention, covers the locus in quo. This contention, which is supported by affidavits of each party in favor of its own view, cannot be decided upon this motion, but must be submitted to a jury. His honor, having correctly found as a fact that "there is a bona fide contention on both sides, based upon evidence," and that the plaintiff has made out a prima facie case, could not, under chapter 666, Acts 1901, do otherwise than continue the restraining order to the hearing.

No error.

(131 N. C. 3)

GOODYEAR v. COOK.

(Supreme Court of North Carolina. Sept. 9, 1902.)

TRUSTEE—LIABILITY—NOTICE.

1. A trustee in a deed of trust, having sold the property, and applied the proceeds to the payment of the note of R., as required by the recorded deed, will not be charged with notice that the deed was improperly registered, and so be liable to B., because as attorney he had 12 years before drawn a deed of trust, taken away before it was signed, which required payment of the note of B., as well as that of R., out of the proceeds; at least where it is admitted he had no knowledge or information whatever, or any reason to suspect or believe, that there was any defect or error in the registration.

Appeal from superior court, Warren county; Winston, Judge.

Action by J. M. Goodyear against Charles A. Cook. Judgment for plaintiff. Defendant appeals. Reversed.

B. G. Green and F. H. Busbee, for appellant.

CLARK, J. Upon the facts agreed, it appears that the defendant, as attorney at law, on April 1, 1886, drew a deed in trust, which

was not then signed nor delivered, to secure two notes,—one for \$175 to Benjamin Goodyear, and the other for \$370, payable to Rebecca Goodyear. The party for whom the paper was drawn took it away, and on June 10, 1886, it was recorded, without any knowledge or agency on the part of the defendant. The matter passed out of the mind of the defendant till about the month of February, 1898, when said Rebecca demanded that the defendant, as trustee, should sell the land. The defendant asked for the trust deed, and was referred to the registry of the same, and directed to sell by that. As recorded, the trust deed named the defendant as trustee, and required him "to pay in full the note to Rebecca Goodyear, and the surplus, if any," to the grantor. The property was duly advertised and sold March 21, 1898, when it was bought by said Rebecca at the price of \$310, which being less than her debt, the amount of her bid was credited on her note, and the land was conveyed to her. The plaintiff did not become holder or owner of the \$175 note till 1901, and neither Benjamin Goodyear nor any one else prior to that time gave the trustee notice of the \$175 claim. The following averment of the defendant is admitted by the plaintiff, i. e.: "The defendant had no knowledge or information whatsoever, nor any reasons to suspect or believe, that there was any defect or error in the registration of said deed, and in executing said powers he was acting as agent for the parties to said deed, and used due care and caution in the discharge of said trust."

Upon the facts admitted, judgment should have been entered for the defendant. The mere fact that the defendant had once drawn a trust deed for the grantor, requiring payment of the \$175 note out of proceeds of sale, as well as payment of the \$370 note, which alone is required by the deed as recorded, was no notice to him that the deed was improperly registered; certainly not after the admission that he did not have any "information or knowledge whatsoever, nor any reasons to suspect or believe, that there was any defect or error in the registration of said deed of trust." Besides, the laches of the plaintiff, and those under whom he claims, has been so gross as to deprive them of any standing in a court of equity, if there had been at any time any merit in his contention.

Reversed.

(131 N. C. 5)

WOLFE et al. v. HAMPTON.

(Supreme Court of North Carolina. Sept. 9, 1902.)

TESTIMONY MADE COMPETENT BY THAT OF OTHER PARTY.

1. Plaintiff having first testified to what passed between defendant and deceased, defendant may give his version of the same transaction.

Appeal from superior court, Washington county; Starbuck, Judge.

Action by T. B. Wolfe and others against W. H. Hampton. Judgment for defendant. Plaintiffs appeal. Affirmed.

W. M. Bond, for appellants. A. O. Gaylord, for appellee.

CLARK, J. The plaintiffs, children of H. E. Wolfe, bring this action as the beneficiaries named in a life insurance policy. They allege that the defendant in 1885 contracted with their father for a consideration to keep up the policy by paying the premiums thereon, but that in December, 1888, the defendant defaulted in such payment, whereby the policy became forfeited. H. E. Wolfe died in 1897. This action was instituted in November, 1900. T. B. Wolfe, one of the plaintiffs, testified that the defendant agreed with his father and himself, for the consideration named, to keep the premiums on said policy paid up, and that after his father's death he saw the defendant, who admitted said agreement, and that he had allowed the policy to lapse in 1888. The defendant testified that his agreement with H. E. Wolfe was that he (witness) would pay the premiums only so long as they did not exceed the then rate of \$3.40 per month, and that any excess above \$3.40 should be paid by Wolfe; that no one was present besides H. E. Wolfe and himself; that when the excess became heavy, Wolfe stopped paying; and that this was the sole cause of the forfeiture. The exception to this evidence of the conversation and contract between the witness and the deceased is the only point presented, as the other exception is as to evidence admitted upon another issue, which became immaterial, in view of the finding upon this issue, and which consequently the jury did not pass upon. As the plaintiff T. B. Wolfe first gave his version as to what passed between his father and the defendant, it could not be error to permit the defendant to give his account of the same transaction.

No error.

(131 N. C. 1)

MEEKINS v. NORFOLK & S. R. CO.

(Supreme Court of North Carolina. Sept. 9, 1902.)

LIMITATIONS—ACTION AFTER NONSUIT—DEATH BY WRONGFUL ACT—REFUSAL TO DISMISS ACTION—APPEAL.

1. Even if Code, § 1498, prescribing a year from the death as the time within which action may be brought for death by wrongful act or negligence, is not strictly a statute of limitations, such an action is within section 166, providing if any action be commenced within the time prescribed therefor, and plaintiff be nonsuited, he may commence a new action within one year after such nonsuit.

2. Refusal to dismiss action is not appealable.

Appeal from superior court, Tyrrell county; Geo. A. Jones, Judge.

Action by J. O. Meekins, administrator, against the Norfolk & Southern Railroad

Company. From a refusal to dismiss the action, defendant appeals. Appeal dismissed.

Pruden & Pruden and Shepherd & Shepherd, for appellant. E. F. Aydlott, for appellee.

OLARK, J. This was an action under Code, § 1498, for damages for the death of plaintiff's intestate, caused by the wrongful act or neglect of the defendant. The original action was brought within one year from the death of the plaintiff's intestate, and a nonsuit was taken. Within one year after such nonsuit, but more than a year after the death of intestate, this action was begun. The defendant demurred *ore tenus*, and moved to dismiss the action, and appealed from a refusal of its motion. Code, § 166, provides: "If any action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited * * * the plaintiff * * * may commence a new action within one year after such nonsuit." The defendant contends that this provision is under the title in the Code applying to limitations, and that the time prescribed under section 1498 is not strictly a statute of limitations. Best v. Town of Kinston, 106 N. C. 205, 10 N. E. 997. But the original action was brought within the time prescribed in section 1498, and therefore it does not here matter what the nature of that prescription is. On the other hand, the time within which a new action may be commenced after a nonsuit, etc., is a statute of limitation, and applies to all cases where a nonsuit, etc., has been sustained. This statute (Code, § 166) contains no exception of cases under section 1498, or of any other cases, where the time prescribed for bringing the original action might not be strictly a statute of limitation. We know no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others. No appeal lies from a refusal to dismiss an action (Clark's Code [3d Ed.] p. 738, and numerous cases there quoted; *Clinard v. White*, 129 N. C. 250, 39 S. E. 960), but we have, notwithstanding, discussed the merits of the motion, as was done in the last named case, and in *State v. Wyld*, 110 N. C. 500.

Appeal dismissed.

(131 N. C. 17)

WALKER et al. v. BRINKLEY et al.

(Supreme Court of North Carolina. Sept. 16, 1902.)

BONDS—PRIMARY LIABILITY—LACHES.

1. A bond required by an employer before he would appoint an employé, and conditioned to be void if the employé performed his serv-

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 730.

ices competently and honestly, is a primary liability, so that the doctrine of laches does not apply.

Appeal from superior court, Washington county; Starbuck, Judge.

Action by Walker & Myers against D. O. Brinkley and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

W. M. Bond, for appellants. A. O. Gaylord, for appellees.

FURCHES, C. J. The plaintiffs, being residents of the city of Baltimore, Md., and the owners of a saw mill in Plymouth, N. C., in December, 1898, employed one C. L. Morton as their general manager and agent of said mill and milling business, taking the bond sued on for their protection and indemnity against the default and misconduct of the said C. L. Morton, which is in the following words and figures: "North Carolina, Washington County. We, D. O. Brinkley, L. S. Landing, Louis P. Hornthall, and Warren Ambrose, of the county and state above named, acknowledge ourselves bound unto A. M. Walker and James R. Myers, trading as merchants in Baltimore, Md., under the firm name of Walker & Myers, in the sum of fifteen hundred dollars. The conditions of the foregoing obligation are such that whereas, one C. L. Morton, of said county and state, has contracted with the said Walker and Myers as employé of said Walker and Myers, to operate and superintend the saw mill owned by Walker and Myers at Plymouth, North Carolina, and to act as general business manager thereof in the manufacture of pine, ash, cypress, and juniper timber, subject to the orders and control of said Walker and Myers: Now, therefore, if the said C. L. Morton shall faithfully act as such manager as aforesaid, and perform the services required in that capacity in a reasonably safe, competent, and honest manner during the time in which he shall hold the same, this obligation to be void. Witness our hands and seals. D. O. Brinkley. [Seal.] L. S. Landing. [Seal.] Louis P. Hornthall. [Seal.] Warren Ambrose. [Seal.] Signed December 5, 1898, and forwarded to W. & M. by H. S. Ward." While this bond was required by the plaintiffs before they appointed C. L. Morton their agent and superintendent of their mill, and was intended to protect them against the misconduct and defalcations of said Morton, it was an original primary liability, and not secondary. It is a penal bond, in which the defendants acknowledge themselves bound to the plaintiffs in the sum of \$1,500, to be void upon the said C. L. Morton performing the conditions therein contained. Of course, if he has performed the conditions, the plaintiffs have no right of action. But the action is brought upon this bond, and breaches of its condition are specifically set out and assigned. The answer of the defendants is what is known as a statutory denial of the complaint,—that they "had no knowledge of the facts alleged, nor sufficient information to form a

belief as to their truth, and they are therefore denied." There was but one witness introduced,—the plaintiff, James R. Myers,—who testified that he met the defendants in Mr. Ward's office; they talked the matter over, and he employed the said C. L. Morton upon the terms stated in the bond; that soon after that he received the bond inclosed in a letter from Mr. Ward, stating that it was good for \$4,000; that he at once wrote Mr. Ward and C. L. Morton that the bond had been received and accepted, and C. L. Morton took possession of the mill, and assumed its control and management; that the defendants all had admitted to him that they signed the bond, and that the defendants and their attorney, Ward, all lived in the town of Plymouth, Washington county. Upon this uncontradicted evidence the following issues were submitted to the jury (and found as stated), with an agreement of counsel that the case should be referred to ascertain the damages, if the jury should find for the plaintiffs: "(1) Did defendants Brinkley, Hornthall, Landing, and Ambrose execute the bond set out in the complaint? Yes. (2) Were said defendants discharged from said bond by the negligence of the plaintiffs, as alleged? No."

There are but two exceptions set out in the record. One is to dismiss the action for the reason that the evidence showed that the defendants had no notice of the acceptance of the bond. This was overruled, and the court charged the jury, if they believed the evidence, they should find the first issue "Yes" and the second issue "No," and the defendants again excepted. Neither of these exceptions can be sustained. Instead of the evidence showing that the defendants did not have notice of the acceptance of the bond, it strongly tended to prove that they did have such notice, if it was necessary to give them any such notice. *Straus v. Beardsley*, 79 N. C. 59. And it being a primary, and not a secondary, liability, the doctrine of laches does not apply, if there had been such. The court gave judgment for the plaintiffs, and made the order referring the case to ascertain the damages, as it had been agreed by counsel he should do, and the defendants appealed.

As we see no error, the judgment is affirmed.

(131 N. C. 20)

MONDS v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. Sept. 16, 1902.)

TRESPASS—TITLE—ESTOPPEL—COUNTER-CLAIM.

1. Defendant in trespass, claiming right to cut timber under a void contract from one who afterwards deeded the land to plaintiff, is estopped to deny plaintiff's title.

2. Defendant in trespass for cutting timber has not, because he paid plaintiff's grantor money for a void contract for the timber, any equity against plaintiff for the money.

Appeal from superior court, Chowan county; Jones, Judge.

Action by Charles Monds against the Elizabeth City Lumber Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Pruden & Pruden and Shepherd & Shepherd, for appellant. W. M. Bond, for appellee.

FURCHES, C. J. This is stated to be an action to remove a cloud upon the title of plaintiff's land, but the pleadings and trial of the case resolve it substantially into an action of trespass upon the plaintiff's land, and cutting and removing timber therefrom. It appears that on the 20th March, 1888, R. E. Parris and wife sold and undertook to convey the timber on this land to the Gay Manufacturing Company, for which it paid Parris \$130. On the 5th of March, 1892, said Parris and wife sold and conveyed said land to the plaintiff by deed in fee simple. The plaintiff at once entered and took possession, and has held the actual possession of said land under said deed ever since. On the 28th of June, 1900, the Gay Manufacturing Company sold and assigned all its interest in said timber to the defendant company, and this is the only claim the defendant has to said timber. In October, 1900, the defendant entered upon said land, and cut and carried away the timber therefrom, and this action is for trespass and the value of the timber so cut and carried away. The contract of Parris and wife with the Gay Manufacturing Company and the deed from Parris and wife to the plaintiff were offered in evidence, and the trespass in cutting and taking away the timber was admitted, its value was found by the jury, and, judgment being rendered for the plaintiff, the defendant appealed.

It was admitted by counsel for the defendant that the contract between Parris and the Gay Manufacturing Company was the same in terms as the one declared on in *Rumbo v. Manufacturing Co.*, 129 N. C. 9, 39 S. E. 581, and was absolutely void. This, it seems to us, puts an end to the case, but the defendant did not think so, and filed the following exceptions. At the close of the testimony the defendant asked the court to charge as follows: "(1) There is no evidence for the consideration of the jury that the plaintiff owned the land described in the complaint at the time the trespass was committed." Refused, and defendant excepted. "(2) There is no evidence for the consideration of the jury that the plaintiff owned the timber described in the complaint at the time the trespass was committed." Refused, and defendant excepted. The court charged the jury that, inasmuch as the plaintiff claimed the title under R. E. Parris and wife, under whom the defendant also claimed the right to cut the timber by virtue of the said timber contract, the defendant was estopped to deny the plaintiff's title to said land, and if they believe the evidence in the case, they should answer

the first issue "Yes." To this charge the defendant excepted.

None of these exceptions can be sustained, and in our opinion do not call for a discussion at our hands. In the argument before us the learned counsel contended that the defendant had an equity upon the plaintiff for the \$130 the Gay Manufacturing Company paid Parris, which the plaintiff should pay, and that he must do that, or offer to do so, before he had any right of action; that it was an equitable action, and he must do equity. No such ground as this was taken in the pleadings, nor on the trial below, so far as we are informed, nor do we see any ground to rest such a defense upon. This question was expressly decided in *Rumbo v. Manufacturing Co.*, supra, argued by the same attorneys, and which would have to be overruled if we were to sustain this contention. But the defendant has never paid the plaintiff anything, nor has the plaintiff ever recovered anything from the defendant, and we see no privity between them or equity in the case. As the plaintiff never received anything from the defendant, we fail to see any right of action against the plaintiff, if it had been set up in the answer. *Davison v. Land Co.*, 126 N. C. 704, 36 S. E. 162.

Affirmed.

(131 N. C. 12)

PHELPS et ux. v. WINDSOR STEAMBOAT CO. et al.

(Supreme Court of North Carolina. Sept. 16, 1902.)

STEAMBOAT CARRIERS—INJURY TO PASSENGER—LIABILITY OF LESSOR.

1. The lessor of a steamboat, not being a quasi public corporation, having received no special privileges or benefits from the state, is not liable for injury to a passenger from negligence of the lessee.

Appeal from superior court, Bertie county; Brown, Judge.

Action by J. T. Phelps and wife against the Windsor Steamboat Company and another. From judgment dismissing the action as to defendant Elizabeth Branning, administratrix, plaintiffs appeal. Affirmed.

St. Leon Scull, for appellants. Pruden & Pruden and Shepherd & Shepherd, for appellee.

CLARK, J. This is an action against the defendant steamboat company, alleging that, while plaintiff was a passenger on one of its boats, by negligence in the loading and operation thereof the boat was capsized, and the plaintiff was thrown into the water and injured, and her baggage was also damaged. The plaintiff joins in the action the administratrix of one John W. Branning, upon the ground that said Branning was the owner of said vessel, and had leased it to the said steamboat company. It does not appear, nor is it alleged, that he had any connection with

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1249.

the operation of said vessel by the other defendant.

His honor properly dismissed the action as to Branning upon the ground that no cause of action is stated against him. *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981; *Shear. & R. Neg.* § 501. In *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, and the cases there cited, from *Aycock v. Railroad Co.*, 89 N. C. 321, down to and inclusive of *Perry v. Railroad Co.*, 129 N. C. 333, 40 S. E. 191, and *City of Raleigh v. North Carolina R. Co.*, 129 N. C. 265, 40 S. E. 2 (affirmed since in *Smith v. Railroad Co.*, 130 N. C. 344, 42 S. E. 139), the lessor is held liable, notwithstanding the lease, because a railroad company (the lessor in those cases) was a quasi public corporation, enjoying the use of the right of eminent domain to take private property by condemnation for its right of way "because it is for a public use," and with many other special privileges and rights conferred for the public benefit, and it could not be allowed, by merely making a lease, to put off all liability for the manner in which its duties are discharged, while receiving the full benefit for valuable privileges conferred upon it in the shape of rental. This can only be done, as the authorities cited in those cases show, when the legislative power, having had opportunity to look into the solvency of the lessee, has not only authorized the lease, but has expressly released the lessor company from further responsibility. *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959; *Anderson v. Railroad Co.* (Mo.) 20 Am. & Eng. R. Cas. Ann., at pages 847, 848 (s. c. 61 S. W. 874); and numerous other cases cited in *Harden v. Railroad Co.*, supra. Were it otherwise, an insolvent lessee could operate the railroad without responsibility to the public or to employes, leaving the lessor, the original corporation, to enjoy the profits of its privileges without any corresponding responsibility in return. But nothing in those cases, nor in the reason of the thing, applies to the lessor of a steamboat which has received no special privileges or benefits of great value from the state, and who indeed in this instance was a private individual. No liability attaches to said Branning because he was president of said company, unless it were alleged and shown that the lease was collusive and colorable only, and a sham to avoid personal liability, and that he had in fact leased his own property to himself. But there is no such averment, and in dismissing the action as against his estate, there was no error.

COOK, J., concurs in the conclusion.

(131 N. C. 8)

TAYLOR v. BRINKLEY et al.
(Supreme Court of North Carolina. Sept. 16, 1902.)

FRAUD—EVIDENCE.

1. There is no fraud authorizing relief where plaintiff was induced to go on land by testator's promise that he should have the use of it

while testator lived, and the improvements he might put on it, and at testator's death "it would belong to plaintiff's wife," though testator devised it to plaintiff's wife for life only, with remainder to her children.

Appeal from superior court, Halifax county; Brown, Judge.

Action by F. H. Taylor against A. Brinkley and others, executors. Judgment for defendants. Plaintiff appeals. Affirmed.

Day & Bell, for appellant. Thos. N. Hill and E. L. Travis, for appellees.

FURCHES, O. J. On the 18th of November, 1885, the plaintiff married Hattie E. Perkins, the only daughter of the intestate. The plaintiff was at that time a resident of the state of Virginia, and the testator a resident of Halifax county, N. C. At the urgent solicitation of the testator, the plaintiff disposed of his property in Virginia, and moved to North Carolina, in the fall of 1888, where he and his family have lived ever since. In order to induce the plaintiff to move to North Carolina, the testator stated to him that, if he would do so, he should have the immediate control and use of the home place, on which the testator then lived, during the testator's lifetime, and "it would belong to the plaintiff's wife at his death"; that the plaintiff should have board for himself and family free of charge, and that he should have the benefit of such improvements as he might put on the land. And under this promise of the testator he moved to North Carolina, and took charge of said "home place," containing about 2,000 acres, and put valuable improvements thereon, consisting of barns and tenant houses, to the value of \$5,000; for which he says he is entitled to be paid that amount, for the reason that said lands did not become the property of his wife at the death of the testator, as testator said they would, and that he is thereby damaged to that amount. That part of the testator's will disposing of this "home place" is as follows: "Item 2. I loan to my daughter, Hattie E. Taylor, during her life, all that part of my home tract of land beginning [giving boundaries]. I loan to Hattie E. Taylor during her life, then to go to her children. In speaking of my home tract of land, I mean all the land I own that joins my home tract." This contract, agreement, or promise which defendants' testator made, the plaintiff alleges induced him to move from Virginia to North Carolina, and to place said improvements upon the land, is denied in the defendants' answer. It cannot, therefore, be proved as a legal contract or liability, not being in writing, and void under the statute of frauds. The only relief the plaintiff has, if he has any, is in equity to prevent a fraud by which the plaintiff would be damaged and the testator's estate benefited, to prevent one party from reaping the benefit of another's money or labor, obtained by the breach of his own contract or promise that induced the placing the buildings on the land. It is there-

fore held that, where one person is induced to put valuable improvements on the land of another under a promise or contract of the owner to convey, and he afterwards refuses to do so, the party so induced to make the improvements may recover compensation therefor to the value of said improvements. This is not a legal right, but an equitable relief to prevent fraud. It is not an action upon the contract, or for a breach of the contract, though the contract or promise may be shown, to establish the fraud. But the relief is collateral to the contract, and is not for the cost of the improvements or the labor done in putting them there, but for the amount they have benefited the land. The plaintiff's right to relief in such cases does not so much proceed upon the idea of compensating the plaintiff for his work, but upon the idea that the defendant shall not be benefited by the plaintiff's work so induced without paying what it is worth to the defendant. *Luton v. Badham*, 129 N. C. 96, 39 S. E. 581, and authorities there cited. It was stated in the argument that *Luton v. Badham* had gone as far as any case in our Reports, but it had advanced nothing new, unless it might be that it was a more pronounced declaration of this doctrine as a cause of action, as well as a ground of defense. But it seems to us that this doctrine is well sustained by the authorities cited in that case, and such a distinction, as claimed by defendants, that it is only a matter of defense, rests upon no well-grounded reason or principle, and is not sustained by authority. And we are unwilling to say that the plaintiff is not entitled to relief for the reason that he is plaintiff, and is asking affirmative relief. And we do not say that no judgment can be had in personam under this doctrine without declaring a lien on the property improved, as there seems to be no reason why such judgments might not be granted. The general rule has been to make judgments in such cases a lien upon the land so improved until paid. This is done for the protection and benefit of the party who has put the improvements on the land. But for this, the defendants might defeat the recovery by claiming the homestead or otherwise. And if any such judgment as this is asked, the owner of the land should be a party. But we do not see why he should be if no such lien is asked. If the plaintiff was induced to put valuable improvements on this land during the testator's lifetime, it was a benefit to the testator, as the land was his at that time; and we do not see why he should not be liable for them, if he afterwards so acted, by selling or conveying the land to some one else, as to deprive the plaintiff of its use and benefit; and, if he would have been liable, we do not see why his estate would not be. Then, is the plaintiff entitled to recover damages against the defendants? He is induced to leave Virginia and come to North Carolina, and to put the improvements on the land, by the promise of the testator that if he would

do so he should have the use of the land while the testator lived, and the improvements he might put on it, and at his (testator's) death "it would belong to plaintiff's wife." There is no complaint until the testator's death, when he willed the land to the plaintiff's wife for life, and then to her children in fee. It is true that in another paragraph of the will he leaves it in trust for them, but the trustees named have renounced their trusteeship, and the plaintiff has been appointed trustee in their stead. He and his family are in possession of said land and improvements, and have been ever since the testator's death. We have seen that the plaintiff has no right of action at law. He therefore appeals to equity, and it is seen that in proper cases equity, to prevent fraud, will give relief. But this doctrine rests entirely upon the ground of fraud. The only ground or allegation of fraud is that the testator said, "at my death it will be your wife's." By testator's will it is his wife's, though not free from incumbrances, nor for so long a time as plaintiff desires. But it is hers, and substantially covers the plaintiff's ground of complaint. It seems to us that most of men would have been satisfied with its being left to his wife and children. But, however this may be, we see no such fraud as will induce the court, in the exercise of its equitable jurisdiction, to interfere with the legal rights of the parties.

Affirmed.

CLARK and DOUGLASS, JJ., concur in the result.

(100 Va. 567)

RECTOR, ETC., OF UNIVERSITY OF
VIRGINIA v. SNYDER et al.

(Supreme Court of Appeals of Virginia. Sept. 18, 1902.)

DEMURRER TO EVIDENCE—JOINDER—DISCRETION OF COURT—CONFLICTING EVIDENCE—REVIEW—DISPOSITION OF CAUSE AFTER REVERSAL—CONTRACT OF SALE—RESCISSION—INSOLVENCY—SUFFICIENCY OF EVIDENCE—RATIFICATION—PROTECTION OF SUBCONTRACTOR.

1. The fact that the evidence is plainly against a party demurring thereto should no longer be regarded as a qualification of his right to demur, and a joinder should be compelled, except where the court doubts what facts should be reasonably inferred.

2. The question of whether a right to demur to the evidence exists, it thereby becoming the duty of the court to compel the demurree to join therein, is within the judicial discretion of the trial court, the exercise of which may be reviewed on writ of error.

3. The trial court should not refuse to compel a joinder in a demurrer to the evidence merely because it is conflicting, as the conflict is determined by rejecting the parol evidence of the demurrant which conflicts with that of his adversary.

4. Where the action of the trial court in refusing to compel a joinder in a demurrer to the evidence is reversed, and the record discloses the demurrer which was tendered, the entire evidence introduced, and the verdict found, the court will proceed to judgment, instead of remanding the case.

5. In an action in trover to recover materials furnished by a subcontractor to the general contractor, evidence considered, and held insufficient to establish the insolvency of the general contractor at the time the contract was made, entitling the subcontractor to disaffirm on account of fraud.

6. Even if a subcontractor was entitled to disaffirm a contract to furnish building material on account of the insolvency of the general contractor, his failing to repudiate after knowledge of all the facts, his calling on the owner for aid in collecting the purchase money, and his filing of a mechanic's lien constituted a ratification.

7. An owner, who had retained a balance due to the general contractor, was under no obligation to protect the interests of a subcontractor, who, with knowledge of the transfer of all the property of general contractor to the owner after insolvency, did not repudiate his contract, or demand the restitution of the materials furnished.

Error to circuit court, Albemarle county.

Action by Asa Snyder & Co. against Langley & Co. and the rector and visitors of the University of Virginia. From a judgment for plaintiff, the last-named defendant brings error. Reversed.

John B. Moon and Duke & Duke, for plaintiff in error. Wm. B. Petit, for defendant in error.

KEITH, P. Asa Snyder & Co. instituted an action on the case in the circuit court of Albemarle county against Langley & Co. and the rector and visitors of the University of Virginia, and filed their declaration, containing three counts. The defendants demurred to the declaration as a whole and to each count thereof. The court sustained the demurrer to the first and second counts, and overruled it with respect to the third count. In this count, which is in trover, the plaintiffs, averring, recite that on the 15th of May, 1897, they were lawfully possessed of certain architectural works, moldings, and castings, which were casually lost, and afterwards came into the possession of the defendants by finding, and that the said defendants, well knowing that the property belonged to the plaintiffs, contriving and fraudulently intending to deceive and defraud the plaintiffs, have not yet delivered the property, or any part thereof, although often requested so to do, but have converted and disposed of the same to their own use.

With this declaration the plaintiffs filed a bill of particulars, the items of which, after applying certain credits, amount to \$1,627.60. The defendants having pleaded not guilty, a jury was sworn, and evidence introduced on behalf of plaintiff and defendants, and when the introduction of testimony was concluded the defendants tendered a demurrer to the evidence, in which the plaintiff refused to join, and the defendants thereupon moved the court to require the plaintiffs so to do, which motion the court overruled, and to this ruling of the court the defendants excepted, and asked that their bill of exceptions, in which the court certifies all the evi-

dence adduced before the jury, might be signed, sealed, and enrolled, which was accordingly done.

Those who are curious in the evolution and development of demurrers to evidence as a part of judicial proceedings in this commonwealth are referred to the opinion in the case of *Railway Co. v. Sparrow's Adm'r*, 98 Va., at page 630, 87 S. E. 302, and cases there cited. It is sufficient for our purposes to refer to the case of *Johnson's Adm'r v. Railway Co.*, 91 Va. 171, 21 S. E. 238. After a review of many authorities, it is held in the learned opinion delivered by Judge Riely, that: "In a civil case either party has a right to demur to the evidence, except where the evidence is plainly against him, or the court doubts what facts should be reasonably inferred from the evidence demurred to; and where a party has the right to demur it is the duty of the court to compel the other party to join in the demurrer."

The only reason for the first exception which we have seen suggested is that, where the evidence is plainly against the demurrant, his motive for interposing a demurrer is in order to delay the decision. *Rohr v. Davis*, 9 Leigh, 30; *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944. Where the case is plainly against the demurrant, the jury would at once find a verdict and the court render a judgment against him; but, in accordance with the practice which formerly prevailed, where there was a joinder in the demurrer to the evidence the case was not decided at that term, but the record was made up, and a decision and judgment upon it were postponed until the ensuing term. By resorting to a demurrer, therefore, in a plain case, the demurrant postponed the day of reckoning for at least one term. It is believed that this practice no longer exists. Where the demurrer is interposed, and there is a joinder in it, the record is at once completed, and judgment rendered upon it without delay. The reason ceasing, the rule should cease, and this qualification of the right to demur to evidence should be no longer regarded. Whether or not, in a particular case, a party has a right to demur, and it becomes the duty of the court to compel the demurree to join therein, is a question addressed to the sound discretion of the trial court; not an arbitrary, but a judicial, discretion, the exercise of which may be reviewed upon a writ of error. *Rohr v. Davis*, supra.

It remains now to consider whether there is such doubt as to what facts should reasonably be inferred from the evidence demurred to as justified the circuit court in refusing to compel a joinder on the part of the defendant in error, and this inquiry will involve a consideration of the evidence.

There is evidence proving or tending to prove that in the spring of 1896 plaintiff in error advertised for bids for the erection of certain buildings in accordance with plans and specifications prepared by McKim, Meade &

White. The contract was awarded to Langley & Co., of Richmond, Va., at the sum of \$269,440, they being the lowest bidders by many thousands of dollars. Work was commenced in June, 1896, and Langley & Co. entered into a contract with Snyder & Co., all of the city of Richmond, who agreed to furnish certain structural ironwork to be used in the buildings, and to be delivered to Langley & Co. f. o. b. the cars at Richmond. Snyder & Co. proceeded to furnish this material from time to time during the summer and fall of 1896, receiving partial payments from Langley & Co. as delivery was made. On December 3, 1896, Snyder & Co. wrote a letter to Dr. Randolph, who was chairman of the building committee on behalf of the University of Virginia, saying that the firm had tried to get a special report as to the standing of Langley & Co. through the mercantile agencies, but had failed in their endeavor; that they had a contract for the ironwork to be used on the rotunda, amounting to \$10,000; that they were ready and anxious to do this work, but that heavy losses during the year had made them cautious. Continuing, they said: "Please advise us how we can secure ourselves. Any information that you can give us will be thankfully received. We hope you will treat this inquiry as purely confidential, as we are very friendly with the contractors, and do not wish to offend them. Hoping you will give this your prompt attention, we remain, very truly yours, [Signed] Asa Snyder & Co."

The reply to this letter was dated December 5, 1896, and was written by Robert Robertson, superintendent of grounds and buildings at the university, who informed Snyder & Co. that Langley & Co. "were general contractors for the University of Virginia for all of their building work now in hand, and that the contracts amount to over \$269,000; and they have been at work since the first of July last. They have given us very fair satisfaction, and we know of no trouble that they are in. Certainly their record has been kept clear so far as mechanics' liens are concerned. We settle with them monthly on the estimate of our architects, McKim, Meade & White, of New York, withholding 15 per cent. until the satisfactory completion of the whole work. Further than this we have no information that will be of service to you, and they, being Richmond people, ought to be better known to you than to us. Your letter to us was confidential, and we hope that you will regard this reply as equally so."

In the execution of their contract with Langley & Co., Snyder & Co. furnished them at various times down to March 29, 1897, with material of the value of \$2,802.60, leaving a balance due of \$1,627.60, as shown by the bill of particulars filed with the declaration. The monthly estimates for work done by Langley & Co. varied from \$25,000 per month to as much as \$40,000 per month, and

of these sums they were entitled to draw, upon the certificate of the architects, 85 per cent. Before the 1st of November, 1896, this reserve had been treasured upon to the extent of \$3,000, in accordance with an arrangement between Langley & Co. and the university; but there still remained in the hands of the university a large balance of the reserve fund. In February and March, 1897, Langley & Co. found themselves in need of ready money. It was rumored that their subcontractors were not being promptly paid. The buildings were approaching completion, and Langley & Co. were called upon for a statement as to the condition of the work and their accounts, and the architects refused to issue any certificates until such statements were furnished.

In April and May numerous notices were served on the university by subcontractors to stop any further payment of money to Langley & Co., and on the 15th of May they surrendered their contract. The university acquiesced in this determination upon the part of Langley & Co., took possession of the tools and material upon the grounds, and relet the work to Ross F. Tucker, who completed it at a cost largely in excess of what would have been due under the contract with Langley & Co., so that there is nothing due by the university to them.

On May 10th Asa Snyder went to the university, and on May 14th wrote Dr. Randolph, stating that his firm were subcontractors for ironwork under C. E. Langley & Co., general contractors, giving the amount of his bill, and on the same day gave formal notice in writing to the university, under section 2479 of the Code, of his claim against Langley & Co. for iron sold and delivered to them. During this visit to the university, Snyder called to see Dr. Randolph, who told him, according to Snyder's version of the interview, that, if the ironwork had not been put upon the buildings, he would be paid for it. Dr. Randolph denies this, but upon the demurrer to the evidence Snyder's account is to be taken as true, though the question of law would still remain, has Dr. Randolph authority to bind the university by such a promise?

On May 7, 1897, Snyder & Co. sent the following telegram to Dr. Randolph: "Please see that our claim for twenty-four hundred dollars for ironwork on university building is protected. Letter will follow."

On the same date he wrote the following letter: "We wired you to-day: 'Please see that our claim for twenty-four hundred dollars for ironwork on university building is protected. Letter will follow.' We were advised to take this step upon information we received in regard to Langley & Co., general contractors on the university building. We were informed by Mr. Delhaye that the board would meet to-day for the purpose of taking the work out of their hands, and building the same themselves. If such is the case, we re-

spectfully ask that you protect us to the amount of our claim, viz., amount of bill rendered for ironwork delivered, \$1,627.60; also partly finished work for second gallery in rotunda building now under construction in our works, approximating \$772.40,—making total \$2,400. We suspended work on this contract until we received your reply. We will further state that our agreement calls for settlement in full for all extra work, and monthly payments on contract work, less 15 per cent., on the 15th of each month. Please advise us as to the condition of affairs, and if we have been correctly informed, and if you think it will be necessary for us to send up to you a representative to look after this matter. We will treat any information you can give as strictly confidential."

And on May 14th they wrote again as follows: "We wired you on the 7th inst.: 'Please see that our claim for twenty-four hundred dollars for work on university building is protected,' which message we now confirm, as subcontractors for ironwork under C. E. Langley & Company, general contractors. The amount of our bill for partly furnished ironwork for second gallery in rotunda building, now under construction in our works, is \$772.50; making a total of \$2,400."

On May 15, 1897, the university and Langley & Co. entered into an agreement which recites that: "By a contract between the parties dated May 26th, 1896, the parties of the first part undertook the construction of certain buildings at the University of Virginia for the parties of the second part, in the fifth clause of which contract it was, among other things, specified that, if the parties of the first part failed in the performance of any of the agreements contained in said contract, and the architects named in said contract certified that such failure was sufficient cause for such action, the parties of the second part should be at liberty to terminate the employment of the parties of the first part for the said work, and enter upon the premises, and take possession of all materials, tools, etc., and to employ any other person or persons to finish the work and provide the materials therefor at the risk and expense of the said Charles E. Langley & Company. * * *

"And whereas, the said parties of the first part do hereby admit and acknowledge in all respects the right and authority of the said parties of the second part to take the action proposed by them with respect to the said contract and work as above stated, and that the said architects have the full right and authority in the premises to make their certificate as aforesaid.

"And whereas, by trust deed of even date herewith the said parties of the first part have secured to the said parties of the second part the sum of \$4,500 upon the aforesaid materials, tools, etc., which sum was advanced as shown in said trust deed for the purpose of paying the laborers and mechanics of the said parties of the first part which it was deemed

desirable to pay, and said deed of trust being subject to the provisions of this contract, and subordinate hereto as a part hereof, and hereto annexed:

"Now, therefore, in consideration of the premises, the said parties of the first part do hereby admit, acknowledge, and declare that in all respects the said parties of the second part and the architects aforesaid had and have full power and authority to give the notice and make the certificate aforesaid, and that after the expiration of three days from this date the said parties of the second part will have, and they are hereby given and granted, full power and authority to enter upon the said premises, and take possession of all the materials, tools, etc., thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor, and in all respects to act in accordance with and be guided by the provisions of the fifth clause of the aforesaid contract."

As of the same date Langley & Co. executed a deed of trust conveying all the property of every kind belonging to them upon the grounds of the University of Virginia or elsewhere in the county of Albemarle to secure the payment to the university of their note for \$4,500, given, as stated in the contract just recited, to pay certain laborers and mechanics who had been in the employment of Langley & Co. Under this deed and contract the property mentioned therein passed into the possession of the University of Virginia.

This material, including the ironwork, had been estimated for by architects under the contract with Langley & Co., and constituted a part of the sum upon which Langley & Co. were entitled to draw 85 per cent. in accordance with the thirteenth clause of the contract between Langley & Co. and the university.

On May 14, 1897, Snyder & Co. gave to the university the following notice: "Take notice that, as subcontractors under C. E. Langley & Co. for doing ironwork contemplated by their contract, we have a claim amounting to \$1,627.60 as of the 10th of April, 1897, for work and materials furnished in and about the erection and repair of buildings at the University of Virginia, under your authority and direction. G. J. Snyder, doing business as Asa Snyder & Co." And, finally, on February 19, 1898, gave further notice of the said claim of \$1,627.60, with interest from the 10th of April, 1897, and on the same day filed a mechanic's lien in due form in the clerk's office of Albemarle county court.

This is, we believe, a fair summary of the facts presented by the record; in other words, to state the proposition in the terms of the rule with respect to demurrers to evidence, these are the facts which should reasonably be inferred from the evidence demurred to. There is really no great conflict in the evidence, but, if there were, that would constitute no reason for refusing to compel a joinder in the demurrer.

"By-the demurrer to the evidence the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence which do not necessarily result therefrom." Johnson's Adm'r v. Railway Co., *supra*.

By the very terms of the rule governing demurrers to evidence a conflict of evidence is contemplated, and the conflict is determined by rejecting the parol evidence of the demurrant which conflicts with that of his adversary.

We are of opinion that the court erred in refusing to compel a joinder in the demurrer, and that for this reason its judgment should be reversed.

It now remains for us to determine what judgment this court should enter. We have a bill of exceptions taken to the ruling of the court refusing the defendants' motion to compel the plaintiff to join in the demurrer, and in that bill of exceptions all the evidence adduced at the trial is spread upon the record. We have a verdict of the jury, in which the full amount claimed by the plaintiff is awarded; and we do not perceive that the ends of justice would be subserved by reversing this case and remanding it to the circuit court with instructions to compel a joinder in the demurrer, when we have in the record every requisite necessary to a complete adjudication of the controversy. We have the demurrer which was tendered to the evidence; we have the evidence spread upon the record, which is of such a character as, in our judgment, required the court to compel a joinder in the demurrer; and we have the verdict of the jury awarding damages to the full amount claimed by the plaintiff in his bill of particulars. To proceed to judgment, instead of remanding the case, may be regarded as innovation, but it is one which promotes the administration of justice, can, under the circumstances of this case, do no injustice, and ends the controversy without subjecting the parties to further delay and additional costs. We shall therefore proceed to inquire what judgment the court should pronounce.

Defendants in error, in order to recover, must show that a fraud was practiced upon them by Langley & Co. when they were induced to enter into the contract under which the property in controversy was manufactured, sold, and delivered to Langley & Co. Fraud must be plainly averred and clearly proven. When established, it renders the contract which it taints voidable at the option of him who is injured by it; and this right to disaffirm must be exercised promptly, and without unnecessary delay, the time depending upon the circumstances of the particular case. The election to abide by a

contract may be shown by proof of acquiescence in it, and any act which discloses an intention to abide by the contract will be sufficient to ratify it, always provided that the acquiescence or ratification was with knowledge of the facts which gave the right to repudiate it; and such election, whether manifested by mere acquiescence or by positive acts, when once made, is, as a rule, irrevocable. These propositions are elementary, and have been asserted in the following cases, and others too numerous to cite: *Jeffries v. Improvement Co.*, 88 Va. 869, 14 S. E. 661; *Rouzie v. Daingerfield*, 97 Va. 708, 34 S. E. 899; 2 Pom. Eq. Jur. § 897; *Kerr, Fraud & M.* 299; *Wilson v. Hundley*, 96 Va. 93, 80 S. E. 492, 70 Am. St. Rep. 837; *Hurt v. Miller*, 95 Va. 82, 27 S. E. 831; *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845; and *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798.

It is not sufficient, to establish fraud in the sale of personal property, to show that the purchaser was at the time financially embarrassed. To hold that the naked fact that a man was in straitened circumstances when he made the purchase tainted the transaction with fraud would be to condemn every man who became embarrassed to hopeless ruin. It would paralyze his efforts, compel him to withdraw from business, and deprive him of the only hope of restoring his fortunes. Such a conclusion would be injurious to society, and cruel and ruinous to the individual, and the law in its benignity tolerates no such principle.

It is true that insolvency is a factor to be considered along with other circumstances which may appear in the case, but will not of itself be sufficient to vitiate and destroy a contract.

In the *Anonymous Case*, reported in 67 N. Y. 598, where the defendants, who were bankers, purchased a draft when they were hopelessly insolvent, to their knowledge, the court held the defendants guilty of fraud in contracting the debt, and said their conduct was not like that of a trader "who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty,"—citing *Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Johnson v. Monell*, 41 N. Y. 855; *Chaffee v. Fort*, 2 Lans. 81. "But it is believed no case can be found in the books holding that a trader, who was hopelessly insolvent, knew that he could not pay his debts, and that he must fail in business, and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity, and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act, the necessary result of which will

be to cheat and defraud another, and the intention to cheat will be inferred." This proposition, thus stated, was approved by the supreme court of the United States in *Railway Co. v. Johnston*, 133 U. S., at page 576, 10 Sup. Ct. 390, 33 L. Ed. 683.

If the evidence in this case measured up to the requirements of the principle thus announced, we should have no hesitation in holding that the contract under investigation was procured by fraud. Snyder & Co. and Langley & Co. all resided in the city of Richmond. When Langley & Co. commenced negotiations which resulted in the contract with Snyder & Co., they frankly informed the defendants in error that they were not in a condition to pay in cash for the property they desired to purchase. They told Snyder & Co. that they had been accepted as bidders for the erection of certain buildings at the university. They were actually engaged in the conduct of other business at the time; and there is not a word of testimony in this case, nor a fact proven, which shows that at the date of that contract Langley & Co. were in point of fact insolvent, or that they were seriously embarrassed. Before the bid was awarded Langley & Co. by the University of Virginia, the officers of that institution charged with superintending the erection of its buildings, men of character and intelligence, depose that they made diligent inquiry as to the financial standing of Langley & Co. They ascertained no fact that led them to doubt the solvency of the firm or its ability to execute the contract into which it was about to enter, which involved about \$269,000.

The bid at which Langley & Co. were awarded the contract was far below that of the next highest bidder, the disparity being so great as to excite the belief that their judgment was seriously at fault in making their estimates. This establishes, perhaps, their want of discretion and capacity to conduct successfully an enterprise of such magnitude, but is not a fraudulent circumstance from which a fraudulent purpose must be deduced.

In December, 1896, Snyder & Co. wrote to the building committee at the university to get information as to the financial standing of Langley & Co. They had endeavored without success to ascertain it from the mercantile agencies. In reply to their letter of inquiry, Robertson, the superintendent at the university, informed Snyder & Co. that Langley & Co. were general contractors to erect buildings then in course of construction at the University of Virginia; that the contract amounted to \$269,000; that they had been at work since the 1st of July; that they had given satisfaction, and that the university had no knowledge of any trouble they were in; that their record had been kept clear of mechanics' liens; that they settled with them monthly on the estimate of their architects, withholding 15 per cent. until the satisfactory completion of the whole work.

Each of these representations is shown to be literally true, except that with respect to the retention of 15 per cent. reserve fund. That had been encroached upon, but there was still in the hands of the university more than enough to meet the demands of Snyder & Co., if it were conceded that they had any interest in it, or that their contract was induced by it. In effect, therefore, it may be said that each and every representation contained in that letter was true. The 15 per cent. was withheld, as stated in the letter of Mr. Robertson, until the satisfactory completion of the whole work, and was retained for the benefit of the owner alone. "The owner is under no obligation to protect the interest of the subcontractor, except where the latter has complied with the law, and thus put himself in a position to demand protection from the owner." *Schrieber v. Bank*, 99 Va. 257, 38 S. E. 134.

During the winter of 1897 Snyder & Co. became uneasy, but continued to furnish supplies under their contract until the last of March. The goods were manufactured and delivered to Langley & Co. f. o. b. the cars at Richmond,—in accordance with the contract. When delivered, title passed out of the vendor and vested in the vendee, subject, it is true, to be divested if there was fraud in the procurement of the contract, and Snyder & Co. should promptly disaffirm it and demand a restitution of the goods. We do not think that from the facts proven in this case we can hold that the contract was at any time voidable. If it had been, then Snyder & Co. were required by every obligation of good faith to the University of Virginia to repudiate it without delay. They knew the purpose for which these goods had been ordered; they knew that they were being delivered upon the grounds at the university; and they should have acted without hesitation as soon as facts came to their knowledge which would justify them in a repudiation of the sale and in demanding a restitution of the property. So far from taking steps to repudiate the contract or to disclose any purpose to disaffirm it, they called upon the university to aid them in collecting the purchase money when there was no purchase money due them if the contract was to be disaffirmed. They dealt with the university, and bargained with it under circumstances which involved the assumption that title to the property had passed out of them into Langley & Co., and from that firm had vested in the university, and yet they uttered no word and did no act indicative of the purpose to disaffirm or to repudiate the transaction and to demand a restitution of the goods. The final act in the transaction was an effort on their part to secure the purchase price by filing a mechanic's lien upon the buildings in the clerk's office of the county court of Albemarle. So that if, as an original proposition, there had been fraud in the transaction, which gave the right to repudiate it, it has been rat-

fied with the full knowledge of every fact connected with the transaction.

But it is claimed on behalf of defendants in error that, although the conduct of Snyder & Co. may have ratified a transaction voidable for fraud, so as to vest absolutely the property which was the subject of the contract, there still remains the right in Snyder & Co. to recover damages for the injury they had suffered in an action of deceit.

The only plaintiff in error in the case before us is the University of Virginia. It owed no duty involving trust and confidence to Snyder & Co. It had no contractual relations with them. They were strangers to each other. Snyder & Co. called upon the university for information. It was given frankly, fully, and truthfully. There is not the slightest suspicion resting upon plaintiff in error with respect to the procurement of the contract. When Langley & Co. abandoned their effort to complete the buildings, Snyder & Co. had full knowledge of the fact. They had delivered the property in dispute to Langley & Co., and it was upon the premises of the University of Virginia. As we have seen, there was no repudiation of the contract, and no demand for the restitution of the property. It passed, under the contract and deed of trust of Langley & Co., with full knowledge of Snyder & Co., into the possession and ownership of the University of Virginia; and still they made no sign indicating a purpose to repudiate. Under such circumstances an action of deceit could not be maintained.

There is one feature of the case to which we should, perhaps, allude. Two counts of the declaration were dismissed upon the demurrer, and defendants in error earnestly contend that in this there was error to their prejudice. They went to trial upon the declaration as established by the judgment of the court, and recovered a verdict and judgment for all that was demanded. The two counts which were dismissed set forth substantially as the ground of action the facts which we have considered as insufficient to warrant a recovery by the plaintiff, but as requiring at the hands of the court a judgment for the defendant. Under the count in trover, which alleges a fraudulent conversion by the plaintiff in error of the property of the defendants in error, every fact and circumstance from the beginning to the end of this transaction was brought before the jury and the court; so that, in whatever aspect the case may be viewed, no other result could have been reached than that which we have announced, and therefore we can assert with entire confidence that there was no error to the prejudice of the defendants in error in dismissing the first and second counts of the declaration.

Upon the whole case we are of opinion that the circuit court should have compelled a joinder in the demurrer, and should then have rendered judgment upon the verdict of the jury for the plaintiff in error.

(116 Ga. 325)

GUNN v. HEAD.

(Supreme Court of Georgia. Aug. 9, 1902.)

PROMISSORY NOTE—ACTION AGAINST JOINT MAKERS—DEFENSE OF AGENCY—AMENDMENT TO PETITION—IMPROPRIETY—INSTRUCTION ON AGENCY—SUPPORT IN EVIDENCE—ADMISSION OF PREJUDICIAL EVIDENCE—GROUND FOR NEW TRIAL—DEFENSE BY PARTY PRO SE—RIGHT TO ADDRESS JURY.

1. The amendment offered was not germane to the cause of action set out in the original petition, and should not have been allowed over the objection of the defendant.

2. There being no evidence in this case to authorize a charge on the law of agency, the same should not have been referred to in the instructions given to the jury.

3. The trial judge erred in instructing the jury as complained of in the fifth ground of the amended motion for a new trial.

4. Evidence irrelevant to the issue on trial should not, when objected to on that ground, be permitted to go to the jury; and when such evidence is calculated to prejudice the jury against one of the parties, its admission over proper objection affords good ground for a new trial.

5. A party to a suit in any of the courts of this state has a right to prosecute or defend his own case in person or by attorney, or both; but when a person is sued, and the answer which he makes sets up no defense, and under his own evidence the plaintiff is entitled to a verdict against him, he has no cause, and no right to appear and address the jury to whom the case has been submitted.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by J. D. Head against H. A. Gunn and another. From a judgment for plaintiff, defendant H. A. Gunn brings error. Reversed.

Hardeman & Moore, for plaintiff in error.
Arthur L. Dasher, for defendant in error.

LITTLE, J. Head instituted an action in the city court of Macon against U. M. Gunn and H. A. Gunn to recover a judgment on a promissory note, dated May 23, 1893, which on its face jointly and severally bound the defendants to pay to the order of the plaintiff \$750 90 days after date. On August 15, 1899, Mrs. H. A. Gunn, one of the defendants, filed her separate answer, denying indebtedness, and pleading non est factum. In March, 1900, the other defendant, U. M. Gunn, filed an answer, in which he, after admitting all of the allegations in the petition, with the exception that he denied in general terms that he was indebted to plaintiff in any sum whatever, set forth, as matter of defense to the action, that he was acting solely as the agent of his codefendant, Mrs. H. A. Gunn, in negotiating the note sued on, being at that time and before her general agent for the purpose of managing her business interests, with power to negotiate notes, borrow money, buy goods on credit, incur debts, all in her name, and to bind her estate thereby; that he received no benefit whatever from said note, but all of its proceeds were used by him in said general agency in paying the expenses of her farming interests and charges against her land; that H. A. Gunn had signed the note in his

presence, had reaped all the benefits arising therefrom, and is the only one against whom a judgment should be rendered. Subsequently, at the trial in June, 1900, the plaintiff offered an amendment to his petition, to the effect that the note was given partly for supplies furnished Mrs. H. A. Gunn through her general agent, U. M. Gunn, for the purpose of conducting her farming interests and improving her lands, and was partly for money loaned, which was used by Gunn, as general agent, in paying taxes and laborers in the interest of Mrs. H. A. Gunn; that her agent had full power and authority to manage the affairs of Mrs. Gunn, and to charge her estate, and she reaped the benefits arising from the conduct of her agent in procuring from petitioner said supplies and money. To the allowance of this amendment the defendant objected, and demurred on a number of grounds. The demurrer was overruled, and defendant filed exceptions pendente lite, and has assigned error on the same. The case was submitted to the jury on evidence to which reference will hereafter be made, and a verdict was rendered for the plaintiff against both defendants. Mrs. H. A. Gunn filed her motion for a new trial, which being overruled she excepted. The motion for new trial contains 24 grounds, many of which we find well taken. Some show that errors of an immaterial character were committed in the trial of the case, and others appear to be without merit. As the case is to be tried again, it is not necessary to consider and pass on the grounds that the verdict was contrary to the evidence and without evidence to support it. Such of the rulings of the trial judge as we deem to be erroneous, and of sufficient importance to cause a reversal of the judgment, we will refer to and consider in the order in which they appear in the record.

1. Complaint is made that the trial judge overruled the demurrer to the amendment which the plaintiff offered to his petition, and allowed the same over defendant's objection. We are of opinion that the court erred in so ruling. The action, it will be remembered, was brought against two defendants, seeking to recover a judgment on a joint and several note. As a matter of law the answer filed by U. M. Gunn set up no defense whatever to the action, and his plea should have been demurred to and stricken. Suppose that in this transaction, as set up by him, U. M. Gunn was the general agent of his codefendant, H. A. Gunn, and that she did receive its benefits, he nevertheless chose to bind himself to pay it; and it was no concern of the plaintiff, or the holder of the note, how he used the proceeds. The general denial of indebtedness on his part only amounted to a plea of the general issue, and since the act of 1893 such a plea is bad. Civ. Code, § 5051. Plaintiff claimed that the two defendants, as several makers of the note, were indebted to him the amounts expressed therein, and he sought to recover a judgment for these

amounts. By his amendment he prayed for no additional relief, and sought no different judgment. The only allegations which the amendment contains are that U. M. Gunn was the general agent of H. A. Gunn, and had authority to manage her affairs and bind her estate; that the consideration of the note was partly for money loaned and supplies used in her behalf, which were procured in good faith, and were necessary to promote the interests of his principal, who accepted and enjoyed the fruits of his action. What connection there is between these allegations and the promise of U. M. Gunn to pay at a particular time the sum mentioned in the note we entirely fail to see. With this amendment the issues were very much enlarged, and to no purpose; for it matters not whether or not U. M. Gunn was such agent and H. A. Gunn received the full benefit of the consideration for which the note was given. Her liability to pay the note, if she made it, would not be increased in any respect because of such facts. If it was the idea of the pleader that, if the plaintiff should fail in obtaining a judgment on the note, he would be entitled to a decree because of the benefits which Mrs. Gunn received from the consideration of the note, that result could not be brought about by the amendment. In that view the cause of action set out in the amendment would not be germane to that contained in the original petition; and, besides, the amendment contains no proper prayers. "Where the strict legal rights of a defendant are insisted upon, the plaintiff cannot sue for one cause of action and recover for another." *Railway Co. v. Tillman*, 79 Ga. 610, 5 S. E. 135. The trial judge erred in allowing the amendment.

2. Error is assigned also to that portion of the charge in which the jury were instructed as to the law of agency, and because the court in that connection charged the jury that, if a principal stands by, and authorizes another to sign his or her name to a promissory note, either by word, act, or silence, it would be the note of the person so standing by and so authorizing; and that if they should find from the evidence that H. A. Gunn began the signature, and did not complete it, and if H. A. Gunn wrote the initials of her name and stopped, and U. M. Gunn completed the signature in her presence and with her acquiescence, and if by her conduct she authorized such completion of her signature, she would be bound for the payment of the note. The legal principle involved in the charge referred to is unobjectionable, but, as we understand the record, it has no application to the evidence in this case. As we have said, there is no question of agency involved. Mrs. Gunn in the legal method denied that she executed the note. The only two witnesses in reference to execution were U. M. and H. A. Gunn. No part of the evidence of either of these witnesses raised the question of agency. U. M. Gunn testified that H. A. Gunn signed the note; that her

signature was very imperfect, or, as he expressed it, "imperfectly visible," and her signature and name could not have been seen "in a prompt way"; that he took his steel pen, and, with ink different from that in which she had written her signature and name, ran his pen over her signature for the purpose of making it legible and visible. He further said: "When I took my pen to fix the signature, Mrs. Gunn was still in the room. She could have seen it. But whether she was looking at me when I did it or not, I do not know. I will say she was looking at me when I ran my pen over it." On the contrary, Mrs. Gunn says that she did not sign the note at all, and never saw it until some years after its date, and that she never saw U. M. Gunn trace her signature. The plain law of the case is that, if the evidence of U. M. Gunn is true, Mrs. Gunn is liable, because she signed the note, and that liability is not diminished because U. M. Gunn retraced her signature. If she did not sign the note, she is not liable, even if Gunn was her general agent, and did trace her signature. If U. M. Gunn's evidence is to be relied on, he did not trace her signature as her agent, but because he wished it to be plainer. So, under no theory of this evidence, is the law of agency involved. Nor can it arise under the evidence that Mrs. Gunn may have seen the tracing, and did not object. Before she could be held liable as adopting the tracing of U. M. Gunn over her signature, it must be made clearly to appear that she knew it, and acquiesced in it. If she did both these things, she could not thereafter be heard to complain of it. But the evidence that she did is neither clear nor positive; but as Gunn, the only witness, relates it, it is matter of great doubt whether she knew it, and the jury would not, if it happened just as Gunn said, have been authorized to find as a fact that she saw Gunn trace her signature, or knew of it. He states that she could have seen it, but whether she was looking at him when he did it he did not know, but would say she was. This was not sufficient evidence to authorize the jury to find that she saw Gunn when he retraced her signature, and knew what he was doing, and acquiesced in it. And as it would not authorize the jury to so find, the court should not have charged on the subject, because the evidence did not warrant it.

3. The following charge is complained of in the fifth ground of the amendment to the motion: "If there are two theories in the judgment of the jury, that are alike reasonably deducible from the evidence, one of which theories would, in effect, charge upon one of the parties in this case the crime of forgery, the fact that the law presumes every man innocent of a crime is to be weighed by the jury in determining which of those two theories they will accept. The law presumes every man, every citizen, innocent of a crime charged upon him, until the contrary

be established; and therefore the court charges you in this case that, if there be two theories that appear to the jury equally reasonable, equally reasonably deducible from the evidence in the case, one of which would involve the crime of forgery upon the part of U. M. Gunn, the other of which would not involve the crime of forgery upon his part, that question, and the fact that the law presumes every citizen innocent of a crime, is to be weighed by you in determining which of these two theories you will accept, and what verdict you will render in the case." In our opinion, this charge was entirely inapplicable to the case on trial. It is true that the law does not presume that a person has committed a crime, and that it presumes every citizen innocent until his guilt is shown. In the case on trial the law presumes that U. M. Gunn told the truth. It did not presume that Mrs. Gunn perjured herself. Unfortunately, the testimony of both of these witnesses as to the fact of the execution of the note by Mrs. Gunn could not be true; but whether Mrs. Gunn did or did not execute the note must be determined from the evidence in the case, and not from presumptions. Mrs. Gunn, in her sworn plea, said she did not sign the note. Being sworn as a witness, she testified that she did not. If she did, she was guilty of perjury; and, while the law would not presume that she was so guilty, the finding of the jury must characterize the evidence on this subject of one of the witnesses as false, because as to the fact of the execution they were directly in conflict. It was a matter for the jury to settle under the evidence, and not by theories; for, if the jury should hesitate to find a verdict for the defendant because such a verdict would, impliedly at least, point to the witness as having forged the instrument, they should, on the same principle, hesitate to find a verdict for the plaintiff, because not only impliedly, but expressly, that verdict would characterize the other witness as a perjurer. When evidence is conflicting, the jury must find the truth by the application of well-known rules, which were undoubtedly communicated to the jury in this case.

4. A number of grounds of the motion complain that the court erred in admitting certain evidence of U. M. Gunn. In the evidence objected to were the statements that the witness, as agent of Mrs. Gunn, had a large plantation, which he had bought at from \$1 to \$5 per acre, and had spent from \$13 to \$70 an acre to clear it up and ditch it; how he managed this property; how long he lived with his wife; how he had been robbed by the "communistic verdicts of juries"; that he had given a \$10,000 bond; and "when I had a bank account I was all right, but I am now a tramp because of that woman, and she has no more reason—infinitely less reason—to pursue me than Delilah had to ruin Sampson or betray him; and I want the jury to know the facts in such a way that they will know

their duty." A knowledge of such facts, obtained by the jury in this way, given for the purpose of showing them their duty, would of itself have been amply sufficient to cause a reversal of the judgment, simply because, without any regard to the truth of or justice of the criticisms thus indulged in, it must be apparent that they could have no connection, even in the remotest degree, with the question at issue,—that is, did Mrs. Gunn sign the note sued on?

5. The last ground presented for our consideration is that the court erred in permitting U. M. Gunn to argue the case to the jury over the objection of H. A. Gunn's counsel, she contending that U. M. Gunn was not entitled to argue the case to the jury, for the reason that he admitted his liability, and made no defense which he was entitled to sustain under the law and the evidence in the case. Paragraph 4 of the bill of rights of the constitution of this state (Civ. Code, § 5701) declares that no person shall be deprived of his right to prosecute or defend his own cause in any of the courts of this state in person or by attorney, or both. It is not claimed that U. M. Gunn was an attorney at law, and engaged as such by the plaintiff in this case. Therefore his right to appear and argue this case depended upon whether he had raised any issue or interposed any defense to the action in which he was sued. If he had, he was entitled to defend his case; that is to say, he was entitled to appear before the jury, and defend this case to the extent in which his interest was involved, and no further. It was ruled in the case of *Stephens v. Gaslight Co.*, 81 Ga. 153, 6 S. E. 838, that where the defendant was personally served, and made no defense, and the statute construing his silence as an admission of the correctness of the account sued on, there was nothing for counsel to argue to the jury, and the court did not err in refusing to allow him to address the jury. The same rule applied to counsel under the authority cited would apply to a party to the case if he desired to appear in person; and to determine the question made by the assignment of error in the ground of the motion above referred to we must ascertain whether U. M. Gunn, one of the defendants, had interposed a defense to the plaintiff's action. We do not think he had. As we have seen, after admitting all the allegations in the petition except his liability, he then set up, by way of a plea in bar, that he was the general agent of H. A. Gunn in negotiating the note, that he received none of the benefits of the proceeds of the note, and that she received them all; and his conclusion was that a judgment should only go against her. It may be said, however, that, while this plea interposed no defense, and did not set up any fact which was a bar to the action, it was not demurred to, and hence the defendant would have the right to go to the jury. This position, in the light of the evidence, cannot be maintained. If the plea is to be treated as

a serious defense, it is summarily disposed of by himself. In the course of his evidence as a witness for the plaintiff he testified that he signed the note; that about the time or shortly before the note was executed there was an agreed compromise settlement by his counsel, C. A. Turner, and Claud Estes, who represented Peter Harris, and Harris agreed to take \$750 in settlement of his claim against him; that there was a \$750 note to be negotiated for the purpose of raising the fund to be used to settle the Harris claim; that he had the blanks in his secretary on both Plant's and the Exchange Bank, and used this blank on the Exchange Bank for the purpose of applying it to this \$750. The witness then proceeded to state in detail the manner in which both his wife and himself signed the note, and the further fact that he traded the note to the plaintiff for various and sundry supplies furnished for plantation use, and that all the \$750 (represented by the note sued on) "went for H. A. Gunn's estate, which was in my hands, that I was handling as her agent," etc. So treating the averments of the plea as a defense, the plaintiff, as a matter of law, was entitled to a verdict against U. M. Gunn on his own evidence, notwithstanding his plea and proof that he was the general agent of his wife, and that she received the proceeds of the note, because there was no evidence of any kind or character which tended to show nonliability on the part of U. M. Gunn; and, as neither under the plea nor the evidence was the plaintiff at issue with this defendant, the only question to be tried and settled was raised by Mrs. Gunn under her plea of non est factum. On this issue U. M. Gunn could not legally appear before and address the jury. The right which is given him to do this is in his own case. He had no case under his plea and his own evidence. Having none, he had no place before the jury, and the trial judge erred as complained of in this ground of the motion for a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

SIKES v. STATE.

(116 Ga. 182)

(Supreme Court of Georgia. Aug. 8, 1902.)
JURY—DISQUALIFICATION OF JUROR—REMOVAL FROM COUNTY—TEMPORARY CHARACTER—AFFIDAVIT—EVIDENCE TO SUPPORT FINDING.

1. While it appeared that one of the jurors had before the trial moved into another county, and was living there, the affidavit of the juror showed that he was on a temporary visit to such county, without any intention of changing his residence, and fully intended to return. The trial judge was therefore authorized to find that the juror was not disqualified.

2. There was evidence to support the verdict. (Syllabus by the Court.)

Error from superior court, Oatoosa county; A. W. Fite, Judge.

¶ 1. See Jury, vol. 21, Cent. Dig. § 254.

J. J. Sikes was convicted of crime, and brings error. Affirmed.

W. E. Mann, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 216)

GLOVER GROCERY CO. v. DORNE

(Supreme Court of Georgia. Aug. 8, 1902.)

BANKRUPTCY—CONFIRMATION OF COMPOSITION—EFFECT.

1. Under sections 12 and 14 of the bankrupt act of 1898, the confirmation of a composition proposed by a bankrupt to his creditors, followed by a dismissal of the case, has the effect of discharging him from all ordinary claims provable in bankruptcy, though the holders thereof did not actually prove the same, and consequently did not participate with the other creditors in taking action upon the composition when offered.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by the Glover Grocery Company against W. R. Dorne. Judgment for defendant, and the company brings error. Affirmed.

J. H. Lumpkin, for plaintiff in error. J. A. Ansley and W. A. Dodson, for defendant in error.

LUMPKIN, P. J. Without stating the facts of this case, it is sufficient to say that it turns upon the question indicated above, which was, in our opinion, rightly decided by the superior court. Section 12 of the bankrupt act of 1898 declares that a bankrupt may, at a specified stage of the proceedings, "offer terms of composition" to his creditors, and provides for the filing of an "application for the confirmation of a composition" after its acceptance "in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims," and after the bankrupt shall have made, under the order of the judge, a deposit of money sufficiently large to cover the "consideration to be paid by the bankrupt to his creditors," and pay all preferred debts and the costs of the proceedings. This section also specifies the terms and conditions upon which a composition may be confirmed, and directs that "upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed." In section 14 of this act it is declared that "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge." See Brandenburg, Bankr. 802—

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 610.

804. A reading of these provisions of the bankrupt act will show, without discussion, that the proposition announced in the headnote is correct.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 182)

McFARLIN v. STATE.

(Supreme Court of Georgia. Aug. 8, 1902.)

APPEAL—REVIEW.

1. No error of law was complained of, and the evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Luke McFarlin was convicted of crime, and brings error. Affirmed.

W. A. Post, for plaintiff in error. A. H. Thompson, Sol. Gen. pro tem., and T. A. Atkinson, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 218)

BATTLE et al. v. WRIGHT.

(Supreme Court of Georgia. Aug. 8, 1902.)

ADMINISTRATOR'S SALE OF REALTY—HEIR'S ACTION FOR ACCOUNTING—RATIFICATION OF SALE—ESTOPPEL TO SET UP ADVERSE TITLE.

1. When heirs at law bring an administrator to an accounting, and obtain against him a judgment, in part based upon the proceeds of land of the intestate, purporting to have been regularly sold by him, they are thereafter estopped from asserting that the sale by the administrator was for any reason unlawful and invalid. Under such circumstances, their conduct amounts to a ratification of the disposition of the property made by the administrator. In such a case, the heirs will not be heard to set up title against one who bona fide claims under the administrator's sale, for it is a sound equitable principle that they cannot have both the proceeds of the land and the land itself.

2. This case, irrespective of all other questions involved, is, upon its substantial merits, absolutely controlled by what is laid down above, and there was no error in directing the verdict, to which exception is taken.

(Syllabus by the Court.)

Error from superior court, Schley county; Z. A. Littlejohn, Judge.

Action between R. B. Battle and others and Cleora Wright. From the judgment, Battle and others bring error. Affirmed.

J. H. Lumpkin, for plaintiffs in error. M. A. Hawkins, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 114)

CARTER v. BRETT et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

PARENT AND CHILD—RELINQUISHMENT OF CUSTODY—EFFECT—HABEAS CORPUS—JUDGMENT—INSUFFICIENCY OF EVIDENCE—CERTIORARI TO REVIEW.

1. Where a father relinquishes the custody and control of his minor child to another, the latter, if a suitable and proper person to have such custody and control, is legally entitled thereto.

2. It is, on the hearing of a writ of habeas corpus, an improper exercise of discretion to render a judgment depriving one legally entitled to the custody of a minor child of the same, and awarding such custody to another, when there is undisputed evidence showing the right and fitness of the former to have such custody, and no evidence to the contrary.

3. It results from the application of what is laid down above to the present case that the court erred in not sustaining the certiorari.

(Syllabus by the Court.)

Error from superior court, Irwin county; D. M. Roberts, Judge.

Habeas corpus between J. H. Carter and Lyman Brett and others. From a judgment refusing certiorari to review the proceedings, Carter brings error. Reversed.

W. W. Bennett, for plaintiff in error. W. P. Ward, for defendants in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 115)

THORNTON et al. v. MARTIN.

(Supreme Court of Georgia. Aug. 7, 1902.)

CORPORATIONS—PURCHASE OF STOCK—COMPANY'S REFUSAL TO RECOGNIZE TRANSACTION—INJUNCTION BY PURCHASER—JOINDER OF PARTIES—PLEDGE OF CORPORATE STOCK—PLACE OF SALE—NOTICE—AGREEMENT FOR POSTPONEMENT—TRANSFER OF STOCK—ADMISSIBILITY IN EVIDENCE.

1. Where one purchases shares of stock in a railroad company, and the vendor and the agents of the company refuse to recognize the validity of the sale or to allow a transfer on the books of the company, the purchaser may bring an equitable proceeding against the vendor and the company to restrain the former from disposing of the stock or interfering with its transfer, and to compel the company to make the transfer and receive the purchaser as a shareholder. There is in such a case no misjoinder of parties or of causes of action.

2. Where, as collateral security for a promissory note, the maker pledges railroad stock and gives the pledgee full powers of sale, the sale need not be made in the county in which the railroad is situated. This is especially true when the note is dated and made payable in another county, in which also the maker resides.

3. Where the pledgee is authorized, on or after the nonpayment of the note at maturity, to sell the stock at public or private sale, without advertisement or "giving any notice" to the maker and pledgor, the sale is not invalid when made without demand and without notice of the time or place of sale, although not made long after the maturity of the note, where there is no valid extension of the note, and the giving of notice is not affected by mere exercising the power of sale.

In such a case evidence that, two or three days before the sale, the pledgee notified the

maker that he wanted to collect the note within a short time, and the maker replied that he was ready to pay whenever the pledgee wished, is insufficient to show an agreement to postpone the sale until further notice, and is irrelevant.

5. In a suit against the pledgor and the railroad company by the purchaser at the pledgee's sale to enforce a recognition of his rights as purchaser, it is error to admit in evidence, without proof of their execution, the written transfer of the stock made by the pledgee, although the defense to the suit calls in question the validity of such transfers, without admitting or denying their existence.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by J. H. Martin against L. O. Thornton, administrator, and others. From a judgment for plaintiff, defendants bring error. Reversed.

An equitable proceeding was instituted by Martin against Thornton, of Muscogee county, and the Talbotton Railroad Company, whose principal office was in Talbot county. The petition alleged that on January 2, 1895, Brannon, administrator of the estate of Hochstrasser, had loaned \$2,000 to Thornton, taking therefor the latter's promissory note, dated and payable at Columbus, in Muscogee county, and due one year after date; that this note, a copy of which was attached, contained a pledge of certain shares of the stock of the defendant railroad company, each of the par value of \$100, then owned by Thornton; that Thornton at the same time delivered to Brannon the certificates representing these shares. The promissory note, after pledging the stock to Brannon, gave him "full power and authority to sell said collateral security, or any part or portion thereof, at public sale or at private sale," on or after the nonpayment of the note, without advertisement or "giving any notice" to Thornton, and to apply the proceeds to the note, accounting for the surplus to Thornton. It was further alleged that the note was not paid, and on August 2, 1898, Brannon offered the stock for sale at public outcry in the city of Columbus, Muscogee county, at the usual place and proper hour for holding sheriff's sales, when the same was knocked off and sold to Martin for \$1,000; that in pursuance of this sale Brannon delivered the certificates to Martin, made him a written transfer of them, and filled in upon the back of each certificate due authority and instructions to the secretary of the defendant company to make the transfer upon the books of the company; that Martin presented to the secretary these certificates, together with the promissory note and pledge of Thornton, and Brannon's transfer of the stock and order to the secretary to make the transfer, offering to surrender the old certificates and have new ones issued in his own name, in accordance with the custom of the company, but the company and its secretary refused to allow the transfer to be made upon the books, although the company had no lien upon this stock; that the only reason

assigned for this refusal was that Thornton still claimed to own the stock, and had given direction that the shares should not be transferred; that Thornton was president of the company. The petition prayed that Thornton be restrained from disposing of the stock or voting it, and from interfering with its transfer upon the books of the company, and that the company be required to make the transfer upon its books. There was also a prayer for general relief. The railroad company demurred generally and on the ground that there was a misjoinder of the company as a party. Thornton demurred generally and on the ground that there was a misjoinder as to him. The court overruled these demurrers, and also oral demurrers of the defendants on the grounds that the stock should have been sold in Talbot county, and could not be sold in Muscogee county; that, as the time of payment of the note had been indefinitely extended, the petition should show that there had been a demand; and that there was a misjoinder of causes of action. To these rulings the defendants excepted. In their answers the defendants set up that no demand for payment was ever made upon Thornton, and he was given no notice of the sale of the stock; that he did not owe the sum claimed by Brannon; and that the latter and Martin colluded together to secretly sell the stock and defraud Thornton. Thornton also filed a cross bill against Brannon, as administrator, and Martin, alleging that he had regularly paid the interest upon his note, and that Brannon had asked no more than this; that he had also in 1897 made a payment of \$200, which he had never been credited upon the note; that in the latter part of July, 1898, Brannon told him that one of the minors interested in the estate he represented would reach the age of 21 during the next month, and he wished Thornton to settle his indebtedness; that Thornton agreed to do this, and was ready and willing so to do, but Brannon, without any notice and without Thornton's knowledge, sold the stock for \$1,000; and that the value of the stock was fully \$5,000. The cross-bill prayed that the sale be set aside and annulled, and that Martin and Brannon be required to surrender the stock upon the payment of such amount as might be found to be due upon the note. In an answer to this cross-bill, Martin denied any collusion or secret understanding with Brannon, and alleged that the purchase of the stock was made by him in good faith, and that the price paid was full and fair. Brannon denied agreeing to any delay in the payment of the note; denied the alleged uncredited payment; alleged that he made repeated demands upon Thornton, and gave him full notice that if the note was not paid by the first Tuesday in August, 1898, he would sell the stock; and alleged that the sale was in every way fair and open, and without any fraud or collusion, and that the price paid was adequate, and was about \$200 less than was then due upon the note. Brannon and

Thornton having died, their personal representatives were made parties to the case. Upon the trial the judge directed a verdict against the defendants, and they excepted, assigning error upon the direction of the verdict and upon the rulings discussed below.

J. J. Bull, for plaintiffs in error. Persons & McGehee, for defendant in error.

SIMMONS, O. J. (after stating the facts as above). 1. That the petition set forth a cause of action, at least as against a general demurrer, we think evident from the synopsis of it given above. Under the allegations made, Martin had acquired a good title to the stock in controversy, and had a right to have it transferred on the books of the company. The contention that there was a misjoinder of parties defendant was also without merit. Thornton claimed to own the stock, and it was necessary to make him a party in order to settle the question of title; and the company was an equally necessary party, in order that the plaintiff might get full relief and have the transfer made on the books of the company. 1 Mor. Priv. Corp. (2d Ed.) § 221. Nor could the plaintiff be forced, in order to remedy his wrongs, to bring two different and independent actions. While the relief prayed was against two different defendants, the causes of action against them were not separate and distinct, but related to the same subject-matter, and were based upon the same transaction. There was therefore no misjoinder either of parties or of causes of action.

2. We can see no force in the contention that the sale under the power given in the note should have been made in another county, merely because the latter was the county in which was located the corporation whose stock was sold. Section 5431 of the Civil Code, providing for the levy of executions upon railroad stock in the counties through which the railroad passes, is in no sense applicable to the present case. The note did not specify where the sale should be made, but inasmuch as it was dated and made payable in Muscogee county, and the maker resided in that county, we think the parties contemplated that the sale should be made in that county. It was not a sale under judicial process or execution, but a sale under a written power of sale; and the intention of the parties, as shown by the writing, must govern as to this matter. The sale took place during the usual hours, and at the place at which the sheriff of Muscogee usually made his sales. It was made at public outcry and on a regular sale day.

3. Counsel for the plaintiffs in error argued in support of the defendants' other demurrer that, "the time of payment of the note having been extended to an indefinite period and no fixed time of payment, a demand for payment should have been made before a sale." The petition does not show

that there had ever been any extension of the note, and nothing more appears than that the sale was delayed until more than two years after the maturity of the note. Indulgence of the payee was not an extension of the note, and the latter was due at a fixed and definite time. Even were this not true, the maker had waived both demand of payment (18 Am. & Eng. Enc. Law [1st Ed.] 669 [3]) and notice of the time and place of sale.

4. Defendants offered in evidence testimony to the effect that in the latter part of July, 1898, Brannon told Thornton he would soon have to settle with one of the beneficiaries of the estate he represented, and wanted Thornton to pay him, and that Thornton had expressed a willingness to do so. This evidence was objected to as irrelevant, and the objection was sustained. The defendants excepted. This evidence was properly excluded. Brannon had full power and authority to sell the railroad stock at any time after the maturity of the note, without notice to the maker of the note. This evidence did not show any definite or binding extension of the note, or any agreement either to postpone the sale until further notice, or to give the maker notice before making the sale. It was insufficient to show any of these things, and was properly ruled out as irrelevant.

5. Error is assigned on the admission in evidence, after the introduction of the note of Thornton, of an entry indorsed thereon, signed by Brannon as administrator, reciting that he had, by virtue of the power vested in him by the note, regularly sold the stock at public sale to Martin, the highest bidder, and entering a credit of \$1,000 on the note. The objection to this evidence was that there was no proof of its execution. The same objection was made to the introduction in evidence of the written transfer of the specific shares of stock by Brannon, administrator, to Martin. This transfer recited that Brannon was acting under the power given him by Thornton, and transferred the stock to Martin. It also authorized the secretary of the railroad company to transfer the stock on the books of the company. Copies of these papers were attached as exhibits to the petition, and the transfer under the sale was not expressly denied by the defendants, but the validity of the sale was attacked, and Thornton sought to have it annulled. At the same time the defendants did not admit the sale or the transfer thereunder. They alleged that they did not know, but that, if there had been such a pretended sale, it was invalid, and should be set aside. Counsel for the defendant in error sought to justify the ruling of the court on the grounds that there was no issue of fact as to the execution of these papers, they being virtually admitted in the pleadings of the defendants; that one of these papers was admissible as being the

foundation of the plaintiff's suit, and that the other was admissible without proof of its execution, under Civ. Code, § 5244, as being only incidentally or collaterally material to the case. We think that these contentions are not sound. Whether or not there had been a sale, and whether or not these papers had been executed by Brannon and delivered to Martin, were not facts which necessarily came within the knowledge of Thornton or of the railroad company. They might very well have been entirely without reliable information as to these matters. The defendants' pleadings did not expressly deny the sale or the execution of the papers attached to the petition as exhibits, but it is also true that they did not expressly admit either. The papers could not, therefore, be admissible as having been admitted to be true. Both of the papers were material to the case,—one of them to show title in the petitioner, and authority to the company to make the transfer on its books, and the other to show the fact of sale, and that there had been a sale to the petitioner and a credit on the note. We are fully aware of the decisions in *Strange v. Barrow*, 65 Ga. 23; *Couch v. Couch*, Id. 748; and *Hays v. Hamilton*, 68 Ga. 833. But they are not here applicable. In each of those cases the suit was upon a written contract embodied in or attached to the petition. That contract was alleged to have been executed by the defendant, and was declared on as the foundation of the suit, and there was no denial of its execution. In such a case the contract is admissible without proof of its execution. In the present case the transfers of the stock to Martin by Brannon were material and necessary to the plaintiff's case, and were attached as exhibits to the petition, but the suit was not against the person who executed them. They are not the foundation of the suit, in the sense that they are declared on, and a recovery sought because of their breach. For these reasons, we think they come within the general rule that papers are inadmissible in evidence until their execution is proved. Without proof of their execution they were inadmissible. As well admit in evidence, in the trial of a suit for land, all of the deeds in the chain of title set up in the declaration, merely because they are essential to the plaintiff's case, and their execution has not been either admitted or denied by the defendant. Without this evidence the case against the defendants was not made out, and, as the evidence should have been excluded, the judgment below must be reversed.

We have considered the motion to dismiss the writ of error made in this case, and have reached the conclusion that it was without merit. It was predicated upon the failure to serve the bill of exceptions upon Martin in his representative capacity as executor of Brannon's estate. In that capacity

he was a mere formal party, and had no interest whatever in the result of the litigation.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 93)

WRAY v. HARRISON et al.

HARRISON et al. v. WRAY.

(Supreme Court of Georgia. Aug. 7, 1902.)

INTOXICATING LIQUORS — LICENSES — PROCEEDINGS TO PROCURE—ENJOINING ILLEGAL SALES—SCOPE OF ORDER.

1. The charter of a town provided that the town authorities should have power to license the sale of spirituous and malt liquors, but should not grant any application for such license unless the same was accompanied by "a petition signed by two-thirds of the citizens of such town, asking for the license." *Held*, that the term "citizens," as used in the charter, embraced only the qualified voters of the town.

2. The judge erred in striking portions of the answer of the defendant to the rule for contempt, but committed no error in dissolving the injunction.

(Syllabus by the Court.)

Error from superior court, Cherokee county; Geo. F. Gober, Judge.

Petition for an injunction by J. P. Harrison and others against J. W. Wray. The court granted the injunction as prayed, and subsequently adjudged defendant in contempt for a violation thereof. Afterwards defendant filed a petition praying that the injunction against him be dissolved, and it was dissolved in part. Petitioners and defendant both bring writs of error. Order adjudging defendant for contempt reversed, and order dissolving the injunction affirmed.

Goodwin, Anderson & Hallman and N. A. Morris, for J. W. Wray. D. W. Blair, for J. P. Harrison and others.

COBB, J. On April 14, 1902, Harrison and others, as citizens and residents of the town of Ball Ground, in Cherokee county, filed their petition against J. W. Wray, alleging that the defendant was maintaining and running a "blind tiger" in the town of Ball Ground by selling intoxicating and spirituous liquors in violation of law. One of the paragraphs of the petition was in the following language: "Petitioners show that the said Wray claims to be operating said place under a pretended license granted him by the town council of Ball Ground, but petitioners charge that said so-called license is absolutely null and void, for the reasons hereinafter stated." The principal reason alleged why the license was void was that it was not granted upon a petition signed by two-thirds of the citizens of the town, asking that the license be issued, as required by law. The prayer of the petition was that an injunction be granted restraining the defendant "from the further prosecution and running of said 'blind tiger,' and from the further selling of any spirituous, malt, or in-

toxicating liquors in said town." The defendant filed a demurrer and answer, and introduced certain evidence claimed to support the allegations of the answer thus filed. The demurrer did not raise the question as to whether one openly selling liquor under color of authority was running a "blind tiger." After considering the pleadings and the evidence, the judge, on April 21, 1902, granted an order "that the prayer for injunction be, and the same is hereby, granted, and the defendant is restrained as prayed." This judgment was not excepted to. On April 28, 1902, there came on to be heard before the judge of the superior court of Cherokee county a petition filed by the persons who were the plaintiffs in the foregoing petition, alleging that the order granting the injunction was still of force, and that since the granting of the same the defendant continued in the sale of spirituous and intoxicating liquors in the town of Ball Ground, in violation of the injunction, and is now engaged in the sale of such liquors at such town. The plaintiffs prayed that the judge might grant such an order, and impose such a penalty upon the defendant as would be reasonable and proper for the enforcement of the order and the protection of the petitioners. The defendant answered this petition, setting up that he was not then, and had not been, violating the order granting the injunction; that he closed his saloon immediately upon the granting of the order, and had not opened the same until the 25th of April, 1902, at which time more than two-thirds of the citizens within the corporate limits of the town of Ball Ground petitioned the mayor and council of the town to grant defendant a license to retail liquor therein, as prescribed by the Acts of 1882-83 of the General Assembly of the state; that upon his compliance with the conditions prescribed by such law the mayor and council granted to him a license, under authority of which he opened his saloon; and that defendant was enjoined by the court from selling liquor under his old license. On May 5, 1902, the court, upon motion of the plaintiffs, granted an order striking, and refusing to allow the defendant to prove the same by evidence, all that portion of his answer which alleges the obtaining of a new license and undertakes to justify his conduct in selling liquor in Ball Ground since the granting of the injunction against him. The court then entered an order adjudging the defendant to be in contempt, making the attachment against him absolute, ordering him to pay a fine of \$200 and be imprisoned in the common jail of the county for 20 days. To the order striking the portions of the answer referred to and refusing to allow him to prove the same by evidence the defendant excepted.

On May 7, 1902, Wray filed a petition praying that the injunction entered against him on April 21st be dissolved, and that the order for the attachment be vacated, or so modified as to provide for a punishment as for a technical, but not an intentional, violation of the in-

junction. This petition contained substantially the following allegations: Petitioner did not understand that the injunction issued against him restrained him from procuring or the mayor and council from issuing to him a new license, but regarded the order simply as one restraining him from selling liquors under the license which he then had. On April 25, 1902, petitioner filed with the mayor and council a petition asking that a license to retail liquors be issued to him, this petition being signed by 63 qualified voters of the town of Ball Ground, there being only 91 qualified voters in the town. This petition was adjudged by the mayor and council to be sufficient, and, the petitioner having complied with the law in all other respects, a license was duly issued to him. He had no intention of violating the order of the court, but fully believed this license conferred upon him the right to sell liquors in the town of Ball Ground. Attached to this petition as exhibits were copies of the minutes of the town council of Ball Ground, showing that Wray, on April 25, 1902, presented a petition for a retail liquor license, signed by 63 persons, and that a resolution was passed reciting that, "more than two-thirds of the citizens of the town of Ball Ground having filed a petition asking that a license be granted J. W. Wray to sell spirituous and malt liquors at retail within the corporate limits of such town, it is resolved that, in compliance with such petition and the Acts of 1882-83 of the general assembly, a license be granted" to the petitioner for a sum named. It also appeared from the minutes that a bond had been given and oath subscribed by Wray as required by law. There was also attached to the petition a copy of the license granted to Wray, dated April 25, 1902, and authorizing him to retail liquors within the town of Ball Ground. Affidavits of certain persons were also attached to the petition, showing that on the 25th day of April, 1902, there were living in the town of Ball Ground only 91 male persons over the age of 21 years; also affidavits from the 63 persons who signed the petition to the mayor and council to grant the license, stating that each of them was, on April 25, 1902, a citizen of the town of Ball Ground over the age of 21 years. A demurrer was filed to this petition by the plaintiffs in the original petition for injunction upon the ground that Wray, by the order of April 21, 1902, had been adjudged in contempt, and that, as it appears from the petition that he has violated this order, and made no effort to obey the same, he is not entitled to be heard before the court on a motion to dissolve the injunction. They also answered the petition, setting up that the population of the town of Ball Ground on April 25, 1902, was not less than 350 persons, all of whom were citizens under the constitution and laws of the United States and the state of Georgia; that the total number of female citizens of 21 years of age and over residing in the town was at least 80, and the minors, males and females,

who were citizens of the town, were at least 192; that of the female citizens in the town at least 15 were single persons, and 5 were widows, who were heads of families. The answer alleges that for this reason Wray had no legal license to retail spirituous liquors on April 25, 1902, and that the injunction against him should not be dissolved. On May 17, 1902, the judge granted an order dissolving the injunction "to the extent of allowing the movant to sell liquor under the new license granted April 25, 1902." To the granting of this order Harrison and others excepted. In the bill of exceptions they assign this order as error, because Wray was not entitled to present and have heard his motion to dissolve the injunction, because, under the evidence, the license issued to him on April 25, 1902, was illegal and void, the petition therefor not having been signed by two-thirds of the citizens of the town as required by law.

1. Under the charter of the town of Ball Ground the mayor and council were authorized to issue licenses for the sale of spirituous and malt liquors at retail, but no license could be issued unless the applicant for the same presented with his application "a petition signed by two-thirds of the citizens of said town, asking for such license." Acts 1882-83, p. 478, § 14. One of the questions to be determined in this case is, who are citizens of the town of Ball Ground, within the meaning of that provision of the charter just quoted? Does the term "citizens" include males and females, adults and infants, or did the general assembly use the word as synonymous with "qualified voters"? A citizen has been defined to be "a person, native or naturalized, of either sex, who owes allegiance to a government, and is entitled to reciprocal protection from it." *Webst. Int. Dict.* In this broad sense not only adult males are citizens, but females of any age, and infants of either sex. Infants, insane persons, and felony convicts, whose offenses involve moral turpitude, even when actually serving a term of penal servitude, are also citizens, within the broad meaning of the term. Certainly it was not the intention of the general assembly to provide that an applicant for the sale of liquors in the town of Ball Ground should present a petition signed by two-thirds of all these different classes. The idiot, the lunatic, the convict, and the babe in arms were certainly not within the contemplation of the general assembly when it used the term "citizens." Infant citizens who have arrived at the age of discretion are not considered by the law sufficiently matured to discharge such civil functions as are connected with the making or the administration of the law. *Civ. Code*, § 1811. Females of all ages are, and have always been, in this state, relieved of the burdensome duties of citizenship, such as military, jury, police, patrol, and road duty. Being excused from the performance of the burdensome duties of citizenship, they have never had conferred upon them some of the

privileges of citizenship, which, although their exercise may carry with it little or no burden, at the same time are privileges fraught with responsibility. Both society and the law, however, in many respects accord to females greater rights and greater protection than to males. Females, being by nature burdened with duties and responsibilities which men cannot perform, have cast upon them, by the demands of society, duties and responsibilities which, even if capable of being performed at all by males, cannot be so well performed. Those who formed and framed governments in the past, in consideration of these facts, have generally done that which has been done in this state,—withdrawn from the female citizen all privileges of citizenship relating to the affairs of government, and relieved her from all of the burdensome duties which the male citizen is required to perform in return for the protection which the government gives to him. The female citizen has been, and will always be, at least equally protected with males by the law, notwithstanding the disabilities imposed upon her by nature which prevent her from performing many of the more important duties of citizenship. The law always has protected and always will protect this class of citizens, and should always relieve them from all duties relating to governmental affairs, that they may not be disturbed in the performance of those duties imposed upon them by nature and society, and which are higher and more important to the welfare of society than the exercise of any civil function. From motives of the character just referred to, the framers of our government, out of deference to the superior rights of the female citizen, not only excused her from the burdensome duties of citizenship above referred to and the duties incident to the elective franchise, but also, as a general rule, relieved her from the duties incident to holding public office; and in this state it is provided distinctly that females are not eligible to any civil office, or to the performance of any civil function, unless specially authorized by law. Civ. Code, § 1810. The settled policy of this state is that female citizens shall not be harassed and annoyed with matters relating to governmental affairs. The lawmakers of this state have never been so inconsiderate or unkind as to impose duties purely political upon the female citizens of the state. All laws must, therefore, be construed in the light of this fact. Wherever a civil function is to be exercised, or a duty political or quasi political is to be performed, unless there is something in the statute requiring the contrary construction, it is to be construed as imposing those duties upon that class upon which the law generally casts such duties; that is, the qualified voters of the state or political division dealt with in the statute. It is the general rule in this state that questions relating to the sale of liquor are submitted to the qualified voters of the locality to be affected. The general local op-

tion law and various local laws relating to the regulation of the sale of liquor in the different localities of this state submit the question to the qualified voters of the locality to be affected. Wherever the general assembly has seen proper to allow any other class of citizens to be heard on this question, even by petition, the act has expressly provided that such other class may be heard. See the act of 1875 relating to Schley county, which required that consent to the granting of a license "should be signed by two-thirds of the citizen freeholders, male and female, living within three miles of the place at which the applicant proposes to sell." Acts 1875, p. 354. And see the act of 1888 relating to Whitfield county, which provided that the sale of domestic wines should not be legal if a "majority of those above the age of eighteen, male and female, residing within two miles of such place of manufacture and sale, shall at any time file in the office of the ordinary objections in writing to such sale." Acts 1888, p. 314. To authorize a female citizen to hold public office, the law of this state in terms provides that there must be an express provision to this effect. To authorize a female citizen to exercise any civil function, there must also be an express statute conferring this authority. Therefore, when the words of a statute are ambiguous or equivocal, that construction must be placed upon it which will relieve the female citizen from the exercise of civil or political functions. We do not think that the general assembly, in using the word "citizens" in the charter of Ball Ground, intended to embrace within the meaning of that term either female citizens resident in that town or any class of citizens other than qualified voters.

2. It follows from what has been said that the first license to Wray was illegal and void, and that the second was lawful and regular in all respects. The judge granted the injunction to restrain Wray from selling liquor under the first license upon the ground that such an injunction was authorized by what is known as the "Blind Tiger Law" (Acts 1899, p. 73; Van Epps' Code Supp. § 6654 et seq.). Whether a person selling liquor openly and under color of authority is running a "blind tiger" within the meaning of that law is a question not raised in the present case. The injunction, however, did not have the effect to restrain Wray from proceeding to secure a license to be issued to him in accordance with the law; and when such a license was issued this authorized him to sell. Properly construed, the order of the judge simply restrained Wray from selling liquor in the town of Ball Ground without a lawful license, and a sale by him after the injunction was granted, under authority of a license which was legal and regular in all respects, was not a violation of the injunction. The judge therefore erred in striking that part of the answer of the defendant to the rule for contempt which attempted to set up that the sales which were

alleged to have been in violation of the order of the court were made under authority of a lawful license, which had been granted after the order was passed. Under the allegations of his answer, Wray never violated the injunction. He was never in contempt. He should not have been attached for contempt; and, this being true, the fact that he was attached constituted no sufficient reason for refusing to hear him on the motion to dissolve the injunction. If he had really violated the injunction, then, of course, he should not have been heard on the motion to dissolve until he had purged himself of this contempt. See, in this connection, *Remley v. De Wall*, 41 Ga. 466 (3); *Jacoby v. Goetter*, 74 Ala. 427; 2 High, Inj. (3d Ed.) § 1464. The judge erred in his rulings which resulted in the defendant being attached for contempt, and there was no error in dissolving the injunction.

Judgment in one case reversed; in the other affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 981)

JOHNSTON v. GULLEDGE.

(Supreme Court of Georgia. July 22, 1902.)

PLEDGE—NOTE—PROPERTY OF MARRIED WOMAN—SECURITY FOR HUSBAND'S DEBT—PARTIAL DEBT OF WIFE—PLEDGE'S RIGHT OF RECOVERY—APPLICATION OF PROCEEDS—REQUESTED INSTRUCTION—NECESSITY OF WRITING.

1. The trial judge did not err in instructing the jury to the following effect: If a promissory note, owned by a wife, is given in pledge to secure a debt which is in part that of the wife and in part that of her husband, and such parts are readily ascertainable, the pledge is a valid one as to the part of the debt which is due by the wife, and the pledgee is entitled, when due, to recover from the maker the amount expressed in the note.

2. When the maker of such a note has in good faith paid such a note, he is entitled to the performance of the obligations which the payee undertook as the consideration for the same.

3. Whether the pledgee, after collecting the note, has made proper application of the proceeds, does not concern the maker.

4. When it does not appear that a request to charge was made in writing, a complaint that the trial judge erred in refusing such request will not be considered.

5. The evidence sustained the verdict, and no error was committed in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Upson county; *E. J. Reagan*, Judge.

Action by *M. F. Gullledge* against *M. C. Johnston*. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Worrill & Rigdill and *Allen & Tisinger*, for plaintiff in error. *R. T. Daniel* and *O. H. B. Bloodworth*, for defendant in error.

LITTLE, J. The defendant in error, by his petition duly filed, prayed that *Mrs. Johnston* be required to execute and deliver to him good and sufficient titles in fee simple to certain land in Monroe county, this

state, which he fully described. The following facts are made to appear by the evidence: *Gullledge* purchased from *Mrs. Johnston* the land which is the subject-matter of his petition, agreeing to pay therefor the sum of \$650, for which he gave two notes, each for \$325, one to become due November 1, 1897, and the other November 1, 1898, payable to "M. C. Johnston or order." The first of these notes he paid to *Mrs. Johnston* when due. The second was deposited as collateral with the *Griffin Savings Bank*, to secure the payment of three notes, for \$78.31 each, signed by *Mrs. Johnston*, which were in renewal of a note for \$209.77 signed by herself, her husband, and her son. She claimed that this original note for \$209.77 was not her debt, but that of her husband. She further claimed that she did not authorize any one to pledge the second note given to her by *Gullledge* as collateral to secure the payment of these notes, and she notified *Gullledge* not to pay his note to the bank. After its maturity, however, the bank demanded payment from *Gullledge*, and he paid it. *Mrs. Johnston* claims that the payment made under these circumstances was not a valid payment of the note, and that *Gullledge* owes her the amount expressed in the second note, with interest thereon; and she avers her readiness, upon the payment of this sum, to make *Gullledge* title to the land, but until such payment she insists that no obligation rests on her to convey it to him. The facts in relation to the execution of the original note for \$209.77, and the deposits of the *Gullledge* note to secure the payment of the renewal notes above referred to with the *Griffin Savings Bank*, as we obtain them from the record, are as follows: *Johnston*, the husband of the defendant, was engaged in mercantile business in the city of *Griffin*, as was also *Mr. Blakely*, president of the savings bank. There were mutual accounts between the parties. In adjusting these accounts it was found that *Johnston* owed *Blakely* \$62.27. Then the note of \$209.77 was executed by *Mrs. Johnston*, her husband, and her son, *C. H. Johnston, Jr.* This note was taken to the *Griffin Savings Bank* and discounted, and the proceeds, \$18.27, were placed to the credit of *Mrs. Johnston* at the bank. *Mrs. Johnston* was not present at the bank, nor did she personally procure the note to be discounted. Her husband took the note to her, and she signed it. He then delivered it to the bank, with certain collateral, which was subsequently withdrawn at the time the renewal notes were given, and the *Gullledge* note placed with the bank as collateral for these renewal notes. The *Gullledge* note had theretofore been indorsed by *Mrs. Johnston*. She testified, however, that she did not receive the money, but that her husband did; that the indorsement was not put on the note for the purpose of using it at the bank; and that she had never borrowed any money from the bank. There al-

so appeared in the evidence an original letter written by Mrs. Johnston to J. P. Nichols, president of the Griffin Banking Company, in which she stated that she had on that date, January 21, 1897, negotiated a loan with the savings bank of Griffin for \$209.77, to be due October 15, 1897, and to better secure the savings bank she had agreed to transfer all the collaterals and mortgages which the Griffin Banking Company held to secure her note to it, due November 1, 1897, for \$450, after that note had been paid. She then authorized the Griffin Banking Company to hand over and transfer to the Savings Bank of Griffin all other collaterals pertaining to her loan to it, after her note to it had been paid in full. The trial of the case resulted in a verdict for the plaintiff, and a decree was had requiring the defendant to make and execute to the plaintiff title to the premises as prayed for. Mrs. Johnston then submitted a motion for a new trial, which being overruled, she excepted.

1-3. A charge to the following effect is, in the fourth ground of the motion for a new trial, alleged to have been error: If the note of Gullledge was transferred to the bank as collateral security for the debt due the bank, and a part of the debt was the debt of Johnston, and a part of it the debt of his wife, then, if it could readily be ascertained from the testimony what part of the debt was the husband's and what part the wife's, the transfer of the note as security for part of the debt which was the wife's would be a valid transfer; and if it was transferred for the purpose of collateral security, and Gullledge paid it, such payment would be good, and the plaintiff would be entitled to a verdict. No specific reason is alleged why this charge was erroneous. Taken as an abstract proposition of law, the charge is sound. In the case of *Jones v. Harrell*, 110 Ga. 373, 35 S. E. 690, this proposition was ruled to be law: "If a married woman signs a promissory note, the consideration of which is partly her own debt and partly the debt of her husband, the payee can recover in a suit on the note that portion which was based upon the debt of the wife; the amount of her debt and that of the husband being clearly shown by the evidence." If it be true, as matter of law, that such recovery can be had, it must also be true that a promissory note belonging to the wife may lawfully be deposited as security for that part of the debt which is owed by the wife. When so deposited, the pledgee who takes it without notice stands upon the same footing as any other innocent purchaser without notice. *Bonand v. Genesi*, 42 Ga. 639. Undoubtedly the savings bank would have had the right to institute an action in its own name to recover from Gullledge the amount of the note pledged as collateral, had it not been paid. The principle was ruled in *Houser v. Houser*, 43 Ga. 415, that if the original note secured had been paid after the commencement of a suit by the pledgee to recover on the collateral, and the

holder of the collateral should proceed to a judgment thereon and collect the money, he would hold the same as the trustee for the benefit of those legally equitably entitled to it. Mr. Colebrook, in his work on Collateral Securities (page 176), states the rule as follows: "The pledgee is entitled to recover of the parties to such collateral note the whole amount of its face, holding any surplus for the benefit of persons who are entitled to it." See cases cited in note 6 of that page. So, then, if the savings bank was entitled to collect from Gullledge the amount of the collateral note which it held, and could compel Gullledge by suit to pay the same, certainly it was the duty of Gullledge to pay the note in the hands of the pledgee when it matured. When he had so paid it, the obligation into which he had entered with Mrs. Johnston would have been fully performed in accordance with their contract, and he would have been entitled to have a conveyance of the land. It must therefore be ruled that there was no error in the charge complained of.

4. Another complaint is that the court erred in refusing a stated request to charge. It does not affirmatively appear that the request to charge was made in writing. Indeed, the record shows that it was made by counsel for defendant "in their argument on the trial of the case," from which it is clearly inferable that it was not in writing. The judge was fully justified in ignoring a request not in writing, and an assignment that the judge erred in refusing such request will not be considered by this court.

5. The only remaining question for us to determine is whether the verdict was supported by the evidence. We think it was, for the reasons already given. It is not apparent to us that the note held by the savings bank was the debt of the husband, and not the debt of the wife. Certainly it is true that she had no connection with or liability for the debt which her husband owed Blakely; nor, as we understand it, does the note to the savings bank represent this debt. It makes no difference who negotiated with the bank for the loan which was made. It is uncontradicted that the note for \$209.77 signed by Mrs. Johnston, her husband and son, was discounted by the bank, and the proceeds placed to the credit of Mrs. Johnston. For all practical and legal purposes, this was her money. If it was, then the note which was discounted was her debt; and, while it may at some time have been her husband's debt, yet, as she received the proceeds, it was her debt. This money she saw fit to check out, and if she checked it out and permitted it to go into the hands of her husband, and with these proceeds he paid the debt of Blakely, it by no means resulted that the note to the bank was rendered invalid. She was at perfect liberty to do what she pleased with the money. She had full control of it. She could have given it to her husband, had she wished. In any event, as she signed the note to the bank and obtained

possession of the money, the debt was as much her own as it was that of her husband.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 189)

ATLANTA, K. & N. RY. CO. v. WILSON.

(Supreme Court of Georgia. Aug. 8, 1902.)

RAILROADS—ACTIONS FOR INJURIES—VENUE.

1. A suit against a railroad company for injuries sustained in a foreign state on account of the negligence of the agents and servants of the company in that state, if brought in this state must be brought in the county where the principal office of the company is located by its charter, no different provision having been made by the general assembly. This is true although the company may have established branch offices in another county, and its secretary, treasurer, and auditor, its traffic manager, and its general manager reside in that county, and from the offices there conduct the active management of the company.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by L. M. Wilson, administratrix, against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Smith, Hammond & Smith, for plaintiff in error. Clay & Blair, Hoke Smith, and H. O. Peeples, for defendant in error.

SIMMONS, C. J. It appears from the record that the Atlanta, Knoxville & Northern Railway Company has a line of road from Marietta, in Cobb county, Ga., to Knoxville, Tenn. The part of the road which is in Georgia is operated under a charter obtained from this state. That charter located the principal office of the company in Atlanta, Fulton county, and authorized the establishment of branch offices at other places. George T. Wilson was a locomotive engineer in the employment of the company. While operating an engine and train of cars in Knoxville, Tenn., he was killed. Letters of administration were issued to his widow, under the laws of Tennessee, and she, for the use and benefit of the widow and minor child of the deceased, brought suit against the railroad company in Cobb county, Ga., to recover damages arising, as she alleged, from the negligence of the company's agents and servants. The petition also alleged that "the principal and general offices" of the company are situated in Marietta, in Cobb county, and that these "offices include those of the general manager, treasurer, auditor, and other officers" of the company, "who are active in the management of said company's affairs." It further alleged that the company had also local offices in Cobb county. The defendant filed a plea to the jurisdiction, alleging that the superior court of Cobb county had no jurisdiction, and that the courts of Fulton county had jurisdiction, because the charter located the principal office of the com-

pany in the latter county. A copy of the charter was introduced in evidence, and showed that the principal office was located in Atlanta, in Fulton county. The evidence also showed that the vice president of the company resided in Atlanta, and had an office as vice president in Fulton county; that the president did not reside within this state; and that several of the directors resided in Fulton county. It also appeared that several of the officers had offices in Cobb county, and that all of the active business of the company, as to the transportation of freight and passengers, was conducted from these Marietta offices. The jury returned a verdict against the plea to the jurisdiction. The defendant moved for a new trial. The motion was overruled, and the movant excepted. One of the grounds of the motion for a new trial was that the court erred in charging the jury as follows: "The place of residence of a corporation is the place where the principal office is located, or where its principal operations are carried on, whence orders emanate, and where the chief officers are to be found. Now, the petitioner insists that this railroad company transacts no business in the county of Fulton; that it has no office there. If it has not, as I have said, it could be sued wherever its principal office is,—its general office is; and if that, gentlemen, is in the county of Cobb, why, in such a case, you would find against the plea of jurisdiction." It was also alleged in the motion that the verdict was contrary to law and the evidence. Counsel for the defendant in error argued that this case had been virtually decided in the case of *Wilson v. Railway Co.*, 115 Ga. 171, 41 S. E. 699. The petition in the present case was introduced in evidence in that case, and was held to be sufficient on its face to show jurisdiction in the courts of Cobb county. An examination of the allegations as to jurisdiction set out above will show that the petition presents a very different case from that made by the evidence. The petition alleged that the principal office and the general offices were located in Cobb county, and there was no intimation that the charter fixed the principal office in another county. The ruling on the allegations of the petition is, therefore, not applicable to the case as it is now presented for decision. Under the constitution of this state all civil cases, except certain ones, which are enumerated, "shall be tried in the county where the defendant resides." This was, early in the history of this court, held to include suits against corporations as well as suits against natural persons. Subsequently the legislature passed acts allowing certain cases against a railroad company to be maintained in counties other than that fixed by the charter as the county wherein the principal office should be located. This legislation was upheld on the ground that the state could fix the residence of its creature, the corporation, in any one or more of the counties of the state, and allow suits to be brought in such counties without violating the constitu-

tion. In cases where no such provision was made it was still held, however, that the residence of the corporation was in the county in which its charter fixed its principal office, and that suits against it must be brought in that county. The present suit for damages for an injury occurring beyond the limits of the state does not come within any of the legislation changing the general rule, and that rule must be applied. The railway company must, therefore, be held to be suable in such a suit in the county in which is located its principal office, and in no other. It was argued, however, that, while the charter fixed the principal office in Fulton county, the company had in fact removed it to Cobb county by placing in the latter county its general operative offices, and locating there such of its officers as took an active part in the administration and operation of the road. We think that, where the charter of a corporation fixes its principal office in a designated county, the corporation cannot, without the aid of legislation or of an amendment to its charter, change its residence and principal office. In the present case it appeared that the company maintained in Fulton county at least one office,—that of its vice president. In the same county several of the directors resided. The offices of the secretary, treasurer, and auditor, and of the acting general manager were not such offices as are usually created by the charter of a corporation, but we have in the brief of evidence only a small portion of the charter of the company, and cannot determine what offices were created by that instrument. The removal to Cobb county of the administrative offices and many of the corporate officers could not annul the charter provision fixing the principal office of the company, or change its residence, within the meaning of the constitutional provision as to the venue of suits. The case of *Jossey v. Railway Co.*, 102 Ga. 706, 28 S. E. 273, strongly supports this view. In that case it was held that, while the location of the principal office of a corporation, which is fixed by its charter at a particular place, cannot be changed by the corporation, the mere administrative offices for the conduct of business are subject to corporate control, and may be removed as the board of directors may deem best. In the opinion in that case (page 706, 102 Ga., page 273, 28 S. E.), Atkinson, J., said: "It will not be seriously questioned that when the situs of a corporation is once established by its charter, unless provision is made therefor in the charter itself, the directors have not authority to change the place of the corporate abode. * * * The business of a railroad corporation, because of its nature, must of necessity be conducted in places other than that fixed by its charter as the place of location of its principal office. While the latter place must be the point at which the corporation as a corporate entity resides, it is indispensable to its business that it shall be enabled elsewhere to establish offices of a purely administrative character, and

a distinction must be taken between the principal office of a corporation proper and those administrative offices which may from time to time be created by the corporation for the more convenient transaction of the business for the conduct of which it was created. It must have a place at which it must be sued, at which its corporate functions may be performed; but this does not negative the right to establish other places for the transaction of the industrial business of the corporation." The charter of the present plaintiff in error fixes the location of the principal office in Fulton county, and the corporation has no right or power to remove it. The charter fixes a definite place at which the corporation may be sued and must perform its purely corporate functions, and the corporation cannot change this. To allow such a change would not only grant to the corporation the power of legislating in this regard, and of changing a legislative enactment without the assent of the legislature or of the officer to whom its power is delegated, but would make the ascertainment of the location of the principal office as difficult and uncertain a question, and one as unsatisfactory of solution, as it was made in the present case for the jury by the charge of the court quoted above. We are clear that this charge is not the law, and that the verdict of the jury was, under the facts in evidence, contrary to law. It follows that the court below erred in overruling the motion for a new trial upon the question of jurisdiction.

The case was also tried in the court below upon the merits, and a motion for new trial made and overruled. The refusal of a new trial in the main case is also excepted to here, but, inasmuch as the decision made above renders nugatory what was done in the main case, we do not deal with the questions there made.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 186)

DIXON v. STATE.

(Supreme Court of Georgia. Aug. 8, 1902.)

CRIMINAL LAW — EVIDENCE — SELF-SERVING DECLARATIONS — INCRIMINATING STATEMENTS — TESTIMONY OF ACCOMPLICES — CONSPIRACY — WITNESSES — COMPETENCY — EXAMINATION — INSTRUCTIONS.

1. The verdict in this case having been fully warranted by the evidence, there is no merit in the general grounds of the motion for a new trial.

2. It is not, on the trial of a criminal case, competent to introduce in behalf of the accused evidence of his own self-serving declarations, whether made before or after the time of the commission of the alleged offense.

3. Though evidence of an incriminating statement made by a prisoner to another shortly after the latter had offered an inducement extending a hope of benefit is not admissible, another and entirely different incriminating statement, made hours afterwards, to the same person, under circumstances tending to show that it was purely voluntary, and not elicited by

such inducement, may be proved; the question whether or not the statement was in fact free and voluntary being one for determination by the jury.

4. That one is a convict does not render him incompetent to testify as a witness in the courts of this state.

5. The question of allowing a witness to be recalled to the stand for further examination, at the instance of either party, is always one within the discretion of the presiding judge, which this court will never control unless manifestly abused.

6. The accused in a criminal case is not entitled, as matter of right, to the privilege of making a supplemental statement to the jury.

7. While a conviction of a felony cannot be lawfully had upon the testimony of an accomplice, unless the same be corroborated by other testimony directly connecting the accused on trial with the perpetration of the crime, it is not essential that the corroborating testimony shall, in and of itself, be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material particular.

8. It is not, on the trial of one of two or more persons jointly indicted for a crime, inappropriate to charge upon the law of conspiracy merely because the indictment does not, in terms, allege that there was a conspiracy to commit the offense.

9. The existence of a conspiracy may be proved by circumstantial, as well as by direct and positive, testimony.

10. There was in the present case ample evidence to show that there was a conspiracy, not only to commit the crime, but also to conceal the fact of its perpetration.

(Syllabus by the Court.)

Error from superior court, Johnson county; D. M. Roberts, Judge.

Sarah E. Dixon was convicted of murder, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. B. T. Rawlings, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

LUMPKIN, P. J. Mrs. Sarah E. Dixon and Jerry Walden were jointly indicted for the murder of the husband of the former. Walden is now serving a life sentence based upon a verdict of guilty returned against him. Mrs. Dixon was convicted, and a like sentence was imposed upon her. This court granted her a new trial (see 113 Ga. 1039, 39 S. E. 846), and she was a second time found guilty, and sentenced to imprisonment for life. She is again before this court, alleging that the trial court erred in overruling a motion for a new trial made by her after the last conviction. This motion embraced the general, and a number of special, grounds. We have carefully read and considered the evidence. It established beyond doubt the guilt of Walden, and his testimony, if true, showed the guilt of Mrs. Dixon. This testimony was corroborated by evidence of numerous facts and circumstances which not only directly connected Mrs. Dixon with the perpetration of the crime, but was really sufficient to warrant a verdict of guilty against her. The testimony, as a whole, therefore, more than met the requirements of the law, and we have no

hesitation whatever in declaring that the general grounds of the motion are without merit. The special grounds thereof present for our determination the familiar questions dealt with above. The correctness of our rulings thereon, as announced in the headnotes, is too obvious to require elaboration or discussion. There was no error, and the judgment below must stand.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 206)

LINDER v. WHITEHEAD et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

VENDOR AND PURCHASER—PAROL CONTRACT TO CONVEY—SUBSEQUENT MORTGAGE BY VENDOR—EFFECT AS AGAINST VENDEE—REVIEW—QUESTIONS PRESENTED.

1. The motion to dismiss the writ of error in this case was not well taken.

2. When a petition is demurred to on both general and special grounds, and dismissed upon the former only, the supreme court will not, upon a bill of exceptions sued out by the plaintiff, in which he assigns error upon the ruling adverse to him, undertake to pass upon the sufficiency of the special grounds of demurrer. The ruling announced in the fifth headnote to the case of Crittenden v. Association, 36 S. E. 643, 111 Ga. 266, will not be extended beyond the special facts upon which it was based.

3. This case is, in principle, controlled by the decision rendered by this court in the case of Collins v. Moore, 41 S. E. 609, 115 Ga. 327, an application of which to the facts alleged in the plaintiff's petition requires a reversal of the judgment dismissing the same.

(Syllabus by the Court.)

Error from superior court, Laurens county; Jno. C. Hart, Judge.

Suit by J. L. Linder against E. M. Whitehead and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. S. Adams and Akerman & Akerman, for plaintiff in error. A. F. Daley and T. L. Griner, for defendants in error.

LUMPKIN, P. J. An equitable petition filed by Linder in the superior court of Laurens county against Whitehead, Hicks, sheriff, the John Flannery Company, and John Flannery, made in substance the following case: On February 22, 1892, Mrs. McCullers gave to the plaintiff her bond conditioned to make to him a title to described land upon his paying certain specified promissory notes, and also paying off certain judgments against J. C. McCullers, deceased, which were liens on the land. Plaintiff from time to time made payments reducing said indebtedness until some time in the fall of 1894, when there was due by him upon said purchase money a balance of \$700, besides interest. The notes evidencing this balance were sued to judgment in a justice's court. Subsequently the plaintiff entered into an agreement with Whitehead, by the terms of which the latter was to pay off the balance

¶ 9. See Conspiracy, vol. 10, Cent. Dig. § 106.

due by the former for the land, and he was to transfer to Whitehead the bond for title which had been executed by Mrs. McCullers. Whitehead also agreed to make to the plaintiff a new bond for title to the land, and give him additional time to pay for the same. Plaintiff delivered to Whitehead the bond for title executed by Mrs. McCullers, but did not transfer the same to Whitehead in writing. On December 4, 1894, Mrs. McCullers and others, all of whom were heirs at law of J. C. McCullers, executed and delivered to Whitehead a deed to the land mentioned above. About the time of the execution of the bond for title by Mrs. McCullers, plaintiff went into possession of the land, and has since then been in the open, notorious, adverse, and exclusive possession thereof, and has also erected upon the premises two houses at a cost of \$400, and has cleared the land, fenced the same, and kept it in a good state of preservation. After making the above-mentioned agreement with Whitehead, plaintiff from time to time paid to him "divers sums of money, and has long since paid off and discharged said indebtedness,—principal, interest, and costs." On February 6, 1895, Whitehead executed and delivered to John Flannery & Co., at that time a firm composed of John Flannery and John L. Johnson, of which John Flannery is the survivor, a mortgage for the sum of \$1,000, which was duly recorded. At the July term, 1901, of Laurens superior court, John Flannery & Co. obtained a rule absolute against Whitehead for the principal, interest, and costs then due upon said mortgage, and the *fi. fa.* issued thereon was on the 2d day of September, 1901, levied upon the land above mentioned by Hicks, the sheriff of said county. On the 5th day of November, 1901, the sheriff sold the land under said levy, and the same was bid off by the John Flannery Company, to whom the sheriff executed and delivered a deed in pursuance of said sale. Plaintiff's possession of the land at the time of the execution of the mortgage by Whitehead to John Flannery & Co. and at the time of the sale by the sheriff to the John Flannery Company was, in law, sufficient to put them upon notice of the plaintiff's equities in the premises; and he having paid to Whitehead the entire purchase money for the property, and having made valuable improvements thereon, it would be inequitable not to enforce the oral agreement between the plaintiff and Whitehead for the conveyance of the land in dispute. The John Flannery Company and Hicks, sheriff, are threatening to eject plaintiff from the premises and place some agent of the John Flannery Company in possession thereof. The prayers of the petition were (1) that Whitehead be decreed to execute and deliver to plaintiff a deed to the land in controversy; (2) that the mortgage from Whitehead to John Flannery & Co. and the deed from the sheriff to the John Flannery Com-

pany be decreed to be void as to plaintiff; and (3) that the sheriff and the John Flannery Company be enjoined from interfering with plaintiff's possession of the property. To this petition separate demurrers were filed by Whitehead, the John Flannery Company, and John Flannery. Each demurrer, besides being general, embraced several special grounds. The case came on for a hearing upon the demurrers at the January term, 1902, of the trial court, and an order was passed adjudging "that said demurrers be sustained on the general grounds of want of equity in said bill, and that the bill be dismissed on said general grounds," and, further, that the restraining order previously granted in the case be dissolved. Linder thereupon sued out a bill of exceptions, from which we extract the following: "The court passed an order sustaining both of said demurrers and dismissing said petition, to which ruling plaintiff excepted, and now assigns the same as error."

1. Upon the call of the case here, a motion to dismiss the writ of error was made, based on the grounds (1) that no supersedeas of the judgment rendered was granted by the court below, and that, the John Flannery Company having been put in possession of the land in dispute, "there is therefore no longer any cause for injunction"; (2) that the specification of error in the bill of exceptions is too uncertain, vague, and indefinite to be clearly understood; and (3) that this specification of error is "at variance with the judgment of the court attempted to be complained of." There is no merit in the first ground of the motion to dismiss, because there is no exception to that portion of the judgment of the superior court dissolving the restraining order; the exception being confined to the action of the court in sustaining the demurrers and dismissing the plaintiff's petition. Besides, the dismissal of the petition would, in effect, have dissolved the restraining order, whether the order of the judge had expressly so recited or not. Neither is the second ground of the motion to dismiss well taken. The bill of exceptions distinctly recites the fact that the demurrers were filed, and that the court sustained them. The record shows that the court sustained only the general grounds of these demurrers. In view of the recitals in the bill of exceptions and of the record, there is not the slightest difficulty in ascertaining the precise action of the court below of which complaint is made, or in arriving at the question presented by the assignment of error. The third ground of the motion to dismiss is not correct in its recitals of fact. The bill of exceptions states, as we have seen, that the court "passed an order sustaining both of said demurrers and dismissing said petition." The record discloses that this is exactly what happened, and the recital in the bill of exceptions is none the less true because the record further shows that the action of the court in sustain-

ing the demurrers was based exclusively upon the general grounds thereof.

2. Before undertaking to dispose of the case upon its merits, we desire to state that we deem it our duty to confine ourselves to a decision of the only question actually made and presented for our determination by the bill of exceptions, viz., was the plaintiff's petition good as against a general demurrer? The ruling announced in the fifth headnote to the case of *Crittenden v. Association*, 111 Ga. 268, 38 S. E. 643, does not, we think, constrain us to pass upon the special grounds of the demurrer. That ruling must be interpreted and understood in the light of the facts upon which it was based. It related to the second count in the plaintiff's petition. The first count thereof was stricken on general demurrer. The second count was stricken on designated special grounds, and this court was of the opinion not only that the trial court might have based its judgment upon another and stronger special ground, but also upon the ground that the entire petition, including, of course, the second count, "was demurrable on the general grounds." See remarks of Mr. Justice Lewis on page 272, 111 Ga., and page 646, 38 S. E. Accordingly the opinion was entertained that it would be useless to reverse the judgment and send the case back for another hearing, when, in any view of the petition, it ought to be dismissed. The headnote above specified, which, as stated, embraces what this court ruled with respect to the second count, is couched in more general terms than was necessary, and we do not now think it should be extended beyond the special facts with which it deals. Some of us, including the writer, are, however, of the opinion that in the *Crittenden* Case this court ought to have confined itself to passing upon those grounds only of the demurrer upon which the court below actually ruled. In view of the definite mandate embraced in section 5584 of the Civil Code, which was codified from the supreme court practice act of November 11, 1889 (Acts 1889, p. 116), that "the supreme court shall not decide any question unless it is made by a special assignment of error in the bill of exceptions," it would seem that this court is not at liberty to institute a general search into the contents of a record with a view to upholding a judgment "if it is right for any reason," but should confine itself to deciding such questions only as are specifically made and presented for its determination either by a main bill or a cross-bill of exceptions. Be this as it may, we all now agree that the present case ought to be disposed of on the line indicated in the second of the preceding headnotes. When it comes up for another hearing, the court below may yet do what it has not heretofore done, viz., pass upon the special grounds of the demurrers.

3. We have without serious difficulty reached the conclusion that the court erred in sustaining the general grounds of the demurrers. Mrs. McCullers having been paid in full for

the land, and the same having been conveyed to Whitehead, the case stood as if Linder had really purchased from Whitehead and had a perfect equity. As the petition does not show when the last of the purchase money was paid, it does not affirmatively appear that Linder could have filed and maintained a claim for the purpose of preventing the sheriff's sale. The case, upon its facts, is very similar to the recent one of *Collins v. Moore*, 115 Ga. 327, 41 S. E. 609. Applying what was there decided to the case before us, it should have been held by the trial court that as Linder remained all the while in possession, thus putting the Flannery Company and all the world on notice of his equities in the premises, it was his right to complete his contract of purchase with Whitehead without regard to that company's mortgage and the sale thereunder, and, to this end, was, under the facts alleged, entitled to the equitable relief for which he prayed.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 108)

MONK et ux. v. McDANIEL.

(Supreme Court of Georgia. Aug. 7, 1902.)

PARENT AND CHILD—RELINQUISHMENT OF CUSTODY—ADOPTING PARENT—RIGHT TO CUSTODY—ACCEPTANCE OF OFFER OF CUSTODY—HABEAS CORPUS—JUDICIAL DISCRETION.

1. Where a father in a letter to his sister-in-law requested that, in the event of his death, she would take and keep his child, and she, in response to such request, wrote him that in case of his death she would take the child and care for it until she could get it a good home, this correspondence did not, in the absence of an acceptance by the father of his sister-in-law's offer, give her, after his death, the legal custody and control of the child.

2. One who legally adopts a child has the right to its custody and control, and an agreement to relinquish the same must, in order to be enforceable, be clearly established by evidence, and also be distinct and unequivocal in its terms.

3. An answer to an offer will not amount to an acceptance, so as to result in a contract, unless it be unconditional and identical with the terms of the offer.

4. While the judge upon the hearing of a writ of habeas corpus for the detention of a child is vested with a discretion in determining to whom its custody shall be given, such discretion should be governed by the rules of law, and be exercised in favor of the party having the legal right, unless the evidence shows that the interest and welfare of the child justify the judge in awarding its custody to another.

5. Irrespective of other rulings complained of in the present bill of exceptions, the case, upon the facts disclosed by the record, is controlled by the legal propositions announced above, and applying the same results in a reversal of the judgment.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Carroll county; W. C. Harris, Judge.

¶ 4. See Habeas Corpus, vol. 25, Cent. Dig. § 84.

Habeas corpus by W. F. Monk and wife against Sarah A. McDaniel for the custody of Ethel Monk. From a judgment awarding the child to the defendant, plaintiffs bring error. Reversed.

Brown & Roop, for plaintiffs in error. W. D. Hamrick and I. E. Smith, for defendant in error.

FISH, J. This was a proceeding by habeas corpus, brought by W. F. Monk and his wife, Minnie Monk, against Sarah A. McDaniel, for the custody of Ethel Monk, formerly Ethel Coker, a child between four and five years of age. The judge of the superior court, upon the hearing, awarded the child to the defendant, whereupon the plaintiffs excepted. It appears from the record that Ethel is the daughter of John and Virginia Coker, who, until their respective deaths, resided in Henry county, Ala., and that John, who survived his wife, died about February, 1900. The record shows that on September 8, 1900, the plaintiffs, in the probate court of Barbour county, Ala., and in accordance with the laws of that state, adopted Ethel as their child, having her name changed to Monk, and that her grandfather Thomas Coker and her aunt Mrs. McCraney consented to the adoption. Plaintiffs based their right to the custody of the child upon this adoption.

1. One of the contentions of the defendant was that she was entitled to the custody of the child, because the child's father had given her to Mrs. Price, who in October, 1900, had given her to the defendant. It appeared that John Coker, about two weeks after his wife's death, and some four months before he died, wrote a letter to Mrs. Price, a sister of Ethel's mother, in which he used the following language: "My health is not very good, no way, and I may not live very long; and, if I should not, I don't know what would become of the children. I know that you have got your hands full, but, if anything was to happen, I want you to take Dudley and Ethel, if possible, and N. W. Vinson Fay, or [if?] it suited you, and you could keep her with them, that would be all right; maybe I would leave enough to help them along some, and, of course, I would expect you to take that." Mrs. Price, who resided in Henry county, Ala., testified by interrogatories as follows: "In reply to said letter I wrote said John Coker that I would, in case of his death, take said children and take care of them until I could get them a good home. I accepted said trust, but afterwards delegated the same to Sarah A. McDaniel, in consideration that she would take said children and raise them as her own, and to clothe, maintain, and educate them." It appeared that, immediately after the death of her father, Ethel was taken to the home of Mrs. Price, where she remained only one night, and was then taken to Barbour county, Ala., to her grandfather Thomas Coker and her aunt Mrs. McCraney,

by permission of Mrs. Price, to remain until she could arrange to get her a suitable home. Coker's desire, as expressed in his letter to Mrs. Price, evidently was that in the event of his death she should take and rear his children. To this it is clear she never assented, but in reply wrote, in substance, that she would care for them until she could get them a good home with some other person. He never agreed, so far as the record shows, that she might take the children for the purpose indicated in her reply. Although she met him upon four different occasions after she wrote to him,—three of them being when he was at her home with the children,—it does not appear that anything more was said as to her taking them. It is therefore apparent that Coker and Mrs. Price never had the same common intention as to the purpose for which she should take his children; there was no meeting of their minds on this subject; and it necessarily follows that Mrs. Price's evidence fails to show that any agreement was entered into between her and Coker whereby she acquired the right to the custody of the children after his death. This being true, of course she could not confer any right as to their custody upon the defendant, especially as against the claim of the plaintiffs, who had previously regularly adopted Ethel. Mrs. Price's testimony to the effect that she "accepted said trust" was merely her conclusion.

2. The defendant further claimed that the plaintiffs relinquished to her their right to the custody and control of Ethel after they adopted her. Mrs. Hearn was the only witness examined in reference to this feature of the case. She testified as follows: "That Ethel was a second cousin of hers and her sister Miss Sarah A. McDaniel; that in June, 1901, she went to Clayton, Ala., to plaintiffs, about Ethel; that she and defendant had already gotten her little brother, Dudley, who was just about two years older than Ethel, and wanted to get Ethel, also; that she saw plaintiffs, and told them what she wanted, and also told them that she thought it best for the children to be raised together, and that plaintiffs said they thought so too; that she had had some correspondence with plaintiffs about Ethel before, and had written them that she was coming to see about getting her; that at first plaintiffs did not seem to be willing to give up Ethel; that she told them that they could have their adoption papers canceled, and that she would pay all costs thereof; plaintiffs agreed to let her and defendant have Ethel, if she was satisfied to stay with them; that at that time Mrs. Strickland, a relative of plaintiffs, was present, and they all said that it was right; that Ethel and Dudley ought to be raised together; and she took her with the distinct understanding that she and defendant were to keep her unless she became dissatisfied; that Mr. Monk said the probate judge was out of town, and when he returned he would have the adoption papers canceled; wit-

ness was at that time single, and defendant intended to adopt Ethel and Dudley; that Ethel seemed to be happy and contented with her and defendant; that, when anything was said to her about going back to plaintiffs, she would say she did not want to go." Plaintiffs introduced the following letter from Mrs. Hearn to Mrs. Monk, dated July 11, 1901: "I have consulted one of the best lawyers in your state, and he says that, if you and your husband decide to cancel the adoption papers, the process is simple and inexpensive. You have only to annul the decree heretofore rendered by the judge of probate of Barbour county. And we would proceed under the laws of Georgia in our adoption proceeding. I trust that you have reached the conclusion that this is the best course to pursue. If so, just send me bill of costs, and I will forward you check for the same. Ethel, I am sure, will always love you both for your loving care bestowed upon her, and, I believe, above all things else, that you have not allowed her to be separated from her little brother." Plaintiffs also put in evidence a letter from Mrs. Hearn to Mrs. Monk, dated November 15, 1901, as follows: "Yours of recent date received. I am very busily employed now between my affairs at Victory and housekeeping at Carrolton, but I will try to get off in December and take Ethel to see you, if you think after a few days you would consent to let her come back with me, and you will relinquish your papers." We do not think that Mrs. Hearn's testimony, as a whole, was sufficiently clear and definite to authorize a finding that plaintiffs entered into a contract with her by which they agreed to permanently relinquish to her their right to the custody and control of their adopted child. Of course, adoptive parents are as much entitled to the custody of their adopted child as are natural parents to their children; and, as was held in *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48: "Where it is insisted that the father has relinquished his right to the custody of his child to a third person by contract, the terms of the contract, to have the effect of depriving him of his control, should be clear, definite, and certain." While it is true that Mrs. Hearn testified that she took Ethel with the distinct understanding that she and the defendant were to keep her, unless she became dissatisfied, and that she had never become so, yet it does not affirmatively and distinctly appear that such was the understanding on the part of the plaintiffs. From Mrs. Hearn's testimony it appears that the agreement was executory in character,—that is, that plaintiffs were to have "their adoption papers canceled" before giving up their right to the child's custody; and it appears that this was never done. Mrs. Hearn's letters show that she still recognized plaintiffs' right to the child after she had brought her to Georgia in pursuance to the alleged contract.

3. Another contention of the defendant was that Mr. Monk in January, 1902, entered into

a contract with Mrs. Hearn by which he agreed to relinquish to her and the defendant the custody of the child. The only evidence submitted in support of this contention was as follows: Mrs. Hearn testified, in substance, that Monk came to Carrolton in January, 1902, after the child; that witness and the defendant declined to give her up; that the child did not wish to go with him; that he said if witness and defendant would pay him \$50—that being about the amount he had expended on the child's account—he would let them keep her; that witness agreed to do this, and told him, if he would have his adoption papers of Ethel canceled, and forward them to the Carrolton bank, she would instruct the bank to pay him the \$50; that this was on Sunday, and the next week she did instruct the cashier of said bank to pay Mr. Monk the \$50 when said papers were sent to the bank, thus canceled, and wrote Mr. Monk, accepting his proposition; that she would have accepted his proposition the day it was made, but did not want to make a trade on Sunday. A letter from Mrs. Hearn to Mr. Monk, dated February 21, 1902, was as follows: "My sister and I accepted your proposition. The money is now in the Carrolton bank, and has been all the while, ready for you when you send in the papers as you said you would. This the second time I have notified you." A letter from Mr. Monk to the cashier of the Carrolton bank was put in evidence by the defendant. It was as follows: "Mrs. Ella Hearn wrote me a few days ago that she had deposited \$50 in the bank for you to give me when I notify you of the cancellation of my adoption of a little girl. If such is the case, and you have the money to send to me on such notice, please let me know by return mail." We gather from this evidence that Monk proposed to Mrs. Hearn that, if she and the defendant would pay him \$50, he would relinquish to them the right to the custody of his child; that this proposition was not accepted when made, but that during the next week Mrs. Hearn proposed to him that if he would have "his adoption papers" canceled, and forward them to a named bank, she would instruct the cashier thereof to pay him the \$50. Manifestly, this was not an unconditional acceptance of his offer, but merely a counter offer made by her, which, never having been accepted by him, so far as disclosed by the record, did not operate to bring about a contract between them. An answer to an offer will not amount to an acceptance thereof, so as to result in a binding contract, unless it be unconditional and identical with the terms of the offer. If there be a variance between the offer and the answer thereto, then there is no acceptance, but a counter offer, which, to result in a contract, must be accepted by the original proposer. *Clark, Cont. 37.*

4. In view of the evidence submitted on the hearing, we do not think that the judge, in the exercise of the discretion vested in him

in such cases, was authorized to award the custody of the child to the defendant, rather than to the plaintiffs, the adoptive parents. There was uncontradicted evidence to the effect that Mr. and Mrs. Monk were each 32 years of age; that they had been married several years and had no children of their own; that he owned realty of the value of twenty-five hundred or three thousand dollars, and three or four hundred dollars worth of personalty; that he was a graduate of the Normal School of Alabama, had been teaching school seven or eight years, and at the time of the trial was superintendent of the schools of Phenix City, in that state, at a salary of six hundred dollars per annum. There was absolutely no evidence tending to show that either he or his wife was an improper person to have the custody of the child they had regularly adopted, or that they had ever in any way mistreated her. It appeared that the defendant was a maiden lady, worth between four and five thousand dollars, and there was no question as to her ability and fitness to rear the child. Both plaintiffs and the defendant professed to love her, but the child expressed a decided preference to remain with the defendant. Under these circumstances, we are constrained to hold that our learned Brother of the trial bench erred in awarding the custody of the child to the defendant. If all else were equal, the adoptive parents, who had never relinquished their right, were certainly entitled to the custody of the child, in preference to the defendant, who had no legal claim to her. It was ruled in *Miller v. Wallace*, supra: "In all writs of habeas corpus sued out on account of the detention of a child, the court, on hearing all the facts, may exercise its discretion in awarding the custody of the child, and shall have authority to award such custody to a third person. Such discretion, however, is not arbitrary or unlimited, but is a discretion guided and governed by the rules of law. Under the discretion vested in him, no judge has authority to disregard or even to impair any acknowledged or established right of a party by its exercise, and, if he does so, he abuses that discretion. The power ought to be exercised in favor of the party having the legal right, unless the circumstances of the case and the precedents established would justify the court, acting for the welfare of the child, in refusing it."

5. In view of the rulings we have made, which dispose of the case upon its substantial merits, we deem it unnecessary to pass upon other assignments of error presented in the bill of exceptions.

Judgment reversed. All the justices concurring, except LITTLE, J., who dissents, and LEWIS, J., absent on account of sickness.

LITTLE, J. (dissenting). It is my judgment that, under the evidence contained in the record, the question of awarding the custody of the child was a matter to be governed by the

exercise of the sound discretion of the judge, and that it was not abused by the judgment he rendered.

(116 Ga. 22)

AMBOS v. PARSONS.

(Supreme Court of Georgia. July 23, 1902.)

EVIDENCE—INSTRUCTIONS.

1. The evidence sustained the allegations of the plaintiff's petition, and was sufficient to authorize the verdict which was rendered. The charges complained of were adjusted to the issues raised by the pleadings. The requests to instruct the jury, as set out in the motion for a new trial, were properly refused, and no error requiring the grant of a new trial was committed by the presiding judge.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Fallgiant, Judge.

Action between Henry Ambos and George Parsons. Judgment rendered, and Ambos brings error. Affirmed.

R. R. Richards, for plaintiff in error. Barrow & Barrow and David C. Barrow, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 19)

SAVANNAH & S. RY. CO. v. DEAL.

(Supreme Court of Georgia. July 23, 1902.)

NEW TRIAL—DENIAL.

1. There being no complaint that any error of law was committed, and the evidence, as a whole, being sufficient to support the verdict as reduced, under the order of the court directing that so much of the same as embraced a recovery of attorney's fees be written off, it does not appear that the trial court abused its discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Bulloch county; B. D. Evans, Judge.

Action by Allison Deal against the Savannah & Statesboro Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Brannen and Groover & Johnston, for plaintiff in error. Moore & Deal, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 27)

JONES v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. July 23, 1902.)

RAILROAD EMPLOYE'S DEATH—ACTION AGAINST COMPANY—NONSUIT.

1. Although there was evidence from which the jury could have found that the plaintiff's husband, an employé of the defendant company,

for whose homicide the suit was brought, was killed by the running of the defendant's train, yet, as it neither affirmatively appeared that he was without negligence, nor that the defendant was negligent, the judge of the superior court did not err in refusing to sanction a petition for certiorari, complaining of the grant of a nonsuit upon the trial of the case in the city court.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Hattie Jones against the Central of Georgia Railway Company. Judgment of nonsuit in the city court, and the judge of the supreme court refused to sanction a petition for certiorari. Plaintiff brings error. Affirmed.

John R. Cooper and M. W. Harris, for plaintiff in error. Hall & Wimberly and J. E. Hall, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1013)

GEORGIA R. CO. v. BALDONI.

(Supreme Court of Georgia. July 22, 1902.)

CARRIERS—EJECTION OF PASSENGER—USE OF TICKET ON DAY OF SALE—PLACARD—ADMISSIBILITY IN EVIDENCE—PASSENGER'S BAGGAGE—SHIPMENT OF MERCHANDISE—SUBSEQUENTLY DISCOVERED FRAUD—JUSTIFICATION OF EJECTION—EXCESSIVE VERDICT.

1. A placard or notice posted by a railroad company at its ticket office, announcing that tickets of a certain class must be used on the day of sale, is not admissible in evidence in favor of the company in a suit against it by a passenger for an alleged wrongful ejection from a train on the ground that the ticket had expired, unless it be shown that the passenger had read the placard or had notice of its contents.

2. Where such a passenger had procured his trunk to be checked two days before he undertook to use the ticket, and, when he attempted to use it, was ejected on the ground that the ticket had expired, and long subsequently it was ascertained that his trunk contained merchandise instead of baggage, it was not error for the trial judge to refuse to charge the jury that on account of this fraud the company had a right to cancel the contract, and could not be held liable for ejecting the passenger.

3. Under the evidence disclosed by the record, the verdict was so excessive as to indicate bias and prejudice on the part of the jury.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by Peter Baldoni against the Georgia Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Jos. B. & Bryan Cumming, Hardeman Davis, and Turner & Jones, for plaintiff in error. M. R. Freeman, Minter Wimberly, and Roland Ellis, for defendant in error.

SIMMONS, C. J. Baldoni, a peddler of balloons and confetti, bought a ticket over

the Georgia Railroad from Macon to Augusta. He did not take the train on the day the ticket was purchased, but two days thereafter started on his journey. When, a few miles from Macon, Baldoni presented his ticket to the conductor, the latter informed him that the time within which the ticket could be used had expired, that the rules of the company limited the use of the ticket to the day on which it was purchased, and that therefore he could not ride upon it. Baldoni had no notice of this rule of the company, and there was no limitation expressed on the ticket. Baldoni insisted that he had paid his money and was entitled to ride. After some further conversation, the conductor informed him that they were approaching the first station outside of Macon, and that he must get off of the train. When the station was reached, Baldoni objected to leaving the train, but obeyed the orders of the conductor and alighted. The conductor seems to have called the agent at the station, and told him of putting Baldoni off, and requested him to flag the incoming train, so that Baldoni could return to Macon. This Baldoni denied, claiming that he had to alight hurriedly in the darkness and find his way to the agent. At any rate, the incoming train was stopped, and Baldoni, paying a few cents for his fare, returned to Macon. He reached Macon before 10 o'clock in the evening, having been absent therefrom but two or three hours. Baldoni then attempted, at several different boarding houses, to get lodging for the night, but was refused. He did not go to a hotel, because he was not sufficiently well dressed, and was afraid the rates would be too high. He finally slept in the city park on some straw. He became quite cold during the night, and early in the morning warmed himself in the station of another railroad company. The ejection from the train was on Saturday night. Baldoni remained in Macon all day Sunday, purchased another ticket from the Georgia Railroad Company, and, just 24 hours after his first attempt to make the trip, boarded a train for Augusta, which place he reached on Monday morning. He thus lost one day (Sunday) on account of the action of the conductor. At times Baldoni's business netted him as much as \$100 per day, and at other times nothing. Augusta was not at that time a good place for his business. He brought suit against the company for damages, and the jury awarded him \$1,250. The defendant moved for a new trial, and the motion was overruled. The defendant excepted.

1. On the trial the defendant offered in evidence a placard or notice, printed in very large type and addressed to the public, in which, among other things, it was stated that "all one-way tickets will be limited to date of sale." A copy of this placard was posted at the ticket office in the depot, and

another near the entrance to the depot. The ticket sold to Baldoni had no limitation expressed upon it, and this placard was offered to show that Baldoni had notice of the regulation of the company requiring such tickets to be used on the day of sale. There was no proof that the plaintiff could read, or that he had read this notice or knew of its contents. There is nothing to show that his attention was in any way directed to this placard. We think that a placard of this character is not sufficient of itself to put a passenger on notice of the rules and regulations of the company in regard to the time limit of their tickets. In these days of hurry and bustle, passengers have little time to give to reading the notices exposed to their gaze in ticket offices and stations. Very few passengers, if any, stop to read such notices. Their usual object is to purchase their tickets, and, boarding the train, to depart upon their journeys. It would not do to charge them with notice of the rules and regulations of the company simply because a copy of such rules or regulations was posted at the ticket office. Notice of the rule or regulation must be in some way brought home to a passenger before he can be charged with it. The court was therefore right in rejecting this evidence.

2. Pending the trial it was ascertained that the plaintiff had checked his trunks over the road of the defendant by virtue of his ticket, which he showed to the baggage master, two days before he attempted to use his ticket for passage, and that the trunks contained balloons, confetti, and other merchandise in which plaintiff dealt. The court was requested by counsel for the defendant to charge the jury that this was a fraud upon the company, and gave it the right to cancel the contract of carriage with Baldoni, and that therefore it could not be held liable for ejecting him from the train. The court refused to so charge, but charged to the contrary. In this the court did not err. The contract made with the railroad company was to transport the purchaser and his baggage. The fact that the purchaser had put merchandise as well as baggage in his trunk would not authorize the company to eject him from its train. The company could have refused to carry the trunks unless the passenger had paid the freight charges on the merchandise in them. After the trunks were checked, it might have had the right to notify the passenger that he would not be carried unless the freight was paid; this notice being accompanied by an offer to return what money was due him. After the trunks had reached their destination the company might have refused to deliver them until the proper freight charges had been paid. If the character of their contents was

not discovered until after delivery, the passenger was still liable to the company in an action for the freight charges. The company did none of these things. We think that a passenger's ticket is not avoided and rendered worthless by the mere fact that he has checked in his trunk articles which are not baggage, any more than if such trunks should happen to weigh more than the company allows to be carried as baggage. Moreover, it appears from the plaintiff's evidence that the company, by its agents, did not undertake to treat the contract as canceled, but ejected plaintiff on the ground that the time limit of his ticket had expired. Having ejected him on this ground, it is doubtful if the company could set up fraud in the procurement of the contract, or a violation of the contract, as a justification of the illegal ejection. Be this as it may, the company did not pursue any of the remedies it had, and cannot rely upon the nature of the contents of the plaintiff's trunks as a justification of his ejection.

3. One ground of the motion for new trial complains that the verdict is excessive. We think this ground well taken. While it is true that the conductor of the train had no legal right to eject the plaintiff because of the expiration of the time limit put upon his ticket by rules of the company of which the plaintiff had no notice, the evidence of three witnesses for the defendant showed that there was no force used, but that the plaintiff obeyed the order of the conductor and alighted at the station. The plaintiff himself testified that the conductor took hold of him and got the best of him, and he surrendered, but even then it does not appear that he was in any way injured or hurt physically. He did not lose any time from the sale of his goods by reason of the delay, the day lost being Sunday. He slept in the park in Macon because, according to his testimony, the boarding house keepers refused to entertain him, and he was not sufficiently well dressed to go to a hotel. According to his testimony, there was but one other passenger in the coach from which he was ejected. Under these facts, we think the verdict for \$1,250 was so excessive as to show bias and prejudice in the minds of the jury. While railroad companies should be held to strict accountability for a violation of the rights of their passengers, we think that juries should not be allowed to run wild in the assessment of damages in cases like the present. Taking into consideration all the facts and circumstances disclosed by the evidence, we think the verdict was far in excess of what it should have been.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 1)

BRUNSWICK GROCERY CO. v. LAMAR et al.

(Supreme Court of Georgia. July 23, 1902.)

STATUTE OF FRAUDS—SALES OF GOODS—REMEDIES OF SELLER—RESALE.

1. The acceptance and receipt of merchandise of a greater value than \$50 under an oral contract of sale which is contemplated by Civ. Code, § 2693, par. 7, as relieving the contract from the operation of the statute of frauds, must be such a transfer of the physical possession of the property as places the goods beyond the control of the vendor, and within the control of the vendee. Such a transfer is not accomplished where, under a contract of the nature indicated, the goods are left in the possession and control of the vendor pending the taking of an inventory by him to determine the price to be paid for the goods.

2. Allegations in a petition which seeks to recover on such a contract to the effect that in pursuance of the contract the plaintiff proceeded with the taking of an inventory, and that at the solicitation of the defendants the plaintiff made announcement to various persons of the transfer of the goods in question, and sent to them orders to be filled for defendants in lieu of the plaintiff, are not sufficient to take the case out of the statute on the ground of a part performance of the contract by the plaintiff.

3. It is not permissible for a vendor, in selling goods as the agent of the vendee, who has refused to accept them, to buy, without authority, additional goods for the purpose of inducing a sale of those on hand, and charge the vendee with a loss sustained on the whole.

(Syllabus by the Court.)

Error from superior court, Lowndes county; A. H. Hansell, Judge.

Petition by the Brunswick Grocery Company against J. J. Lamar and another. Judgment for defendants, and petitioner brings error. Affirmed.

W. E. Kay and E. P. S. Denmark, for plaintiff in error. W. H. Griffin, for defendants in error.

LITTLE, J. This was an equitable petition brought by the Brunswick Grocery Company against J. J. Lamar and J. F. Lewis, who formerly did business as a partnership under the firm name of J. J. Lamar & Co. The petition was, in substance, as follows: Prior to October 14, 1899, the defendants entered into negotiations with the plaintiff with a view to acquiring the stock of merchandise owned by the plaintiff in its wholesale grocery and tobacco business; it being contemplated that the plaintiff would retire from business, and that the defendants would acquire its stock and the business built up by it. An oral agreement was reached "on the basis that the said defendants acquired the entire stock of merchandise" belonging to the plaintiff, including that in transit on October 14, 1899, "on the basis of invoice cost, with freight thereon added, and the payment thereof was to be all cash, or, at the option of the defendants, one-third in cash and the balance within twelve

months, with interest, in which latter event the same was to be satisfactorily secured as petitioner might direct." The purchase price was to be determined by an inventory of the stock on hand. In accordance with this agreement the plaintiff began taking stock, and the business was from that time conducted by the plaintiff for the benefit of the defendants. The defendants made public announcement of their purchase of the plaintiff's business, and at the solicitation of the defendants the plaintiff made an announcement of the sale to a number of the most reliable houses with which it had been doing business, inclosing orders for shipment to the defendants in lieu of the plaintiff. The defendants also published notices in the newspapers of the acquisition by them of the business of the plaintiff. While the delivery was in progress and the price to be paid was being determined, the defendants, without any reason, notified the plaintiff that they declined to carry out their contract, and requested a rescission of same, which plaintiff refused, electing to stand upon the trade as made with the defendants. The plaintiff then proceeded as rapidly as possible, and to the best advantage of the defendants, to dispose of the stock of goods on hand which had been purchased by the defendants, the value of which on October 14, 1899, with freight added, was \$16,980.44. In so disposing of these goods, it became necessary for the plaintiff to purchase other goods from time to time, so as to sell to the best advantage the goods not easily marketable, and to sell in the due course of trade on the usual time and credit to buyers, all of which was done with prudence and judgment by plaintiff, so that much less loss was entailed by the defendants than would have resulted if the plaintiff had sold the stock of goods at forced sale immediately upon the announcement by the defendants of their refusal to consummate the trade. The money expended in purchasing goods for this purpose of aiding in selling off the stock amounted to \$22,985.05, and the freight on all items purchased from and after October 14, 1899, to the date when shipment ceased, was \$1,043.99, "making a total value of goods on hand on October 14, 1899, freight added, and those subsequently purchased, with freight added, of \$41,009.48." From October 14, 1899, to August 1, 1900, when the liquidation of the sale of the stock was completed, for items of labor, rent, insurance, traveling expenses of salesmen, and miscellaneous items of expense, there was paid out \$3,506.77. There was also paid out for salaries of officers and employes, other than set out in the last-named item, \$3,045. The stock of goods on hand October 14, 1899, together with those subsequently purchased, was sold for \$45,540.18, entailing a loss of \$1,623.42 incurred from bad debts necessarily created in disposing of so large an amount of goods principally to a trade purchasing usually on credit, which is also justly due petitioner, together with interest on said sum, mak-

¶ 1. See *Frauds*, Statute of, vol. 23, Cent. Dig. §§ 176, 174, 175.

ing due as principal \$3,644.49, with interest, all of which defendants refuse to pay. The refusal of the defendants to carry out their agreement was in bad faith, and was done for the purpose of embarrassing plaintiff's business and credit, so that the defendants might acquire the stock of goods at a less figure than they would have to pay under the agreement made by them. Plaintiff also prays to recover attorney's fees amounting to \$600. By amendment the plaintiff alleged that the defendants had also contracted with reference to purchasing the good will of the business, and added the following paragraph:

"That the defendants on or about the 13th, 14th, and 15th days of October, 1899, inspected, approved, and thereby accepted the property so sold to them by petitioner, and thereupon actually received the same; said property being left in your petitioner's possession as the bailee of the defendants."

In another amendment it was alleged that the plaintiff "made a due and legal tender of the said goods purchased by said defendants, and demanded payment for the same, and the said defendants refused to take the goods or to pay for them."

The defendants filed a demurrer on numerous special grounds, those that are pertinent to the present discussion being that the suit appears to be upon a contract in parol for the sale of more than \$50 worth of goods, it not appearing that any note or memorandum in writing expressing the consideration was ever made; that it affirmatively appears that the plaintiff kept control of the goods and sold them to others, the petition containing no allegation that the defendants were insolvent or unable to pay the amount of the trade in full; and that no reason is shown why the plaintiff would have assumed guardianship over the stock of goods and conducted a mercantile business for the defendants for nearly a year. The trial court sustained the demurrer and dismissed the petition, to which judgment the plaintiff excepted.

1. Relatively to the statute of frauds, this case presents for determination two questions: First. Do the allegations of the petition make a case of a complete sale, with an acceptance and receipt by the vendee of all or any part of the goods sold? Second. Does the case fall within the purview of any one of the three paragraphs of section 2694 of the Civil Code, which enumerates the exceptions to the operation of the statute of frauds? Section 2693 of the Civil Code names, among the obligations which must be in writing to be binding on the promisor (paragraph 7), "any contract for the sale of goods, wares and merchandise in existence, or not in esse, to the amount of fifty dollars or more, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment." It is quite clear that the words "except the buyer shall accept part of the goods sold and actually receive the same" necessitate an actual, rather

than a constructive or implied, delivery. It is true, as was in effect ruled in the case of *Daniel v. Hannah*, 108 Ga. 91, 31 S. E. 734 (3), that this delivery need not be into the physical custody or possession of the buyer, but may be made to his agent, or at a place designated by him. But there must be no doubt that the delivery, in whatever form it be made, is such a one as will place the goods entirely beyond the control of the vendor and completely within the control of the vendee. Accordingly, it has been held that delivery by the vendor to a carrier for shipment to the vendee (the goods being lost or destroyed in transit) is not such an acceptance and receipt by the vendee as will prevent the operation of the statute. *Loyd v. Wright*, 20 Ga. 574, 65 Am. Dec. 636. In the same case, reported in 25 Ga. 216, the rule is laid down in the following language: "There is no actual acceptance, to satisfy the act, so long as the buyer continues to have the right to object to the quantum or quality of the goods." Tested by this rule, it is evidence that there was in the present case no acceptance and receipt sufficient to satisfy the statute, for the plaintiff had not completed the inventory, which was a condition precedent to fixing the price to be paid for the goods; and, in the light of all the authorities, it seems to us quite clear that the petition does not make out such a case of acceptance and actual receipt of the goods on the part of the defendants as to take the case out of the statute of frauds. True, the petition alleges sale and acceptance, but it contains other matter which directly negatives these allegations. It appears that no definite agreement had been reached as to the price to be paid for the stock of goods; this very important detail having been deferred pending the inventory, which, it is to be noted, was taken by the plaintiff. While it is alleged that from the time the plaintiff began taking stock the business was conducted by the plaintiff for the benefit of the defendants, it is not alleged that this course was in pursuance of any agreement, oral or otherwise, between the parties, or that the defendants consented to it or were cognizant of it. If there were any doubt as to whether the petition makes out a case of acceptance and receipt by the defendants such as is contemplated by the statute, it would be put at rest by the plaintiff's amendment, which declares that "petitioner made a due and legal tender of the said goods purchased by said defendants, and demanded payment for the same, and the said defendants refused to take the goods or to pay for them." This language, of course, must be construed most strongly against the pleader; and it goes without saying that there could have been no tender and no refusal to accept, if, as is contended, the goods had already been accepted by the defendants, and were under their actual control.

2. Section 2694 of the Civil Code, as before stated, enumerates the cases to which the preceding section, embodying the provisions

of the statute of frauds, shall not apply. They are: (1) When the contract has been fully executed; (2) where there has been performance on one side, accepted by the other, in accordance with the contract; and (3) where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance. The facts set out in the petition do not, we think, bring the case made within any one of these three classes; certainly not in the first, and we think not fairly or properly in either of the other two. What, according to the allegations of the petition, was done by the plaintiff in the way of a performance of the contract? Three things are alleged, viz., the taking of an inventory to determine the price to be paid for the goods, the sending out of notices of the transfer of the business, and the ordering of additional goods upon the credit of the defendants. It does not appear from the record that any of these acts, except the taking of the inventory, was required by the verbal contract made between the parties, and upon which this suit is founded. The announcement by the plaintiff, to the houses with which it had been dealing, of the transfer of the business, is alleged to have been merely at the solicitation of the defendants, and not in pursuance of the contract of purchase, while no authority is shown for the ordering of additional goods to be charged to the defendants. The contract declared on was one simply of bargain and sale, and anything done outside of the plain limits of such a contract must, in order to charge the defendants, have entered in some way into the consideration of the agreement between the parties. Certainly it will not be contended that the taking of an inventory for the purpose of ascertaining the price to be paid, accompanied, so far as appears from the record, by no expense whatever, is such a part performance of the contract of sale as to render it a fraud of the defendants to refuse to comply with their agreement. Mr. Browne, in his work on the Statute of Frauds (section 448), says: "It is obvious that the mere circumstance that a verbal agreement has been in part performed can afford no reason, such as to control the action of any court, whether of law or equity, for holding the parties bound to perform what remains executory. The doctrine of equity in such cases is that where an agreement has been so far executed by one party, with the tacit encouragement of the other, relying upon his fulfillment of it, that for the latter to repudiate it and shelter himself under the provision of the statute would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement." It is further to be observed that the announcement by the plaintiff of

the transfer of the business to the defendants, and the ordering by it of goods for the defendants, not being required by the contract of sale upon which the plaintiff is seeking to recover, cannot constitute part performance of that contract, so as to take it out of the statute. In the case of *Graham v. Thels*, 47 Ga. 479 (2), this court ruled that the part performance provided by the statute as making an exception "must be a part performance of the contract, and the doing by either party of some independent act, not a part of the contract, does not become a part performance because the doer of the act was led so to act by his belief that the parol contract would be performed by the other party." It is argued, however, by counsel for the plaintiff, that the question whether these acts constituted a part performance of the contract was one which should have been submitted to the jury; and in support of this contention the cases of *Bryan v. Railroad Co.*, 37 Ga. 26, and *Burnett v. Blackmar*, 43 Ga. 569, are cited. An examination of these cases shows that they do not sustain the position taken by the plaintiff; for in each of them it appears that the petition filed by the plaintiff alleged acts which, indisputably and as matter of law, constituted part performance of the contract sued on, and which, if proved, would necessarily have prevented the operation of the statute. In the *Bryan Case*, supra, so confidently relied upon by counsel, there was no demurrer to the petition. A judgment of nonsuit was rendered, which was reversed by this court on the ground that evidence had been introduced by the plaintiff tending to establish the part performance of the contract set up in his petition, and that this evidence should have gone to the jury for their consideration. The case at bar is quite different; for here the facts alleged in the petition do not, as a matter of law, if proved, constitute a part performance of the contract declared on.

3. Independently of what has been here laid down, there can be no doubt that the plaintiff has failed to make a case for recovery, under Civ. Code, § 3551, of the difference between the contract price of the goods and the price realized upon the sale of the stock by the plaintiff. There is no authority or precedent in law for the course pursued by the plaintiff, after the alleged violation by the defendants of their contract, in continuing to conduct the business for nearly a year, buying new goods, opening additional accounts (many of which were admitted to have been bad), and keeping traveling salesmen on the road for the purpose of selling the goods.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 989)

LAMPKIN et al. v. NORTHINGTON.

(Supreme Court of Georgia. July 22, 1902.)
**JUSTICES OF THE PEACE — GARNISHMENT —
 PAYMENT INTO COURT — RIGHTS OF
 DEBTOR — PRESUMPTIONS.**

1. Where a garnishee filed in a justice's court an answer admitting indebtedness, and paid the money into court, the answer setting up that the fund due to the debtor was, for reasons stated, exempt from the process of garnishment, and the magistrate thereupon entered a judgment that the fund was not so exempt, and it appears from a record brought to this court that the debtor sued out a certiorari, complaining of that judgment, it will, as against him, when the record does not disclose anything to the contrary, be presumed that he was a party to the garnishment proceedings from which such judgment resulted.

2. In such a case, the debtor cannot maintain against the magistrate a rule for the money, without first showing that the judgment adjudging the fund subject to garnishment has on certiorari been set aside.

(Syllabus by the Court.)

Error from superior court, Fulton county;
J. H. Lumpkin, Judge.

Garnishment proceedings in justice's court between A. C. Lampkin and others and C. N. Northington. From proceedings in the superior court, Lampkin and others bring error. Reversed.

S. D. Johnson, for plaintiffs in error. John L. Hopkins & Sons, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

LITTLE, J. I concur in the judgment.

(116 Ga. 194)

WRIGHT v. ROBERTS.

(Supreme Court of Georgia. Aug. 8, 1902.)

DECEDENTS' ESTATES — ADMINISTRATORS — APPOINTMENT — JURISDICTION — YEAR'S SUPPORT FOR WIDOW AND CHILDREN — PETITION — AMENDMENT — PAROL EVIDENCE — ASSIGNMENTS OF ERROR.

1. It is not error on the part of the trial judge to reject an amendment to a petition, when it appears that such amendment only embraces matter which has before been set out in another amendment previously allowed.

2. Parol evidence, offered for the purpose of showing insolvency, that one owned land in another state, and that the same was incumbered by liens greater in amount than the value of such land, is inadmissible.

3. A petition which alleged that a year's support was void because of fraud practiced upon the ordinary and another is not sustained when the evidence in support thereof fails to show that any fraud was practiced.

4. When an exception is taken, and the error alleged to have been committed was in admitting "all testimony" bearing on a given subject of inquiry, the assignment of error is not properly made, because it fails to state, either literally or substantially, what was the evidence admitted.

5. When the grant of letters of administration and the setting aside of a year's support to a widow and minor children are attacked as

being void on the ground that the intestate was a nonresident of this state, and at the time of his death had no property in the county where proceedings were had, such attack fails when the evidence shows that the intestate, though a nonresident, was possessed of a valuable interest in a partnership in this state, and left personal property in such county at the time of his death, and that at the time of setting apart the year's support the widow and two of the minor children resided in said county.

6. The evidence in this case was sufficient to authorize the conclusion that the petitioner was a creditor of his deceased father's estate, but it was entirely insufficient to show that the fund which went into the hands of the administratrix, or, after her death, into the hands of her administrator, or into the hands of the guardian of her two minor children, was any part of the fund which the father, while in life, held in trust for the petitioner.

7. It does not appear from any of the assignments of error embraced in the bill of exceptions that the court committed any error in rejecting or admitting evidence.

8. The evidence introduced on the trial was not sufficient to authorize a recovery or judgment in favor of the plaintiff under any of the prayers of his petition. The grant of a nonsuit on motion of the defendant was therefore not error.

9. The foregoing rulings dispose of the case on its merits, under the assignments of error contained in the bill of exceptions.

(Syllabus by the Court.)

Error from superior court, Douglas county;
C. G. Janes, Judge.

Petition by L. T. Wright against W. T. Roberts, administrator. Judgment in favor of defendant, and plaintiff brings error. Affirmed.

C. J. Haden and J. S. James, for plaintiff in error. Roberts & Hutcheson, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1017)

FREEMAN & TURNER NEWS CO. et al. v. MENCKEN et al.

(Supreme Court of Georgia. July 22, 1902.)

NEW TRIAL — ERROR IN ADMITTING EVIDENCE — REVIEW — NECESSITY OF SETTING FORTH EVIDENCE — REFUSAL TO PERMIT QUESTION — TESTIMONY SOUGHT TO BE ELICITED — NECESSITY OF SHOWING — SALES — DEFECTIVE GOODS — INJURY TO OTHER GOODS — INSTRUCTION — CONFORMITY TO PLEADING — SUPPORT IN EVIDENCE — REFUSAL OF INSTRUCTION — PRESUMPTION AGAINST ERROR.

1. A ground of a motion for a new trial complaining of the admission of evidence will not be considered by the supreme court unless the evidence objected to is set forth, either literally or in substance, in the motion itself or in an exhibit thereto.

2. In assigning error upon the refusal of a trial judge to allow a witness to answer a specified question propounded to him, it must be made to affirmatively appear, not only what was the testimony sought to be elicited from the witness, but that the party calling him fully informed the court as to the purpose of such question, and the nature of the anticipated answer to the same.

3. For no reason assigned were the charges excepted to erroneous. So far as appears, the court did not err in refusing to instruct the jury as requested; and the verdict returned by them was not, as claimed, without evidence to support it.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by Aug. Mencken & Bro. against the Freeman & Turner News Company, a partnership, and others. From a judgment in favor of plaintiffs, defendants bring error. Affirmed.

A. L. Dasher, for plaintiffs in error. Lane & Park, for defendants in error.

LUMPKIN, P. J. This case originated in a justice's court, the same being an action upon an open account instituted by Aug. Mencken & Bro. against the Freeman & Turner News Company, a partnership, and the members thereof, to recover a balance alleged to be due upon a bill for cigars sold to that firm. The defense interposed to this suit was that the defendants had "been endamaged by the said Aug. Mencken & Bro. in the sum of eighty-six dollars and thirty-one cents (\$86.31), for that the said Aug. Mencken & Bro. shipped to defendants certain tobacco and cigars in which there were tobacco worms; that these worms were scattered throughout defendants' stock of tobaccos and cigars, and rendered certain parts of said stock absolutely worthless"; and that "the defects in said tobacco and cigars at the time of the purchase [were] not patent, and by no possible means could they have discovered such defects." Upon the trial of an appeal to the superior court, the jury returned a verdict in favor of the plaintiffs. The defendants made a motion for a new trial; and we are called upon to pass on the merits of the various grounds upon which it was based, for the reason that it was overruled by the court below, and the defendants are here complaining that this action on its part was attended with error.

1. The question of practice dealt with in the first headnote has heretofore been definitely settled by this court. See *Petty v. Railway Co.*, 109 Ga. 666, 35 S. E. 82, following previous decisions; *Webb v. Wight & Westlosky Co.*, 112 Ga. 432, 37 S. E. 710; *Willingham v. Cycle Works*, 113 Ga. 953, 39 S. E. 314; *Waldrop v. Wolff*, 114 Ga. 610, 40 S. E. 830, and cases cited.

2. In support of the ruling announced in the second headnote, it is only necessary to cite the recent case of *Bigby v. Warnock*, 115 Ga. 303, 41 S. E. 622.

3. In one of the grounds of the motion for a new trial, complaint is made that the court instructed the jury that: "If the defendants show that there were worms in the cigars at the time they were sold to them by the plaintiffs, and that these facts were unknown to defendants, and that these worms were af-

terwards communicated to the defendants' stock of tobacco and cigars, and defendants suffered damages thereby, then" they would be entitled to such damages as they "sustained by reason of the worms communicated to the stock of the defendants." This charge was precisely adjusted to the facts alleged in their written defense. Nevertheless error is assigned thereon, because (1) "there was no evidence going to show that the bugs were in the cigars at the time of sale"; and (2) "defendants insisted that at the time of the sale, not the worm, but the worm-producing egg or germ, was in the cigars, and invisible to any ordinary inspection." That the defendants may not, as they appear to confess, have established their defense as laid, but relied upon a state of facts not set up in their pleadings, cannot properly be regarded as warranting the conclusion that the charge excepted to affords them any just cause of complaint. *Hill v. Callahan*, 82 Ga. 109, 112, 113, 8 S. E. 730. See, also, in this connection, *Hill v. Music House*, 113 Ga. 320, 324, 38 S. E. 752, wherein this court held it is not incumbent on a trial judge, even though a special written request be preferred, "to give an instruction from which the defendant would get the benefit of a defense not made in his answer." Upon this branch of the case the court further instructed the jury as follows: "If defendants purchased these cigars, and they were sound and free from fault at the time [they] purchased them, and after they purchased them worms developed in them, and the development of the worms in the cigars was one of the risks incident to the tobacco trade, and the defendants suffered damages in consequence of the worms coming into the tobacco, the loss on that account would fall on defendants in the case, just as if a person should buy eggs, potatoes, or apples that were sound at the time they were purchased, and rot or disease should subsequently develop in them, the loss should fall on the purchaser rather than the seller." Complaint is made of this charge on the ground that the court thereby "injected into the case an issue upon which there was no testimony"; it not having been shown "by plaintiff that tobacco worms and bugs were natural to tobacco, as rot and decay of cabbage, apple, and potato, or tomato." Our reply to this contention is that a witness introduced in behalf of the plaintiff testified as follows: "I am a tobaccoist, and have been familiar with the cigar and tobacco business for twenty years. There are two kinds of worms or bugs which get into tobacco. One is a little gray bug or worm, and the other is brown. These worms or bugs are very often found in tobacco, especially in hot weather. During May or June tobacco usually goes through a what we call sweating period, and fermentation sets in, and the bugs are then hatched out. I don't know whether the bugs cause the fermentation, or the fermentation cause the bugs. Such bugs or worms are likely to

appear in any tobacco, and I do not consider their appearance any evidence of anything improper in the manufacture of tobacco. The worms or bugs are likely to get into tobacco at any stage, and, of course, it would be possible for them to get into the tobacco before it was made. * * * We have trouble with worms or bugs almost every season; and, as I understand it, they are likely to come, particularly in warm, damp atmospheres." In another ground of the motion for a new trial, exception is taken to the refusal of the judge to give in charge to the jury a written request on the subject of the measure of damages to which the defendants would be entitled if they established their alleged right to recover. In approving this ground, his honor below certified that in his general charge he did, as he thought, clearly instruct the jury fully upon this subject. This being so, and the charge of the court not being before us, not having been specified as a material part of the record to be transmitted to this court, we must assume that the request to charge was sufficiently covered by other instructions given to the jury as to the matter to which it related. *Mickleberry v. O'Neal*, 98 Ga. 43, 25 S. E. 933. As to the general grounds of the motion, it need only be said that a careful perusal of the brief of the evidence satisfies us that the verdict of the jury was not, as claimed by the plaintiffs in error, unauthorized under any view of the testimony adduced at the trial.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 22)

GANO v. GREEN.

(Supreme Court of Georgia. July 23, 1902.)
COVENANTS IN DEEDS—ACTIONS FOR BREACH—PLEADING.

1. A petition in an action to recover damages for a breach of warranty alleged to be contained in a deed is open to special demurrer if it does not set forth, at least in substance, a sufficiency of the contents of such deed to show the covenant of warranty the breach of which is complained of; and where such a demurrer to such a petition is filed, and the defect is not cured by amendment, it is not erroneous to dismiss the petition.

2. Irrespective of the questions presented by the other grounds of the demurrer in this case, the judgment excepted to was, for the reason indicated above, manifestly correct.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Jr., Judge.

Action by F. W. Gano against E. W. Green. Judgment dismissing the petition, and plaintiff brings error. Affirmed.

Edwin L. Bryan, for plaintiff in error.
Brown & Brown, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

¶ 1. See *Covenants*, vol. 14, Cent. Dig. § 191.

(116 Ga. 19)

FLORIDA CENT. & P. R. CO. v. BERRY.

(Supreme Court of Georgia. July 23, 1902.)
CARRIERS—DELAY IN TRANSPORTING GOODS—EXCUSES.

1. Where an owner of goods delivers them to a railroad company to be shipped to a designated point, and a bill of lading is issued to the owner, in which he is named as both shipper and consignee, and which contains the words, "notify" a third person, it is the duty of the railroad company, unless otherwise instructed by the owner, or by some holder of the bill of lading properly indorsed, to transport the goods, within a reasonable time, to the point of destination mentioned in the bill of lading. The company will not be relieved of liability to the owner for loss occasioned by a failure to comply with this obligation by showing that the failure to deliver the goods at the point of destination within a reasonable time was due to instructions not to deliver, given by the person whom it was directed in the bill of lading to notify of the arrival of the goods at their destination, who, at the time of such instructions, was not in possession of the bill of lading nor entitled to its possession. Such person could not acquire any title to the goods or right to control the shipment until he came into possession of the bill of lading properly indorsed by the consignor.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by J. M. Berry against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiff in error.
J. R. Lamar, for defendant in error.

COBB, J. This was an action by Berry to recover damages from the railroad company for a failure to deliver within a reasonable time two car loads of bran shipped from Augusta, Ga., to Tampa, Fla. A bill of lading was issued to Berry, in which he was named as both shipper and consignee, but which contained the words, "Notify Phillips & Fuller." The bill of lading was indorsed by Berry, and attached to drafts upon Phillips & Fuller, which were sent for collection to a bank at Tampa. These drafts were not paid. At the trial the railroad company offered evidence tending to show that the failure to deliver the bran in Tampa was due to instructions given to it by Phillips & Fuller, and that it could have delivered the bran at Tampa within a reasonable time if it had not been for these instructions. The court rejected this evidence, and this is assigned as error. It is therefore necessary to determine what control, if any, Phillips & Fuller had over this shipment before they paid the drafts attached to the bill of lading. The contract contained in the bill of lading was an agreement on the part of the railroad company to carry the goods to Tampa, Fla., within a reasonable time, and nothing short of this was a compliance with the contract. See *Hutch. Carr.* (2d Ed.) § 328. If the carrier had transported the goods to Tampa within a reasonable time, it would

have complied with its contract. Until it had done this, Phillips & Fuller had no connection at all with the transaction. Under the contract made with the railroad company Berry retained title to the goods shipped, and Phillips & Fuller could not acquire title to the same until the goods were delivered, and paid for by them. See *Erwin v. Harris*, 87 Ga. 333, 336, 13 S. E. 513. The direction in the bill of lading to notify Phillips & Fuller was, in effect, an instruction to the company to advise them that the goods had reached their destination; and until the goods had reached their destination no notice to Phillips & Fuller was required, and until that time they had no concern with the transaction. The carrier should have transported the goods to Tampa, the place of destination; and, if Phillips & Fuller failed or refused within a reasonable time to appear with the bill of lading properly indorsed and receive the goods, the railroad company could have stored the goods in Tampa, and held the same at the risk of Berry, its liability from that time on being simply that of a warehouseman. *Railway Co. v. Pound*, 111 Ga. 6, 36 S. E. 312; *Hutch. Carr.* (2d Ed.) § 368 et seq. Even if the goods had reached Tampa within a reasonable time, Phillips & Fuller, under the stipulations in the bill of lading, would have had no right to receive or otherwise control the property shipped until they presented the bill of lading indorsed by Berry. *Boatmen's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221, 7 S. E. 125; *Hutch. Carr.* (2d Ed.) § 121b. There was no error in rejecting the evidence. The fact that Berry, after notice to him that the goods had not been transported to Tampa, still insisted upon the payment of the drafts by Phillips & Fuller, would not relieve the railroad company from liability to him for a failure to transport the property within a reasonable time. Such was the undertaking of the company, and Berry had a right to expect that the contract would be complied with. Neither would the railroad company be relieved from liability by showing that the goods had been transported to a point near Tampa, but not at the place of destination in Tampa, and there held subject to delivery in Tampa whenever Phillips & Fuller should so require. Under the bill of lading Phillips & Fuller had no right to take control of the goods shipped until after the drafts attached to the bill of lading were paid. The railroad company, under the terms of the contract, was to treat Berry as the owner of the goods until some one appeared with the bill of lading indorsed, demanding delivery of the property. Berry, as the owner of the goods and the consignee in the bill of lading, had a right to demand of the railroad company that the goods be carried to their point of destination within a reasonable time. The railroad company had no right to deal with Phillips & Fuller, nor was it under any obligation to notify them of anything, until

the goods had been safely transported to the point of destination at Tampa, Fla. There was no error in the rulings complained of.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 18)

LEE et al. v. MALLARD.

(Supreme Court of Georgia. July 23, 1902.)

DEEDS—PROPERTY CONVEYED—FISHERY RIGHTS.

1. The owner of water in a stream or pond not navigable, or of all the privileges therein, has the exclusive right of fishing in the same, though the land lying under the water may belong to another. Accordingly, a conveyance of land lying upon the natural bank of an unnavigable stream, upon which is located a mill, standing on other land of the grantor, and across which is a dam, causing a pond, a portion of which covers a part of the land conveyed, does not pass to the grantee any right to fish in such pond at any point below the then existing high-water mark thereof, when by the terms of the conveyance an exception is made in the grantor's favor as to "all water privileges up to high-water mark, and all other privileges in going to his mill." *Turner v. Selectmen*, 22 Atl. 961, 61 Conn. 175, 14 L. R. A. 336; *Coke*, Litt. 4, b; *Washb. Easem.* *416. See, also, *Jackson v. Halstead*, 5 Cow. 216.

2. Applying what is laid down above to the undisputed facts of the present case, the court did not err in directing the verdict which the jury rendered.

(Syllabus by the Court.)

Error from superior court, Bulloch county; B. D. Evans, Judge.

Action between Ebb Lee and others and George Mallard. From the judgment rendered, Lee and others bring error. Affirmed.

Moore & Deal, for plaintiffs in error. J. A. Brannen, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 27)

UNION CASUALTY & SURETY CO. v. WINSHIP.

(Supreme Court of Georgia. July 23, 1902.)

RECEIPT—ADMISSIBILITY IN EVIDENCE.

1. Whether the receipt admitted in evidence was or was not relevant depended on the conclusions to be drawn from other testimony in the case; and the court, in allowing this paper to go to the jury, did so under proper limitations. It does not, therefore, appear that there was any error in admitting the document. This being so, the special ground of the motion for a new trial is without merit, and so also are the general grounds; there being in the record evidence sufficient to support the verdict.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between the Union Casualty & Surety Company and Ike Winship. Judgment rendered, and the company brings error. Affirmed.

B. J. Dasher and A. L. Dasher, for plaintiff in error. T. C. Cochran and Jesse M. Moore, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

116 Ga. 39)

COLLINS v. CARR.

(Supreme Court of Georgia. July 23, 1902.)

INTERLOCUTORY JUDGMENT—WHEN RES ADJUDICATA.

1. An interlocutory judgment of a trial judge upon an equitable petition, affirmed by this court, is not *res judicata* unless it was based solely upon a question of law. If based upon law and evidence, it is not binding at the final trial unless the proof is then substantially the same as at the interlocutory hearing.

2. Where, therefore, a father had in his will given all of his property to A. in trust for B., the son of the testator, with certain limitations over, and after the probate of the will B. filed an equitable petition against the trustee, alleging that B. was *sui juris*, and not within any of the classes for whom trusts can be created in this state, and praying that the trust be declared executed, the trustee removed, and the title to the property decreed to be in petitioner; and the trustee answered that the son was of weak mind, and of intemperate, wasteful, and profligate habits (illustrating by some of the acts of B.), and B., in an affidavit, denied the allegations of the answer, and no evidence was introduced except the petition, answer, and reply affidavit; and upon these facts the judge decided that the trust was executed, and removed the trustee, the judgment, being based upon a question of fact, was not final between the parties, although affirmed by this court.

3. It not appearing that there has ever been a final trial before the jury, the case is still pending in the court for trial. If, upon such trial, the son should establish his contentions to the satisfaction of the jury, the trust will be finally set aside and annulled.

4. The foregoing being true, there was no necessity for a motion to set aside the interlocutory judgment, and the court did not err in refusing to set it aside, although the reason given may have been erroneous.

(Syllabus by the Court.)

Error from superior court, Hancock county; H. M. Holden, Judge.

Equitable petition by J. H. Carr against J. J. Collins, trustee. An interlocutory judgment was rendered in favor of petitioner, and defendant moved to set the same aside. Judgment overruling the motion, and defendant brings error. Affirmed.

Hunt & Merritt and Jas. A. Harley, for plaintiff in error. R. H. Lewis and W. H. Burwell, for defendant in error.

SIMMONS, C. J. Dying testate, Josiah Carr, by his will, gave all of his property to Collins, in trust for his son, J. H. Carr, for life, with certain remainders over. In 1899 the son filed an equitable petition in the superior court, alleging that he was *sui juris*,

and not of intemperate, wasteful, or profligate habits, and praying that the trust be declared executed as to the life estate, that the appointment of the trustee be annulled, and that a receiver be appointed to take charge of the assets until the final order of the court. A rule nisi was issued, calling upon the trustee to show cause, at chambers and in vacation, why the relief prayed should not be granted. Collins answered, alleging that the son was of weak mind, and of intemperate, wasteful, and profligate habits, and reciting certain acts of the son which he claimed showed that this was true. The son also filed an affidavit, denying the charges made in the answer. Upon the interlocutory hearing at chambers the case was submitted to the judge on the petition and answer and the affidavit of the son. The judge held that the trust was executed, and removed the trustee. Collins sued out a bill of exceptions to this court, where, at the March term, 1900, the assignment of error being insufficient, the writ of error was dismissed, and the judgment below affirmed. Collins then filed a motion in the court below to set aside the interlocutory judgment rendered at chambers on the ground that the judge had no authority to make a final decree at chambers. The judge below overruled this motion, and held that, inasmuch as the judgment had been affirmed by the judgment of this court, the question had become *res judicata*. To this Collins excepted.

1, 2. An interlocutory judgment or order, rendered by a judge at chambers, and affirmed by this court, is only binding and controlling on the final hearing when based solely upon a question of law. *Ingram v. Trustees*, 102 Ga. 228, 29 S. E. 273. In the case just cited the reasons why such a judgment is controlling are set out and elaborated. If the judgment is not based upon pure questions of law, but upon questions of evidence or of law and evidence, it is not binding or controlling upon the final hearing, unless the proof be the same as at the interlocutory hearing. Whenever a judgment depends upon the discretion of the court in deciding questions of law and fact, it is not binding. See *City of Atlanta v. First M. E. Church*, 83 Ga. 448, 10 S. E. 231. In the present case, the judgment holding that the trust was executed, and removing the trustee, was based upon the allegations of the petition and answer and the supplementary affidavit of the petitioner. In order to arrive at the decision made, the judge must have held that, under the evidence before him, Carr had sufficient capacity to manage the property, and was not of such intemperate, wasteful, or profligate habits as to authorize the appointment of a trustee for him. This judgment was, therefore, not binding upon the court or the parties at the final hearing, although affirmed by this court, unless the jury should, from the evidence before them, reach the same conclusion as had been reached by the judge at the interlocutory hearing.

3. So far as appears from the record, the case made by the original petition of Carr and the answer of the trustee is still pending in the superior court of Hancock county. It should be tried and disposed of. If, upon the trial, the plaintiff can show to the satisfaction of the court and jury that his father was mistaken as to his mental capacity and habits at the time the will was made, or that at the time of the trial he is not within any of the classes for whom trusts can be created in Georgia, then the court and jury would be authorized to declare the trust executed as to the life estate. *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415.

4. The foregoing propositions being true, there was no necessity for a motion to set aside the interlocutory judgment, and there was no error in the ruling of the judge, although he may have based his ruling upon an incorrect theory of the law.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 900)

STANLEY v. STANLEY.

(Supreme Court of Georgia. July 22, 1902.)

DIVORCE—GROUNDS—ILLEGAL INTERCOURSE PRIOR TO MARRIAGE—CONDONATION—ALIMONY.

1. An act of illicit sexual intercourse committed by a party to a marriage contract prior to the marriage is not a ground of divorce in this state.

2. Even if false representations by a wife as to her chastity before marriage would constitute such a fraud as to authorize a divorce in this state, it was not error, in the trial of an application for alimony, to exclude evidence of such representations, when it did not appear that the husband, immediately upon being satisfied that the representations were false, separated from the wife, and declined to further live in the marriage state with her. Continuing to live with the wife after full knowledge that the representations above referred to were false would preclude the husband from urging it as a ground for divorce. See, in this connection, 1 Nels. Div. & Sep. § 380; 2 Nels. Div. & Sep. § 604.

3. There was no abuse of discretion, under the facts of the present case, in granting alimony to the wife.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action for divorce between Byrd Stanley and Lulu Stanley. Order allowing alimony to the wife, and the husband brings error. Affirmed.

Jas. K. Hines, for plaintiff in error. S. J. Hall, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

¶ 1. See Divorce, vol. 17, Cent. Dig. §§ 29, 30, 34.

(115 Ga. 1002)

GRAHAM et al. v. RICHERRSON.

(Supreme Court of Georgia. July 22, 1902.)

BANKRUPTCY—DISCHARGE—EFFECT—DEBTS RELEASED—DEBTS FOR PURCHASE PRICE OF PERSONALTY.

1. There being in this state no vendor's lien for the price of property sold, a discharge in bankruptcy is a good defense to an action upon an ordinary unsecured debt, contracted for the purchase of personalty, when the name of the holder of such debt was included in the schedule of the bankrupt's creditors, and such holder had due notice of the proceeding in bankruptcy. This is so, though he may, during the pendency of such proceeding, and before the discharge was granted, have sued out an attachment for the purchase money, and caused the same to be levied upon the property he had sold the bankrupt.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Attachment suit by Graham & Co. against John T. Richerson. Judgment for plaintiffs in justice's court, and defendant took the case by certiorari to the superior court, where the justice's judgment was reversed. Plaintiffs bring error. Judgment affirmed.

F. W. Capers, for plaintiffs in error. Henry C. Roney, for defendant in error.

FISH, J. John T. Richerson was indebted to Graham & Co. upon an unsecured account for the purchase money of certain goods sold to him by them. He filed a petition in bankruptcy, the debt was duly scheduled, and Graham & Co. properly notified. They made no appearance in the bankruptcy court. The goods were set apart to the bankrupt by the trustee as an exemption. Subsequently, and pending the proceedings in bankruptcy, Graham & Co. sued out an attachment for the purchase money of the goods, and the same were levied on. Pending the attachment suit, Richerson was discharged in bankruptcy, and he pleaded his discharge in bar of a recovery on the attachment. The facts having been agreed upon by the parties on the trial of the attachment in a justice's court, the magistrate rendered judgment against Richerson, who took the case by certiorari to the superior court, where the judgment of the magistrate was reversed; the judge holding that the discharge in bankruptcy was a complete defense to the action. To this ruling Graham & Co. excepted.

The judge of the superior court correctly decided the case. A discharge in bankruptcy releases a bankrupt from all his provable debts, except those expressly excepted by the bankrupt act, and a debt for purchase money is not among those excepted. It is true that, under the constitution of this state, an exemption is subject to levy and sale for the purchase money thereof, but our law gives a vendor no lien for purchase money; and before exempted property can be sold for its

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 772, 780.

purchase money, judgment must be obtained against the debtor, and execution be levied on the property. If the debtor be discharged in bankruptcy, he is thereby absolutely released from the purchase-money debt, and the creditor holding the same cannot obtain judgment thereon in order to have the property sold. If there be no judgment and execution, the question whether or not the exemption is subject for the purchase money cannot arise. *Hoskins v. Wall*, 77 N. C. 249.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 221)

MAYOR, ETC., OF CITY OF WAYCROSS
et al. v. WALKER et al.

(Supreme Court of Georgia. Aug. 8, 1902.)
MUNICIPAL CORPORATIONS—IMPOUNDING COWS.

1. Section 30 of the charter of the city of Waycross (Acts 1889, p. 909) was intended to be and is exhaustive of the power of the municipal authorities with respect to impounding domestic animals running at large, and, as this section does not include cows, the right to impound such animals does not exist; and this is so notwithstanding the broad powers contained in the general welfare clause embraced in that charter.

(Syllabus by the Court.)

Error from superior court, Ware county; Jos. W. Bennet, Judge.

Action between the mayor and council of the city of Waycross and others and J. L. Walker and others. Judgment rendered, and the mayor and council bring error. Affirmed.

Leon A. Willson, for plaintiffs in error. J. C. Reynolds, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1022)

SOUTHERN RY. CO. v. EDWARDS.

(Supreme Court of Georgia. July 23, 1902.)
REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP.

1. Although there may, in a suit against two or more defendants, one of whom is a nonresident, be charges of concurrent negligence against all, yet if there be also a distinct charge of negligence against the nonresident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different states, and therefore removable to the proper United States court.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by Pinkney Edwards against the Southern Railway Company and another. Judgment for plaintiff, and the railway company brings error. Reversed.

Dessau, Harris & Harris, for plaintiff in error. Robt. L. Berner, for defendant in error.

LUMPKIN, P. J. An action was brought by Edwards, an employé of the Southern Railway Company, against it and Russell, one of its engineers, for personal injuries which Edwards suffered in consequence of having been struck by a lump of coal which fell from the tender of a passing locomotive of which Russell was in charge. The company, which is a nonresident of this state, is here upon a bill of exceptions assigning error upon the refusal of the trial court to grant an order removing the case to the federal court. The plaintiff in his petition alleges that both the company and Russell were guilty of a number of specified acts of negligence, one of which was overloading the tender with coal. It is in one paragraph of the petition also alleged that the company was negligent "in not providing said engine with an engineer who was careful and prudent, and who would not have permitted said tender to be thus overloaded." In *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, it was held that, "when concurrent negligence is charged, the controversy is not separable." The decision in this case therefore seems to be authority for the proposition that, in so far as related to the joint acts of negligence, the case made by the plaintiff's petition would not be one which could properly be removed to the United States court. Be this as it may, however, we are quite confident that, because of that paragraph of the petition specially mentioned above, the case was removable. That paragraph certainly did not charge an act of "concurrent negligence," for it cannot be true that the company's negligence in providing a careless and incompetent engineer was an act in which the latter participated. Indeed, the plaintiff does not undertake to allege that this was so, but makes his charge of negligence with respect to employing an incompetent engineer against the company alone. As to this particular matter, therefore, there was a "separable controversy" between the plaintiff and the company. The alleged negligent act of employing such an engineer, with resulting damage to the plaintiff, would, in and of itself, have given rise to a distinct cause of action, involving a controversy wholly between citizens of different states, and a suit of this kind would certainly have been removable. It makes no difference that in the present case such a controversy exists in connection with others that may not be separable. The fact that there is in the suit "a controversy which is wholly between citizens of different states, and which can be fully determined as between them," brings the case within the removal act of 1887. Black, Dill. Rem. Causes, § 139. See, also, section 143, and cases cited. That there is a separable controversy must appear from the plaintiff's pleadings. Id. § 141. When removal is proper, the effect is to carry the entire case into the federal court. Id. § 1

The court erred in not granting the order of removal.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 195)

MAYNARD et al. v. NEWTON.

NEWTON v. MAYNARD et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

JUDGMENT—RES ADJUDICATA—NEW TRIALS—
GROUND.

1. There was evidence which supported the allegations in the petition, and the verdict which was rendered. While such evidence was conflicting on some material points, it cannot be said that the verdict was contrary either to law or the evidence.

2. The question whether title to the cotton which was the subject-matter of the action in this case passed to the testator of the defendant in error, by delivery of the warehouse receipts to him, was adjudicated by this court in the case of Zellner v. Mobley, 11 S. E. 402, 84 Ga. 746, 20 Am. St. Rep. 390. Hence the court did not err in refusing to charge the jury that the title to the cotton would not pass to the pledgee on the transfer of a warehouse receipt representing such cotton at a named date.

3. Refusal to admit evidence of a witness as to a point in issue is not cause for a new trial, when it appears that the same witness was allowed to testify to practically the same facts in other language.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by J. W. Newton, executor, against W. T. Maynard and others. Judgment for plaintiff, and both parties bring error. Affirmed.

B. J. Willingham, for plaintiff. Berner & Reagan, for defendants.

LITTLE, J. This case has heretofore been before this court, and is reported in 84 Ga. 746, 11 S. E. 402, 20 Am. St. Rep. 390. It is there entitled Zellner v. Mobley. Zellner having died pending the case, it proceeded, under proper order, in the name of Newton, the surviving executor of Head. To the report of the facts disclosed by the record when the case was formerly considered, it is only necessary to add to the statement then made by our present Chief Justice such additional facts as appear in the record now before us. These are substantially that Maynard and Mobley were engaged in business; that Maynard furnished the money, while Mobley collected the debts of the partnership, and was to have an interest in the profits; that Mobley had an interest in the business, and Watson owed the firm a debt contracted with Maynard, and Mobley had an interest in that debt; that when Watson carried the two bales of cotton to the warehouse he delivered them to Mobley with instructions to credit them on the debt which he had contracted with Maynard; that the cotton was at that time received by Mobley under those instructions, and was valued,

but by agreement the cotton was held so as to give Watson the benefit of the rise, if there was any; that the receipt for the cotton was not given when the two bales were delivered, but later in the evening, at Watson's request; that when the cotton was received it was placed with the other bales belonging to Maynard in the warehouse, and was insured. In the brief of evidence in the present record, Mobley testifies that the receipt had not been transferred to Head when he first saw it in the hands of Brooks, the agent of Head. Watson denied telling Mobley when he delivered the cotton to place it on Maynard's debt. He said that he carried the receipt home, and borrowed \$90 on it, and gave his note for that sum a few days afterwards. There was additional testimony on which the witnesses were in conflict, but which, under the view we take of the case, it is not necessary now to recite. The trial resulted in a verdict for the plaintiff for \$94.77 principal and \$131.59 interest. The defendants made a motion for a new trial, which being overruled, they excepted.

Before considering any of the grounds of the motion for a new trial, it is proper for us to refer to the decision made in the case as reported in 84 Ga., 11 S. E., and 20 Am. St. Rep., supra; as, after a careful examination of the briefs of counsel and of the rulings and opinion in that case, we have arrived at the conclusion that many of the questions made in the present record were decided and settled there, and, whether right or wrong, are, as between the parties to this case, res adjudicata. The salient points and main facts on which the contentions between the parties arose on the first trial are present in the record now before us, and none of the additional evidence, as we construe it, has any effect in changing or modifying the former decision of this court. It appears that when the case was first tried the court granted a nonsuit, apparently because the note which Watson gave to Head was infected with usury. This court arrived at the conclusion that the trial judge erred in granting the nonsuit, and necessarily considered not only the evidence, but the rules of law applicable to the evidence. Certain rulings were then made directly on the merits and law of the case. Our present Chief Justice, in elaborating the headnote, which was general in its terms, said: "When Watson assigned this receipt to Head, the assignment vested the title in Head, and when Watson delivered the receipt to Head he thereby delivered possession of the cotton to Head." And further, as to the plea of usury, it was ruled that Watson and his privies alone could make the question that the title was void on account of usury. We are bound, then, when we proceed to the consideration of the present case, to take as res adjudicata the facts: First, that the assignment of the receipt by Watson to Head vested the title of the cotton in the latter; sec-

ond, that though, under the evidence, the title to Head was void as against Watson, it was not so as to Maynard and Mobley, and that they would not be heard to allege that Head's title was void unless they, or one of them, should show that they or he had an interest in the cotton, derived from Watson; that, on so showing, they or he could legally present the question as to Head's title being void for usury, in order to protect his or their interest. With these propositions standing as adjudicated in the first case, we come now to consider the grounds of the motion in the present record.

1. Among these are that the verdict in favor of the plaintiff was contrary to law, contrary to the evidence, and against the weight of the evidence. We cannot reverse the judgment below for the refusal of the court to grant a new trial on any of these grounds. The evidence was conflicting. The jury had the right to believe the witnesses to whom they gave the highest credit. There was evidence from some of these to sustain the allegations of the petition; hence, to authorize the verdict which was rendered; and, as the verdict has received the approval of the trial judge, we cannot set it aside as being contrary either to the law or the evidence.

2. It is complained that the court refused to give in charge a written request made by defendants' counsel to the effect that in the years 1881 and 1882 the holder of a certain warehouse receipt could not pass the title to the cotton covered by the same, in order to secure the loan of money; that under the law at that time it could not be used as collateral security, etc. It is set out in the motion that the court refused to give this charge for the reason that the supreme court had decided in this identical case that the title to the cotton passed to Head on the transfer of this cotton receipt; and it is alleged that the court committed error in refusing to give this charge, because the point was not raised in the supreme court, and could not have been settled by that court; that the receipt was transferred in 1881 or 1882, and at that time it was not assignable as collateral security, and was not so assignable before the act of October, 1887. The able counsel for the plaintiffs in error has submitted many authorities to sustain his contention that prior to the act of 1887 a transfer of warehouse receipts as collateral security did not have the effect to pledge the cotton represented. While from an examination which we have given to this question we are inclined to differ with counsel, it is not necessary, under the view which we take of the prior decision, to rule on this point, for we agree with our Brother of the trial bench that this court had in this identical case ruled and decided that the title to the cotton passed to Head on the transfer of the receipt; and we differ with counsel for the defendants in the court below in the view which he takes that the point

was not raised in the supreme court, and hence could not have been settled by this court in that case. Let it be remembered that the point made in the bill of exceptions then was that the court erred in granting a nonsuit. If the evidence for the plaintiff did not support the case he made, it was proper to have granted the nonsuit. On the contrary, if the evidence did support the case made by the plaintiff, the grant of the nonsuit was error. In passing on this question this court necessarily had not only to judge of the evidence which the plaintiff introduced, but also of the legal conclusions which that evidence brought about. Therefore, when it appeared by the evidence that Watson had borrowed from Head a sum of money, and transferred to the latter the warehouse receipt, it was a conclusion of law, in the opinion of this court, that such transfer vested the title of the cotton in Head; and when this result was sought to be defeated by evidence that the note which was secured by the cotton was infected with usury, under the plea of usury filed by Mobley, the court further ruled that while, under the evidence, the note was infected with usury, as between Mobley and Head that fact did not void the title to the cotton as to Head, because Mobley could not raise that issue, the plea of usury being a personal one to Watson; and the only point which was left open in that decision was that if, in another trial, Mobley showed himself to be privy in title to Watson, in order to protect that title, or the interest which it carried, he might then make the question whether as to him the title of Head was void. So, therefore, in ruling that the grant of a nonsuit was error, the court decided from the evidence that certain legal consequences ensued; and these legal consequences were that Head took the title by transfer of the warehouse receipt, and that Mobley could not attack that title as being void for usury, for want of privity of title with Watson, the borrower of the money. We must therefore rule that the question whether Head took title by the transfer of the receipt is an adjudicated one. Therefore the trial judge did not err in refusing to charge as requested in the third ground of the motion. For the same reason it is also ruled that the court did not err in charging the jury that the title to the cotton passed by the transfer of the receipt, which charge is complained of in the fourth ground of the motion for a new trial.

3. It is further complained that the court erred in rejecting evidence of the witness Mobley to the effect that he did not give Watson a receipt when he threw the cotton off in the morning, as he had turned it over on Maynard's debt; that Watson did not demand it, but late in the evening came back and said that he might die before he and Maynard had a settlement, and, to protect him in the event of his death, he wanted a receipt, and it was given under these circum-

stances. This evidence, in our opinion, was clearly admissible. It explained the issue of the receipt as the warehouseman understood the circumstances, and had a direct bearing upon the issues in the case. The refusal to admit the evidence would have been material error, had it not been for the fact that the same witness during his examination was allowed to testify to substantially the same facts. The brief of evidence records a portion of Mobley's evidence in these words: "I recognize this receipt for the two bags of cotton sued on. I gave it. Mr. Watson brought the two bags of cotton to the warehouse in the morning, and threw them off, and said: 'Here are the two bags of cotton which I promised you. Put them on the debt I owe Mr. Maynard.' * * * I did not give the receipt. He came back late that evening, and I gave it to him." This evidence is practically the same as that which the plaintiff in error claimed that the court erred in refusing to admit, except the reasons given by Watson why he wanted a receipt; and these reasons, because the facts testified to did go to the jury, are not, in our judgment, so material as to require a reversal of the judgment because the evidence in the brief does not appear in the identical language set out in the ground of the motion. As we see it, substantially the same evidence as to the facts was before the jury. Therefore, while the evidence in the exact words of the witness, as set out in the motion, was admissible, the refusal of the trial judge to admit it is not such an error as requires the verdict to be set aside, when it appears that the judge did admit practically the same evidence which was before the jury when they rendered their verdict.

We have thus dealt with all the grounds of the motion for a new trial, and passed on the errors alleged to have been committed therein, in the light of the objections as they appear in the motion. Other points have been made by counsel for plaintiff in error in his brief. Some of these are involved in what has been said. Others are not, for the reason that such do not properly arise under the assignments of error which appear in the motion for a new trial; and, as we view the record and the previous adjudication of the issues between the parties in this case, the judgment must be affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 140)

OKLAHOMA VINEGAR CO. v. CARTER et al.

(Supreme Court of Georgia. Aug. 7, 1902.)

SALES — RESCISSION — EFFECT OF COUNTERMAND OF ORDER — NECESSITY OF SELLER'S ASSENT — BREACH OF CONTRACT — NATURE OF REMEDY.

1. When two parties have entered into a written contract for the purchase and sale of goods, neither a countermand of the order for the shipment of the goods, nor a notice by the

purchaser to the seller that he will not accept and receive them, is effectual to cause a rescission of the contract. Such a result cannot be accomplished without the assent of the seller.

2. The notice indicated above, under the common law, operates as a breach of the contract by the vendee, and in such a case the remedy of the vendor is in an action to recover damages for such breach. Under the statute, the vendor, after the purchaser refuses to take and pay for the goods, may in an action recover the price of the goods, where it appears that after default of the purchaser he stored and retained them for such purchaser. Under the evidence the statutory remedy was not available to the plaintiff in the present case, and his only remedy was a suit to recover damages for the breach of the contract. His action, as brought, to recover the contract price of the goods, was not maintainable.

(Syllabus by the Court.)

Error from city court of Douglas; F. W. Dart, Judge.

Action by the Oklahoma Vinegar Company against Carter & Ford, partners. From a judgment for defendants, plaintiff brings error. Affirmed.

Quincey & McDonald, for plaintiff in error. Perry & Tipton, for defendants in error.

LITTLE, J. The Oklahoma Vinegar Company brought an action on an account against the firm of Carter & Ford to recover the sum of \$72. The action was predicated on an order given in writing by Carter & Ford, a copy of which was attached to the petition, which is as follows:

"Order No. 838, Date 3/6, 1901.

"Oklahoma Vinegar Co.: Ship to Carter & Ford, Post Office Willacoochee, State Ga. R. R. point on B. & W. R. R. Terms Apr. 1st 60, or 3% off for cash in ten days. Ship at once [Here follows a list of articles, one of which is cherry phosphate.] Frt prepaid. We guarantee that our fruit phosphates are not subject to any special tax, either State or county, or internal revenue; also that they will not intoxicate. We guarantee to replace all sour or spoiled goods, free of expense.

Oklahoma Vinegar Co.

"Customer sign here: Carter & Ford.

"Salesman sign here: R. B. Lashman.

"This order not subject to countermand."

The defendants answered, denying indebtedness as alleged, setting up that they never received the goods. They admitted that they signed the order, but said that they did so under a misapprehension, and that the same was canceled in a very short time after it was signed. For further plea they set up that if plaintiff had any right of action at all in the premises, which they deny, it was for damages on breach of contract, and it could not recover on open account, and this action should be dismissed. The case was submitted by agreement to be heard by the judge without the intervention of a jury on the following agreed statement of facts: "The defendants, Carter & Ford, by and through R. L. Ford, the junior member of said firm of Carter & Ford, gave the salesman of the

plaintiff, the Oklahoma Vinegar Company, the order [heretofore set out]. A few minutes after giving the order the said Ford saw William Moore and purchased a whole barrel of cherry phosphate from him, that bore the same name, and that he judged, from the taste and general appearance, to be the same goods as the sample shown him by the salesman of plaintiff, which samples he tasted, and from which he gave the order, for which whole barrel he paid Moore one dollar and a quarter, and that he immediately went to the salesman of the plaintiff and countermanded the order, and notified him that he would not accept the goods if shipped. The said Ford also immediately mailed, under special delivery postage, a letter to the plaintiff, countermanding the said order, and notifying that they [the defendants] would not accept and receive the goods ordered, and this letter was received by the plaintiff before the goods were separated from the common stock and delivered to the railroad for shipment; that after this the plaintiff delivered the goods ordered to the railroad, and shipped them consigned to defendants at Willacoochee, Georgia, but the defendants declined to receive the goods, and allowed them to remain in the depot, and notified the plaintiff of their refusal to accept them; that the goods ordered and described in the order hereto attached were articles of merchandise kept in common stock and sold generally by the plaintiff; that there was no consideration for the contract not to countermand the order which appears at the bottom of the order; that the cherry phosphate Ford bought from Moore was not salable; that he still has the greater part of it on hand; tried to give it away to induce trade, but it rather had the effect to run off trade, and was worthless, but Ford does not know whether this he bought from Moore was from the same house [plaintiff's] or not, and does not know how long Moore had had the said barrel in stock prior to this purchase from Moore." The presiding judge rendered a judgment in favor of the defendants for costs, whereupon the plaintiff made a motion for a new trial, which being overruled it excepted. The grounds of this motion were that the verdict was contrary to law and to the evidence. The answer of the defendants raises two questions: First. Are the defendants liable to the plaintiff under the contract notwithstanding the fact that the order for the goods was countermanded before delivery, and notice given to the plaintiff before shipment that the defendants would not accept and receive the goods which they had ordered? Second. Should the action on open account abate because the defendants, if liable at all, were only so in an action to recover damages for a breach of the contract?

1. We find no difficulty in disposing of the first of these questions. The contract made by the parties was a good and valid one, in writing, by the terms of which plaintiff

agreed to sell and deliver to the defendants certain goods named therein, and the defendants agreed to pay for the same when so delivered. It was an executory contract, and bound both parties. Without any regard to the entry which appeared below the signature of the parties,—that the order was not subject to countermand,—it may be stated in general terms that, as the contract was the act of both of the parties, it could not be legally dissolved and rendered nugatory except with the consent of each; and the countermand and notice to the plaintiff that the defendants would not be bound by its terms did not have the effect of rescinding the contract unless the plaintiff agreed to such rescission. It appears from the agreed statement of facts that the plaintiff did not so agree; hence no rescission of the contract was effected.

2. The second proposition raised by the plea—that if the plaintiff had any right of action it was for damages for a breach of the contract, and not on open account to recover the price of the goods—is one more difficult of solution. In legal effect, this part of the plea is to be treated a plea in abatement of the action. Under it the question arises whether the notice of the countermand which defendants gave plaintiff in advance of the time of performance was effectual to cause a breach of the terms of the contract. It is undoubtedly true, as a general rule, that, after the breach of an executory contract by either party, the only remedy of the other is to recover such damages as he may have sustained in consequence of the breach. If the notice did not, under the law, cause a breach of the contract, then the seller would have the right to perform his part of the contract and force the buyer to comply with his obligation; that is, pay the contract price for the goods. But the authorities differ as to the effect of a notice that the buyer will not, at the time fixed for the performance of the contract, accept the goods purchased. By some eminent law writers, and in many adjudicated cases, the proposition is laid down that "the notice of an intended breach will operate as a breach only if accepted and acted upon as such by the other party, who may, if he pleases, disregard the notice and insist upon performance according to the contract." Leake, Cont. 872. Mr. Parsons, in his *Law of Contracts* (volume 2, *676), says: "If one bound to perform a future act, before the time for doing it declares his intention not to do it, this is no breach of his contract; but, if his declaration be not withdrawn when the time comes for the act to be done, it constitutes a sufficient excuse for the default of the other party." Mr. Benjamin, in his work on *Sales* (6th Am. Ed., § 1118) says: "The date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice

that he intends to break the contract and to refuse accepting the goods." This doctrine has also been sustained by the supreme judicial court of Massachusetts, where it was ruled that an action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase. *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384. The contrary of this doctrine was stated to be the law by Cockburn, C. J., in the case of *Frost v. Knight*, L. R. 7 Exch. 111, in the following language: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the party as a wrongful putting an end to the contract, and at once bring his action as on the breach of it; and in such an action he will be entitled to such damages as would have arisen from nonperformance of the contract at the appointed time, subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss." Mr. Mechem, in his treatise on the Law of Sales of Personal Property (section 1089) declares that "this doctrine is well settled in England, and is adopted by the majority, though not by all, of the American courts"; and after examination we find that rulings have been made to this effect in a great number of the courts of last resort in several of the United States. *Crabtree v. Messersmith*, 19 Iowa, 179; *Machine Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *Roebing's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Pancake v. George Campbell Co.*, 44 W. Va. 82, 28 S. E. 719; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173; *Zuck v. McClure*, 98 Pa. 541; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836. Mr. Mechem further says (sections 1091, 1092): "Where goods have been ordered from a wholesale dealer, but before shipment or other appropriation the order is recalled, * * * the law is well settled that a party to an executory contract may always stop performance on the other

side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress." "The contract is not rescinded, but broken; and, while the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation, for that purpose, to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." An examination discloses that this language fairly states the rule laid down in the cases of *Davis v. Bronson*, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 53 Am. St. Rep. 783; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Clarke v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670; *Danforth v. Walker*, 37 Vt. 239; *Id.*, 40 Vt. 257; *Scale Co. v. Beed*, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Fireworks Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981. It has also been repeatedly ruled that the remedy of the seller who has received such a notice from the buyer is an action for the breach of the contract, and not for goods sold or for labor and material; that the seller is entitled to pursue his remedy at once, because the direction of the buyer not to proceed is the equivalent of an absolute physical inability, etc. In the case of *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, the supreme court of the United States declared that "after a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract by a refusal on the part of one party to perform it, the court holds that the rule laid down in *Hochster v. De La Tour*, 2 El. & Bl. 678, is a reasonable and proper rule to be applied" in the case then being considered, and "that rule is that after the renunciation of a continuing agreement by one party the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it, but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option." See, also, *Mechem, Sales*, § 1699, and cases cited.

It must be ruled, from a consideration of the numerous cases cited above, and the rule therein enunciated, which seems to be founded both in reason and justice, that a notice from the buyer of goods, such as appears in this case, operates as a breach of the contract; and, without attempting to harmonize the numerous cases arising in other juris-

dictions as to the remedy which the law affords to the seller under such circumstances, we can reach such conclusions also on the law contained in our Civil Code (section 3551), which prescribed that, where the purchaser refuses to take and pay for goods bought, "the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or, he may sell the property, acting for this purpose as the agent of the vendee, and recover the difference between the contract price and the price on resale; or, he may store or retain the property for the vendee and sue him for the entire price." While under this last provision the seller might have stored and retained the property for the buyers after notice by the buyers that they would not receive the goods, it is sufficient to say that it did not do so, but, without so doing, sought to recover the price agreed on. Had it done so, it might have brought an action against the buyers for the entire price of the goods. On the contrary, instead of storing and retaining the goods after the notice, it delivered them to the carrier, doubtless under the well-recognized general rule that in ordinary transactions of bargain and sale of goods a delivery to the carrier is a delivery to the seller. It may be that the provisions of this section of our Code do, to some extent, at least, modify the rule found in some of the authorities above cited; but under its plain provisions the remedy of the seller in this case was not to sue for the price of the goods, but it was remitted to its action for a breach of the contract. It was ruled in the case of *Fireworks Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788, that "where goods were ordered under a simple contract of bargain and sale, and notice was given by the buyer to the seller not to ship them, in advance of delivery, and before they were separated from the bulk and set apart to the buyer, such notice is not only a repudiation of the contract, but also a revocation of the carrier's agency to receive them; and the refusal of the buyer to receive the goods when delivery is tendered by the carrier does not make him liable for their contract price, but only for special damages for the refusal to receive them." In the opinion in that case Clark, J., said: "It is plain that the notice given to the plaintiffs by the defendants not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs thereby had notice of the revocation. * * * The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered." As we

have seen, the plaintiff did not store or retain the goods for the vendees after the latter had given notice that they would not take and pay for the goods, so as to obtain the statutory right to sue for the value of the goods; and not having done so, and the legal effect of the notice given being to cause a breach of the contract, the only remedy which the plaintiff had was to institute an action to recover damages for the breach. Hence its petition, which treated the contract as an executed one on its part, and sought to recover the purchase price of the goods, was subject to a plea in abatement of the action, and the trial judge committed no error in dismissing the same under the facts admitted to be true, and the plea filed by the defendant.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 8.)

BOOTH v. HUFF.

(Supreme Court of Georgia. July 23, 1902.)

NOTE—EXECUTION—JOINT AND SEVERAL CHARACTER—SIGNATURE ON BACK—EFFECT—JOINT AND SEVERAL OBLIGORS—UNSATISFIED JUDGMENT—EFFECT AS BAR.

1. A promissory note executed by two persons, one signing at the bottom of the note, and the other upon the back thereof, the latter not being the payee, and which is written "I promise to pay," is a joint and several note; and the person whose name appears upon the back of the note is, according to the facts connected with his undertaking, liable thereon either in the capacity of a co-principal or in that of a surety.

2. A judgment against one of two joint and several obligors, which has never been satisfied, is no bar to a suit against the other.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Walter Huff against S. Booth. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

R. B. Blackburn, for plaintiff in error. J. M. McAfee, for defendant in error.

COBB, J. Huff brought suit in a justice's court against Booth on a promissory note, and the case was carried by appeal to the superior court. The note sued on was signed by H. F. Harden, and begins with the statement: "Ninety days after date, I promise to pay Walter Huff, or order, seventy dollars." On the back of the note the name of "S. Booth" was written. The defendant filed a plea, in which he alleged that at a previous term of the court the plaintiff had brought suit on the note against Harden, and recovered a judgment against him for the full amount of the note, and this judgment is a bar to the present suit. Upon motion this plea of the defendant was stricken, and judgment entered in favor of the plaintiff. To

¶ 2. See Judgment, vol. 30, Cent. Dig. § 1145.

the order striking the plea the defendant excepted.

By signing his name on the back of the note sued on, the defendant became liable thereon either as a joint maker or as a surety, but not as an indorser. *Benson v. Warehouse Co.*, 99 Ga. 303, 25 S. E. 645. See, also, *Quin v. Sterne*, 26 Ga. 223, 71 Am. Dec. 204. If he was a joint maker with Harden, they were under the contract jointly and severally bound to pay. If he was only a surety, they were bound in like manner. A note signed by two persons, which is written "I promise," is a joint and several note. A note signed "A. D., Principal"; "C. D., Surety," and written "I promise," is also joint and several. 1 Daniel, Neg. Inst. (4th Ed.) § 94, and cases cited; Story, Prom. Notes, §§ 57, 58. As the contract contained in the note sued on was a joint and several promise by Harden and Booth, a judgment against Harden which has not been satisfied would not be a bar to a suit against Booth. Story, Bills, §§ 430-432. The plea set up no defense, and was properly stricken.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 22)

STEWART CONTRACTING CO. v. JENKINS.

(Supreme Court of Georgia. July 23, 1902.)

REVIEW—BILL OF EXCEPTIONS.

1. Where a motion for a nonsuit was made and overruled, and a mistrial followed, a bill of exceptions, assigning no error except the refusal to grant a nonsuit, cannot be entertained by the supreme court. *Banking Co. v. Denson*, 9 S. E. 788, 83 Ga. 267; *Railway Co. v. Tennant*, 26 S. E. 481, 98 Ga. 156; *Jones v. Daniel*, 33 S. E. 41, 106 Ga. 853.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Jos. Jenkins against the Stewart Contracting Company. Judgment for plaintiff, and defendant brings error. Writ dismissed.

Osborne & Lawrence, for plaintiff in error. Garrard & Meldrim, for defendant in error.

PER CURIAM. Writ of error dismissed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1020)

GEORGIA R. CO. v. IVEY.

(Supreme Court of Georgia. July 22, 1902.)

RAILROADS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—IMPROPER RECOVERY.

1. The evidence did not show any negligence on the part of the agents or employees of the defendant company, and the injury was the result of accident, or a want of care on the part of the deceased. A verdict in favor of the plaintiff was therefore without evidence to support it, and should have been set aside.

(Syllabus by the Court.)

Error from superior court, Warren county; E. L. Brinson, Judge.

Action by Othello Ivey against the Georgia Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Jos. B. & Bryan Cumming, for plaintiff in error. E. P. Davis, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 87)

DAVIS v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE AND IMPEACHING CHARACTER—BILL OF INDICTMENT—FAILURE TO DEMUR—EFFECT.

1. The newly discovered evidence which it is claimed requires the grant of a new trial is found to be merely cumulative and impeaching in its character. Being so, it did not afford sufficient cause for setting aside the verdict.

2. In the absence of a demurrer pointing out its defects, the bill of indictment in this case must be held to have sufficiently charged the plaintiff in error with the offense of robbery.

3. There was sufficient evidence introduced on the trial to authorize the jury to conclude that the accused was guilty as charged.

4. The court committed no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

William Davis was convicted of robbery, and brings error. Affirmed.

T. W. Hardwick, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 999)

HARRISON et al. v. HARRISON et al.

(Supreme Court of Georgia. July 22, 1902.)

EQUITY—REFERENCE TO AUDITOR—FAILURE TO TAKE OATH—REMEDY.

1. That an auditor was not sworn according to law does not constitute a ground for an exception of fact to his report. The proper remedy in such a case is a motion, in due time, to recommit the case to the auditor.

2. The auditor's conclusions of fact, as set forth in his report, were supported by the evidence. His conclusions of law, as therein stated, are in accordance with the rulings and decisions in the case of *Harrison v. Harrison*, 31 S. E. 455, 105 Ga. 517, 70 Am. St. Rep. 60. There was no error in the rulings made on the admission of evidence of sufficient materiality to affect the result, and it does not appear that the trial judge committed any error in making the auditor's report the judgment in the case.

(Syllabus by the Court.)

Error from superior court, Washington county; H. M. Holden, Judge.

Action by W. T. Harrison and others against M. J. Harrison and others. From the judg-

ment, W. T. Harrison and others bring error. Judgment affirmed.

R. H. Lewis and Jas. K. Hines, for plaintiffs in error. Jas. A. Harley and Evans & Evans, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1020)

COMBS v. GEORGIA R. & BANKING CO.
(Supreme Court of Georgia. July 22, 1902.)

RAILROADS—CHILD ON TRACK—INJURY—INSTRUCTION AS TO PRECAUTIONS—INSTRUCTION AS TO STATUTORY SIGNALS.

1. Even if, under the facts of this case, the railway company was under a legal duty, in approaching the point where the plaintiff's child was struck by its train, to maintain a lookout, yet, as the evidence demanded a finding that the servants of the company fully complied with this requirement, a charge of the court to the effect that the company was under no duty to take precautions to prevent killing the child until its presence on the track was actually discovered was not prejudicial to the plaintiff. Nor, in view of the facts disclosed by the evidence, is it cause for a new trial that the court in its charge to the jury applied to the child the rule of diligence to be expected of adults.

2. It was in the present case proper to instruct the jury that the omission by a railway engineer to comply with the statutory requirements as to giving signals and checking the speed of his train in approaching a public crossing was not, relatively to the plaintiff's child, an act of negligence.

3. The evidence fully warranted the verdict in behalf of the defendant company, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Tallahassee county; E. L. Brinson, Judge.

Action by T. M. Combs, as administrator, against the Georgia Railroad & Banking Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Colley & Sims and Cloud & Jennings, for plaintiff in error. Jos. B. & Bryan Cumming, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1013)

PITTS v. FLORIDA CENT. & P. R. CO.
(Supreme Court of Georgia. July 22, 1902.)

NONSUIT—MOTION TO REOPEN CASE—DISCRETION OF COURT.

1. After a plaintiff has closed his evidence, and the court has granted a nonsuit, but before the order has been written or entered upon the minutes, a motion to reopen the case is addressed to the sound discretion of the court, and its refusal will not be interfered with by this court.

2. Under the facts disclosed by the record, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Effingham county; P. E. Seabrook, Judge.

Action by J. M. Pitts against the Florida, Central & Peninsular Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

D. H. Clark, for plaintiff in error. Adama, Freeman, Denmark & Adama, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 9)

HENRY v. LENNOX-HALDEMAN CO.

(Supreme Court of Georgia. July 23, 1902.)

GARNISHMENT—BOND TO DISSOLVE—JUDGMENT IN PERSONAM—PROPRIETY—MOTION TO DISMISS—PREMATURE CHARACTER.

1. The giving of a bond by a defendant in attachment to dissolve a garnishment does not have the effect of converting the attachment proceeding into a suit authorizing a judgment in personam against the debtor.

2. A motion to dismiss an attachment against a nonresident, which has been executed by service of a summons of garnishment, upon the ground that no property or effects of or debt due the defendant within the jurisdiction of the court has been seized, is premature until the garnishee has filed an answer. And this is true notwithstanding a bond has been given to dissolve the garnishment.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by W. L. Henry against the Lennox-Haldeman Company. From a judgment sustaining defendant's motion to dismiss for want of jurisdiction, plaintiff brings error. Reversed.

Kontz & Austin, for plaintiff in error. Simmons & Pettigrew, for defendant in error.

COBB, J. Henry sued out an attachment against the Lennox-Haldeman Company upon the ground that it resided beyond the limits of the state, and this attachment was executed by the service of a summons of garnishment upon Griffith & Wells, returnable to the city court of Atlanta. At the appearance term the plaintiff in attachment filed a declaration, in which it was alleged that the defendant in attachment was a foreign corporation residing in the state of Illinois, and that it was liable to the plaintiff on account of certain injuries which had been sustained by him as a result of the negligence of the defendant; the manner in which the injuries were sustained and their character being fully set forth in the declaration. It was also alleged that the defendant was engaged in the business of plastering the structure known as the "Federal Prison," in the county of Fulton; that the contract for the erection of that building was let by the government to Griffith & Wells, who had contracted with the defendant to do, for a fixed sum, all the plastering required in the construction of the building. The declaration

concluded with a prayer for judgment against the defendant for a specified amount as damages, and that this judgment might be satisfied out of any money, property, or effects that might be in the hands of the garnishees above referred to. The defendant had filed a bond dissolving the garnishment. It entered a special appearance in the attachment case, and moved to dismiss the case for want of jurisdiction upon two grounds: First, that the court has no jurisdiction over the person of the defendant; and, second, that the court has not acquired jurisdiction over any property of the defendant, nor has it seized any debt due the defendant within the jurisdiction of the court. The court sustained the motion, and dismissed the case. To this judgment the plaintiff excepted.

We will first dispose of the first ground of the motion to dismiss. It is clear that the court had no jurisdiction of the person of the defendant at the time the attachment issued, it being a nonresident of the state. Whether it, after that time, acquired jurisdiction of the person of the defendant, depends upon whether it has done any act which, under the law of this state, would have the effect to submit itself to the jurisdiction in such a way as to authorize a judgment in personam to be entered in the case. The Code provides: "When the defendant has given bond and security, as provided in this Code, or when he has appeared and made defense by himself or attorney at law, or when he has been cited to appear, as provided in this Code, the judgment rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service, and execution shall issue accordingly, but it shall be first levied upon the property attached. In all other cases the judgment on the attachment shall only bind the property attached, and the judgment shall be entered only against such property." Civ. Code, § 4575. The bond referred to in this section is the bond provided for in the Civil Code (section 4567), which is given by the defendant in attachment for the purpose of replevying property attached, and is conditioned to pay the plaintiff the amount of the judgment and costs that he may recover in the attachment case. The citation to appear, referred to in the section quoted, is the citation provided for in the Civil Code (section 4557), which requires a written notice of the pendency of the attachment and personal service of the same at least ten days before final judgment in the attachment case. According to the plain provisions of the Code, in no other way is a proceeding by attachment converted into a suit authorizing a general judgment in personam. The giving of a bond to dissolve a garnishment issued on an attachment will not have that effect. The case of *Moore v. Kelly & Jones Co.*, 109 Ga. 798, 801, 35 S. E. 168, does not so rule. The question dealt with in the second division of the opinion

in that case was simply whether the movant had exercised due diligence in making the motion to vacate and set aside the judgment, and the language of the opinion must be taken in the light of the question under discussion. As was there held, anything that would give notice of the pendency of a suit prior to the date of the judgment rendered should, on a motion to set aside the judgment, be considered on the question as to whether the movant was guilty of laches. The court not having acquired jurisdiction of the person of the defendant, the correctness of the judgment dismissing the case depends upon whether any property of the defendant within the jurisdiction of the court has been seized under the attachment.

The attachment was executed by the service of a summons of garnishment, and the second ground of the motion to dismiss was based upon the assumption that the garnishees had no property in their possession in this state belonging to the defendant, and owed the defendant no debt which was due and payable in this state. It does not appear from the record that the garnishees have filed any answer at all. The dissolution of a garnishment by the giving of a bond does not relieve the garnishee from filing an answer, and no judgment can be entered in the garnishment proceedings until such an answer is filed. Civ. Code, §§ 4718, 4719; *Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368. Until the garnishees answer, it is impossible to determine whether there were any property or effects in their hands belonging to the defendant, or any debt due by them to it, which could be seized by the courts of this state under attachment. It may be that the garnishees have in their possession in this state articles of property belonging to the defendant. If so, it is their duty under the law to answer, stating the facts, so that the court can determine what is the value of such property, and thus arrive at what is the amount of liability upon the bond dissolving the garnishment; or if the garnishees have in their hands no tangible property or effects of the defendant, but are indebted to it in any sum, the answer should set forth the amount and character of the indebtedness, when due, and where payable, so that the court may determine on this answer whether the debt due by the garnishees to the defendant is of such a character that it can be seized under attachment in this state. It was held in the case of *Railway Co. v. Brinson*, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382, which was followed in *Johnson v. Railway Co.*, 110 Ga. 303, 34 S. E. 1002, that the general rule is that the situs of a debt is at the place where the creditor is domiciled. Under this rule, if the garnishees are indebted to the defendant generally, without any agreement as to where it is to be paid, the situs of the debt would be at the residence of the defendant beyond the limits of this state, and the debt would not be subject

to attachment in this state. On the other hand, if the debt is payable in the state of Georgia, the rule might be different. In any event, the court was not in a position to determine anything in reference to the case at the time the motion was made to dismiss, and will not be in such a position until the garnishees have filed their answer. The motion to dismiss, so far as the second ground of the same was concerned, was prematurely made, and the court erred in sustaining it. While the court had no jurisdiction to render a judgment in personam against the defendant, it did have jurisdiction to render an attachment judgment against any property of the defendant within the jurisdiction of the court which had been seized under the attachment; and whether any such property had been so seized could not be determined until the garnishee had answered and there was a final judgment on the answer.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 12)

BEASLEY v. LENNOX-HALDEMAN CO.

(Supreme Court of Georgia. July 24, 1902.)

GARNISHMENT — NONRESIDENT — SITUS OF DEBT — JURISDICTION — BOND TO DISSOLVE GARNISHMENT — JUDGMENT IN PERSONAM — PROPRIETY — DISMISSAL OF PROCEEDING.

1. As a general rule, the situs of a debt is at the place where the creditor is domiciled. *Railway Co. v. Brinson*, 34 S. E. 597, 109 Ga. 354, 77 Am. St. Rep. 382; *Johnson v. Railway Co.*, 34 S. E. 1002, 110 Ga. 303; *Henry v. Lennox-Haldeman Co.*, 42 S. E. 383, 116 Ga. —.

2. An attachment was issued against a non-resident of the state, and executed by service of garnishment only; and the answer of the garnishee showed that it was indebted to the nonresident in a given sum, it not appearing at what place the debt was payable. *Held*, that upon the face of the answer the debt was payable at the place where the nonresident was domiciled, and therefore the debt was not within the jurisdiction of the courts of this state.

3. The giving of a bond to dissolve a garnishment issued on an attachment does not convert the proceeding into a suit authorizing a personal judgment against the defendant. *Henry v. Lennox-Haldeman Co.*, 42 S. E. 383, 116 Ga. —.

4. The defendant having done nothing to enable the courts of this state to acquire jurisdiction of its person, and no property within the jurisdiction of this state having been seized under the attachment, there was no error in dismissing the entire proceeding.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Thomas Beasley against the Lennox-Haldeman Company. From a judgment dismissing the action, plaintiff brings error. Affirmed.

Kontz & Austin, for plaintiff in error. Simmons & Pettigrew, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

42 S.E.—25

(115 Ga. 1009)

MILLER v. MERCHANTS' & MINERS' TRANSP. CO.

(Supreme Court of Georgia. July 22, 1902.)

INJURY TO EMPLOYE—PLEADING.

1. A petition to recover damages for personal injuries against a transportation company, which in general terms alleged negligence in that the cargo of a ship was improperly distributed, and the ship itself defectively constructed, was properly dismissed upon special demurrer calling for particulars as to the alleged negligence, when the petition was not amended to meet the objections raised by such demurrer. (Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Murray Miller against the Merchants' & Miners' Transportation Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Oliver, for plaintiff in error. O'Connor, O'Byrne & Hartridge, for defendant in error.

FISH, J. Miller sued the Merchants' & Miners' Transportation Company to recover damages for personal injuries alleged to have been sustained by him on account of the defendant's negligence. The petition alleged that the plaintiff was an employé of the defendant; that one of its vessels, while lying at or near her wharves in the city of Savannah, had two piles of lumber loaded on her deck,—one on the port and the other on the starboard side; that on these piles of lumber were loaded a number of cross-ties; that as plaintiff was going along between the two piles of lumber, engaged in loading the vessel, it suddenly listed to the starboard, causing one of the cross-ties which had been loaded on the port side to fall upon him, striking his head and face, and severely injuring him; "that at the time of said injuries [plaintiff] was in his proper place, and in the discharge of his usual and accustomed duty, and in no wise contributed to the occurrence which caused the same; that [he] did not know of the condition of the ship which caused it to list, and was then unaware of any improper distribution of the cargo, which brought about his aforesaid injuries; that [he] had the right to assume that the position that he occupied was safe, and that the ship was in proper condition to be loaded, without subjecting himself to risk or hazard." The petition further alleged "that the plaintiff's injuries were due to the fault and negligence of said company in not properly loading and distributing the cargo of said ship, the latter being defective in construction, and therefore liable to list, unless care was observed in loading the same,—all of which was unknown to [plaintiff] before and at the time he was engaged in loading said ship as aforesaid; that the said loading and distribution of said cargo was not done by [plaintiff] or any fellow servant of his; that [plaintiff] is a common laborer, uneducated, and did not know,

and had no means of knowing, in what manner said ship was defective in construction; that it was the duty of the company to have provided him a safe place to work, and safe ingress and egress to and from his work; that said improper loading and defective construction of said ship was known to said defendant, or should have been known by the exercise of ordinary care and diligence." There were allegations as to the extent of plaintiff's injuries. The defendant demurred specially to the petition upon several grounds. Two of the grounds were: "(1) It is not shown in said declaration in what manner the cargo of said ship was improperly distributed; (2) because it is not shown in said declaration in what manner said ship was defective in construction." The demurrer was sustained upon these two grounds, and, the plaintiff failing to amend, the petition was dismissed. The plaintiff excepted to the judgment sustaining the demurrer.

It will be observed that the negligence of the defendant, which the plaintiff alleged caused his injuries, was the improper loading and distribution of the ship's cargo and the defective construction of the ship. The defendant, in order to prepare its defense, was entitled to be put on notice of the particular manner in which the plaintiff expected to show that the cargo was improperly distributed, and also the particular defects which plaintiff expected to prove existed in the construction of the ship. The defendant, by an appropriate special demurrer, called for the information to which it was entitled. The plaintiff declined to amend the petition in the respects indicated, and we are of opinion that the court did not err in sustaining the demurrer and dismissing the petition. In *Blackstone v. Railway Co.*, 105 Ga. 381, 31 S. E. 90, it was held: "Where the cause of the injury was alleged to be a pole, concerning which the petition in general terms only alleged that it was 'too near the track,' and the defendant, by special demurrer, made the point that the petition did not allege 'how near said pole was to the track,' the petition ought to have been amended so as to set forth the facts as to this matter more fully and explicitly; and, in the absence of such an amendment, this court will not reverse a judgment sustaining the demurrer and dismissing the action." Counsel for plaintiff in error cite in their brief only one Georgia case, —*Telegraph Co. v. Jenkins*, 92 Ga. 398, 17 S. E. 620. In that case the petition alleged that the plaintiff's husband, an employé of the company, was killed without fault or negligence on his part, and wholly by the fault and negligence of the defendant company; the homicide being caused by the falling of a rotten pole which he had climbed in the performance of the duties of his employment, its defective condition being unknown to him. It was held that the petition was good as against a general demurrer. It was said, however: "If the declaration was defective

in matter of form in failing to allege that the company's negligence consisted in keeping the pole in use, either with knowledge of its condition or negligently without knowledge, this was matter for special demurrer." It appears, therefore, that the case cited is authority in support of the position that the special demurrer in the case in hand should have been sustained. There are cases from other courts cited in the brief of counsel for plaintiff in error, which seem to sustain their contention that the petition in the present case was sufficient, even as against the special demurrer made thereto; but under our understanding of the law in respect to the question, and in view of the former rulings of this court, we deem it unnecessary to attempt to analyze, or to distinguish, if possible, those decisions from our own. Counsel for plaintiff in error contend that the allegations of the petition to the effect that the plaintiff was ignorant of the improper distribution of the cargo and of the defective construction of the ship were sufficient to excuse him from going into the particulars in relation to these matters called for by the special demurrer; but even if the plaintiff, on account of his ignorance, could, in any event, be excused from specifying the particulars of the improper distribution of the cargo and the defective construction of the ship, it will be noted that the petition only alleges that the plaintiff was ignorant of these matters at the time he was injured, and that there is no allegation that he did not have knowledge of the negligence of the defendant, which he alleged caused his injuries, at the time of bringing his suit. From what we have said, it follows that there was no error in sustaining the demurrer to the petition.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 187)

KERBY et al. v. LONG, Ordinary, et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

PRESENTMENT OF GRAND JURY—COLLATERAL ATTACK.

1. Where general presentments are signed and returned into court by the grand jurors who were impaneled at the opening of the term of court, and are spread upon the minutes, without objection, the validity of a recommendation which is embodied in such presentments, and which is a proper subject-matter thereof, cannot be afterwards attacked on the ground that at the time of the grand jury's deliberations in regard to such recommendation some of the regular grand jurors were absent, and tales grand jurors participated in the vote which was taken thereon.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. B. Estes, Judge.

Bill by W. C. Kerby and others against W. S. Long, Ordinary, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

L. E. Bleckley, J. R. Grant, and Hubert Estes, for plaintiffs in error. R. E. A. Hamby, W. S. Paris, and H. H. Dean, for defendants in error.

SIMMONS, C. J. Certain citizens and taxpayers of the county of Rabun sought to enjoin the officers of the county from putting in operation and enforcing the alternative road law in that county. It appeared that the adoption of this law had been recommended by the grand jury, but it was claimed by the petitioners that this recommendation was invalid. The attack was made on the ground that, after the grand jury had been regularly impaneled and sworn, it was ascertained, pending the term of court, that several of the grand jurors were disqualified in particular cases; that talesmen were substituted and sworn in to hear these cases; and that, while the talesmen were acting as grand jurors, and during the absence of the disqualified grand jurors, the recommendation was adopted by a majority of one on a vote in which the talesmen participated. It also appeared that, after this vote was taken and the disqualified cases were acted on, the talesmen retired, the original jurors resumed their duties, the recommendation as to the road law was embodied in the general presentments, and all of the original grand jurors signed these presentments and returned them into court, where they were spread upon the minutes, without objection by any one. The judge refused the injunction, and the petitioners excepted.

It was argued here that, while a finding of a grand jury in a criminal case could not be impeached on grounds like that relied on in this case, civil matters which were by law referred to the grand jury were acted upon by that body as a commission, and not as a jury; that, accordingly, it was not contrary to the policy of the law to allow such an attack to be made. Whether the recommendation as to the road law was made by the grand jury as a jury in the strict sense, or as a commission to which the matter was referred by statute, we think that the injunction was properly refused. The private deliberations of the grand jurors and the votes taken by them are but tentative. A conclusion reached by them, but not returned into court, may be changed upon a reconsideration of the matter. It is only by the return that it becomes the final action of the grand jury. In the present case the original grand jurors, about whose qualification no question is raised, all signed the presentments, and returned them into court. These presentments, embodying the recommendation as to the road law, were spread upon the minutes without objection. This was clearly an adoption of what was in the presentments by the entire grand jury. When all of the grand jurors signed the presentments, what was in them became the act of the entire body, and, after the return into court and the

entry on the minutes, no part of the presentments could be attacked on the ground that the grand jurors had not all participated. There is no suggestion that the jurors were fraudulently induced to sign the presentments and return them into court, though it does appear that they were requested by the judge to hasten their deliberations. Thus, independently of the question of whether the recommendation was the act of a commission or of a grand jury in the strict sense, the recommendation was the act of the grand jurors, each and all, and cannot be attacked because of the participation of unauthorized persons in the deliberations which led up to the tentative conclusion to make it. For these reasons we think that the injunction was properly refused.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 1004)

OETJEN et al. v. OETJEN.

(Supreme Court of Georgia. July 22, 1902.)

WILL—REVOCATION.

1. In the left-hand corner of the last sheet upon which a will was written appeared this entry: "This, my will and testament, is of no avail, and null and void." The entry was signed by the testator, and dated, but the names of no subscribing or attesting witnesses appear signed thereto; nor was the entry written in such a manner as to obliterate or cancel any material portion of the will. *Held*, that such entry did not have the effect of revoking the will.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action between W. Oetjen and another and Joseph Oetjen. From the judgment, Oetjen and another bring error. Affirmed.

Irwin Alexander and Wm. H. Barrett, for plaintiffs in error. J. R. Lamar, for defendant in error.

COBB, J. In the case of *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638, this court held that, in order for a written entry upon a will to operate as a revocation thereof, it must have either been attested in the same manner and with the same formality as is required for the execution of a will, or the entry must have been written upon the will in such a manner as to obliterate or cancel some material portion of the will. The facts of the present case are almost identical with those of the case just referred to, the only difference being that one word of the entry in the present case was written across one word in the last line of the will. This word was in a sentence which stated merely that a word in the will had been changed before signing. It thus appears that no material portion of the will was obliterated, even if the mere writing across a word in a will, leaving the same perfectly legible, could be said to be an obliteration.

tion or cancellation, within the meaning of the statute which provides that a will may be revoked by canceling some material portion thereof. The case is, upon its facts, absolutely controlled by the decision in *Howard v. Hunter*.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 1006)

OETJEN et al. v. DIEMMER et al.

(Supreme Court of Georgia. July 22, 1902.)

WILL—CONSTRUCTION.

1. An item in a will, which makes certain disposition of property "If my wife and myself should perish at sea in going to or returning from Germany," the will, in a subsequent item, making other disposition of the property should the wife survive the testator, is contingent upon the happening of the event described.

2. An item of a will, to the effect that, "should my wife survive me, I devise and bequeath to her, during her natural life [described property], and at her death it is my will that said [property] shall vest in my nephew," is contingent in whole upon the survival of the wife. The life estate and the remainder both fail where the wife does not survive the testator.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Bill by Joseph Oetjen and others against Max. Diemmer and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. R. Lamar, and E. B. Baxter, for plaintiffs in error. Irwin Alexander and Wm. H. Barrett, for defendants in error.

SIMMONS, C. J. The executor of C. H. Oetjen filed an equitable petition in the superior court of Richmond county, asking the court to construe the will of his testator, and to give direction as to the duties of the executor. Thereafter there was a contest over the probate of the will in solemn form, and the caveat was, by consent, appealed to the superior court. The two cases were there tried together on the pleadings and certain agreed facts. It was admitted that the will was originally executed in due and legal form, but the caveators contended that the will had been revoked by the testator's writing thereon the words: "This, my last will and testament, is of no avail, and null and void. Sept. 5, 1890. C. H. Oetjen." The court held to the contrary, and the caveators excepted, the questions thus raised being dealt with in the case of *Oetjen v. Oetjen* (this day decided) 42 S. E. 387. The court then proceeded to construe the will, and to give direction to the executor. This branch of the litigation was brought to this court by the present bill of exceptions. The will, in so far as at present material, was as follows: "(5) If my wife and myself should perish at sea in going to or returning from

Germany, I give, devise, and bequeath to my nephew William Henry Oetjen (son of my brother, Joseph), and his heirs, forever, my house and lot [describing it] in the city of Augusta, Georgia. (6) In the same event, it is my will, and I direct, that one half of the net proceeds of all the rest and residue of my property and estate be divided among my mother, my brother Joseph [and others]. It is further my will, and I direct, that the other half of the net proceeds of said residuum be equally divided among [certain relatives of testator's wife]. (7) Should my wife survive me, I devise and bequeath to her, during her natural life, the house and lot mentioned in the preceding 5th item of this, my will, and at her death it is my will that said house and lot shall vest in my nephew William Henry Oetjen, if living, and, if not, in his children, and, if he leaves none, or none are living at that time, then in his brothers and sisters, or his lineal heirs. In the same event, I devise and bequeath to my said wife, during her natural life, all the rest and residue of my property and estate, or the net proceeds thereof, to be divided and distributed at her death as directed in the preceding 6th item of this, my will, provided that, should she remarry, and have issue, the whole of said residue shall vest absolutely in my said wife and her heirs, forever." This will was executed in 1878. Neither the testator nor his wife perished at sea. The wife died on or about January 21, 1899, while the testator lived until January 27, 1900. The court below held that "the fifth and sixth items of the will are not of force, they depending upon the condition that the testator and his wife perish at sea"; and that the seventh item "is not of force, it appearing that the testator's wife did not survive him." To this decision Wm. H. Oetjen and the executor excepted.

1. We agree with the trial court that the fifth and sixth items of the will were conditional upon the happening of the event therein described. The testator did not, by his reference to the possibility of death at sea, "merely intend to particularize the circumstances and inducements which surrounded him, and which prompted" the execution of the will. 1 Underh. Wills, § 8. On the contrary, this contingency applied to but two items of the will, and the testator was very clear in expressing his intention that the validity of these items should depend upon the death of his wife and himself at sea. This intention was shown both by the language employed to express the contingency, and also by the fact that the will then proceeded to make a different disposition of the property in case the named event should not occur.

2. With regard to the seventh item of the will, the learned counsel for the plaintiffs in error contended that the devise was equivalent to a devise to the wife for life, with lim-

itation over at her death (unless she should remarry and have issue); that the general rule is that, in the event of the death of a life tenant before the testator, the life estate only is extinguished, and the remainderman is let in as soon as the will takes effect; that the words "should my wife survive me" were only expressive of what must be true in every life estate; and that the interposition of the words "It is my will" between the life estate and the remainder separated the two devises, that to the nephew springing from a new root, and being an independent substantive gift. It is, of course, true, generally, where there is a devise to one for life, with remainder to another, that the remainder is not extinguished by the death of the life tenant before the death of the testator. In the present case, however, the question is as to whether the life estate and the remainder are not both dependent upon the happening of a condition or contingency. The words "should my wife survive me" clearly import a condition as to the life estate, and the real question is as to whether the subsequent gifts to the nephew and other relatives are not made to depend upon the same condition. The mere interposition of the words "It is my will" after the gift of the life estate will not serve to disconnect the subsequent gifts from the previously expressed contingency. If the subsequent gifts were substantive independent gifts, this might be true. 1 Jarm. Wills (8th Am. Ed.) 803. "It is not, however, to be assumed that whenever the word 'item' or 'likewise' begins a sentence, it creates a complete severance of all that follows from the previously expressed contingency. It cannot be put higher than this: that such expressions make a prima facie case for the disconnection, which the context of the will may either maintain or rebut." Id. 804. In the present case the words "It is my will" do not stand at the beginning of the sentence, but in the middle of it. They occur in the midst of the words expressing the gift to those who are to take after the termination of the life estate. Nor are the gifts to the wife and those to the others independent and disconnected. On the contrary, they form an uninterrupted series; the gifts to the wife for life being immediately and without interruption followed by the ulterior limitations. "If the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same

event, for want of something in the will to authorize a distinction between them." Id. 802, and cases cited. After a careful reading of many authorities, we believe that the weight of the best-considered cases is in accord with this view. Our decision is, however, not made merely because of the similarity of decisions in other cases. In no class of cases are seeming precedents of less value than those involving the construction of wills. Each case must depend largely upon its own facts, the words used in the clause or item under consideration, and the context generally, the court seeking diligently the intention of the testator. In the present case the grammatical construction of the words used would import a contingency as to both the gifts to the wife and the ulterior gifts, and this construction seems, from the context and from the instrument as a whole, to be what the testator intended. The items of the will preceding the fifth sought to dispose of but little property, and even as to that must fail, for reasons not necessary here to be set out, and the only item which follows the seventh disposed of no property; so that a decision that the fifth, sixth, and seventh items are inoperative serves, in effect, to declare an intestacy save as to the nomination of an executor. While this is true, we cannot say that the testator did not so desire. He made the disposing items of his will dependent upon certain contingencies. As the contingencies did not occur, these items are inoperative. As to what the testator desired in case of the failure of these contingencies the will is silent, and we are left to conjecture alone, unless the testator's silence be evidence that he desired the law to take its course as in case of an intestacy. After a careful study of the will as a whole, we are convinced that the decision below was correct, and that the disputed items were all dependent upon the contingencies expressed in them, and that all of these items failed because of the failure of the contingencies.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 92)

PAT v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

CRIMINAL LAW—AUTRE FOIS ACQUIT—RECEIVING STOLEN GOODS.

1. An acquittal upon an indictment for burglary will not support a plea of autre fois acquit to an indictment for receiving stolen goods, knowing the same to have been stolen.

2. A charge of this nature cannot be established by evidence showing that the accused received the stolen goods, not knowing at the time that they had been stolen, but, upon being informed of the larceny, secreted the goods, and retained the possession thereof.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. M. Holden, Judge.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 334.

Fannie Pat was convicted of receiving stolen goods, and brings error. Reversed.

L. C. Van Duzer and Geo. C. Grogan, for plaintiff in error. David W. Meadow, Sol. Gen., for the State.

FISH, J. Fannie Pat was indicted for the offense of receiving stolen goods, knowing them to be stolen. Upon the trial she pleaded autre fois acquit, in that she had, at a former term of the court, been tried and acquitted of the offense of burglary, and that the facts in the burglary case were the same as those in the case upon trial; the two cases involving the same transaction. The plea was overruled, and upon the trial the accused was found guilty. She made a motion for a new trial, which was denied, whereupon she excepted to the judgment refusing the new trial, and also to the overruling of the plea of autre fois acquit.

1. The offense of receiving stolen goods, knowing them to be stolen, is not a necessary element in, and does not constitute an essential part of, the offense of burglary. The two offenses are separate and distinct, and a verdict of guilty of receiving stolen goods, knowing them to be stolen, could not legally be found under an indictment for burglary. *Mangham v. State*, 87 Ga. 549, 13 S. E. 558. Therefore, the acquittal of the accused upon the indictment for burglary could not support a plea of autre fois acquit to the indictment for receiving stolen goods, knowing them to be stolen. See *Bell v. State*, 103 Ga. 307, 30 S. E. 294, 68 Am. St. Rep. 102; *Smith v. State*, 105 Ga. 724, 32 S. E. 127.

2. Complaint was made of a charge of the court to the effect that if the accused did not know that the goods were stolen at the time she received them, but knew after she received them that they were stolen, and then secreted them, the jury would be authorized to convict her. We think this charge was erroneous. The gist of the offense of receiving stolen goods, knowing them to be stolen, is the felonious knowledge that the goods were stolen; and to constitute the offense, the person receiving the goods must have this knowledge at the time of receiving them. *State v. Caveness*, 78 N. C. 484; *May v. People*, 60 Ill. 119.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 1002)

MEADOWS v. FROST.

(Supreme Court of Georgia. July 22, 1902.)

APPEAL—REVIEW.

1. No error of law was committed, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from superior court, Washington county; H. M. Holden, Judge.

Action between C. S. Meadows and William Frost. From the judgment, Meadows brings error. Affirmed.

Faircloth & Blount, for plaintiff in error. Rawlings & Howard and T. W. Hardwick, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1012)

DOUGAN et al. v. DUNHAM.

(Supreme Court of Georgia. July 22, 1902.)

ACTION ON ACCOUNT—EVIDENCE—CERTIORARI.

1. The correctness of an account cannot be lawfully proved by the testimony of a witness that the same is "a correct copy of the charges made on the books" kept by her, when the witness further testifies that "she knew nothing of her own knowledge" with respect to the account, and "only copied in the book entries given to her by [another] on slips."

2. As the magistrate erred in admitting against the defendants illegal testimony, which was necessarily prejudicial to them, the superior court erred in not sustaining their petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Chatham county; P. E. Seabrook, Judge.

Action by W. J. Dunham against Dougan & Sheftall. Judgment for plaintiff, and defendants bring error. Reversed.

Gignilhat & Stubbs, for plaintiffs in error. Jas. T. Evans and Twiggs & Oliver, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 87)

WELLS v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

CRIMINAL LAW—DEFECTIVE VERDICT—AMENDMENT—ARREST OF JUDGMENT.

1. Where by consent the jury in a criminal case, after agreeing upon their finding, dispersed, and thereafter returned into court a verdict which was too uncertain or indefinite to support a judgment, it was beyond the power of the court to order this verdict to be so amended as to cure the defects therein. Any action by the court in attempting to thus amend such a verdict should be treated as a mere nullity.

2. Where, upon an indictment charging the offense of simple larceny, by stealing a hog, a verdict in these words was rendered, "We, the jury, find the defendant guilty of misdemeanor," it was erroneous to overrule a motion in arrest of judgment.

(Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

Set Wells was convicted of hog stealing, and brings error. Reversed.

T. W. Hardwick, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

FISH, J. On the trial of Set Wells under an indictment charging him with hog stealing, after the argument was concluded and the charge given to the jury, and when the court was about to take a recess for the night, counsel for both sides consented that the jury should disperse after agreeing upon a verdict, and that the foreman should return the verdict into court the next morning. A verdict was agreed upon during the night, and the jury then dispersed. The next morning a verdict in the following words was rendered: "We, the jury, find the defendant guilty of misdemeanor." Thereupon the court, over the objection of the accused, passed the following order: "Counsel for the defendant consented that the jury in the above case might disperse after agreement on a verdict, and the jury did disperse pursuant to this agreement. When the jury came into court they rendered the following verdict, indorsed on the bill of indictment: 'We, the jury, find the defendant guilty of misdemeanor. T. J. Brooks, Sr., Foreman;' and the said foreman stated at the time the verdict was published that the intent of the verdict was to find the defendant guilty, and to recommend that the penalty be reduced to a misdemeanor. It is therefore ordered that said verdict be amended in accordance therewith." Judgment was entered upon the verdict as amended, and the accused sentenced as for a misdemeanor. He moved in arrest of judgment upon the ground that there was no legal verdict against him upon which judgment could be entered. The motion was overruled, and the accused excepted.

Under the Code of 1882 (sections 4390, 4401), hog stealing was punishable as a misdemeanor when the jury trying the case recommended the prisoner to mercy. In such event the judge was obliged to follow the jury's recommendation, and to impose a misdemeanor punishment. Such, however, is no longer the law, since the adoption of the Code of 1895. Pen. Code, § 163, declares: "The punishment of hog-stealing shall be as prescribed in section 161 for the offense of cattle-stealing." Section 161 is: "The stealing of one or more animals falling under the above description of cattle shall be punished by imprisonment in the penitentiary not less than two nor more than four years." Section 1036 of that Code provides that all felonies, with certain specified exceptions, among which hog stealing is not mentioned, "shall be punished by imprisonment and labor in the penitentiary for the terms set forth in the several sections in this Code prescribing the punishment of such offenses; but on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as misdemeanors. If the judge trying the case sees proper, he may, in his punishment, reduce such felonies to misdemeanors." It appears, therefore, that hog stealing is now a felony, and that the jury

finding one accused of such offense guilty cannot reduce it to a misdemeanor by a recommendation to mercy. The jury may, however, as we have seen, recommend that the prisoner be punished as for a misdemeanor, but such recommendation has no effect unless it be approved by the presiding judge. It is clear that the jury trying the present case could not legally find the accused guilty of a misdemeanor. The charge against him was a felony, and the verdict was bound to be one or the other of the general verdicts of guilty or not guilty, or a special verdict of guilty, with a recommendation for misdemeanor punishment. The verdict as originally written was none of these, and, if not a mere nullity, was manifestly too uncertain and indefinite to support a judgment. The judgment, however, was entered upon the verdict as amended. Was that a legal verdict? We think not. While a verdict may be amended in mere matter of form after the jury rendering it have dispersed, the verdict cannot, after such dispersal, by amendment be essentially changed. The amendment in the present case sought to make a substantial change in the verdict as it originally appeared. A verdict finding the accused, who was on trial for a specified felony, guilty of a misdemeanor generally, which was not permissible, was sought to be changed to one finding him guilty of the felony charged; with recommendation that a misdemeanor punishment be imposed. This could not legally be done. What the foreman said as to the intent of the verdict could not authorize the amendment sought to be made; for, when the verdict was agreed on and the jury dispersed, the trial was, in effect, at an end (*Smith v. State*, 59 Ga. 513, 27 Am. Rep. 393), and the jury was functus officio. The verdict as amended was not the verdict found by the jury, and no valid judgment could be entered upon it. The court therefore erred in overruling the motion in arrest of judgment.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 147)

NEW v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 7, 1902.)

CONTRACT—HIRING OUT SERVICES OF SON—RELEASING CLAIMS FOR INJURY—VALIDITY AND EFFECT.

1. A contract whereby a father hires his minor son to another, and releases him from all liability for "damages for any injuries sustained" by the son while in the employer's service, will, when such contract can, under the facts of a case arising thereunder, be properly treated as valid and binding, defeat a recovery by the father for the loss of the value of the son's services during minority, even where such loss is occasioned by the homicide of the minor.

2. Such a contract, though made with a railway company, is valid and binding to the extent of exempting the latter from liability for negligent acts of itself or servants which are not criminal.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Oulhoun, Judge.

Action by W. B. New against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Arnold & Arnold, for plaintiff in error. Dorsey, Brewster & Howell and Sanders McDaniel, for defendant in error.

LUMPKIN, P. J. The Southern Railway Company employed as a switchman Looney Oscar New, the minor son of W. B. New. The latter entered into a written contract with the company, by which he, among other things, stipulated as follows: "I further hereby agree and consent that said company is by these presents released and forever acquitted from all or any claim or liability to me for damages for any injuries sustained by said Looney Oscar New while in its employment; and also that said company may pay all wages and other moneys due or growing out of said employment direct to him, and receive acquittance therefor from him in his own name." The minor was killed while in the service of the company, and the father brought an action for the value of his services up to the time when he would have attained majority. After the plaintiff had closed, the defendant introduced in evidence the above-mentioned contract, and the court directed a verdict in its favor, on the ground that this contract "barred any right of the plaintiff to recover." To this W. B. New excepted. The case, as here presented and argued, turns upon the two questions dealt with in the discussion which follows.

1. It was insisted in behalf of the plaintiff in error that, as the contract purported to relieve the company only from such damages as might arise from "injuries" sustained by the minor, it did not apply to damages resulting to the father from the son's death. While "injury" and "death" are by no means synonymous, it is certainly true that, relatively to a father seeking to recover for the lost services of his minor child, it is immaterial whether the tort from which his loss originated was one which occasioned the child physical injury, destroying his ability to labor, or one which, by causing his death, brought about the same result. So far as the alleged right of W. B. New to have compensation from the company was concerned, the killing of his son by it was, to all practical intents and purposes, the same as the injuring of him by it; for the gist of his action was the loss of the son's services. See *Frazier v. Railroad Co.*, 101 Ga. 70, 28 S. E. 684. The company, in contracting with New for a release from damages for injuries sustained by the son, was manifestly seeking to free itself from damages which, but for the contract, the father might claim because of such injuries; and in this view it is without doubt proper to construe the term "injuries," used in the con-

tract, as having been intended to apply to any and all kinds of bodily harm, whether resulting in partial or total disability of the minor or in his death.

2. The remaining and more important contention of counsel for the plaintiff in error is that, inasmuch as the contract, if enforced, will, in effect, relieve the company of liability for the consequences of its own negligence, it is for this purpose, at least, void, as being contrary to public policy. Our ruling on this branch of the case is expressed in the second headnote. In the case of *Railroad Co. v. Bishop*, 50 Ga. 465, this court held that a contract between a railroad company and its employé, exempting the former from damages resulting from its own negligence, was, save as to "any criminal neglect of the company or its principal officers," valid. In that case the action was by an employé for personal injuries. The ruling therein made was followed and applied in *Railroad Co. v. Strong*, 52 Ga. 461, which was an action by a widow for the homicide of her husband; and it was decided that, as the contract was binding upon him, her right of action was cut off. A similar case—that of *Hendricks v. Railroad Co.*—appears in the same volume, page 467. The correctness of the rule laid down in *Bishop's Case* was recognized in that of *Galloway v. Railroad Co.*, 57 Ga. 512, which was also an action for personal injuries, brought by an employé against the company. These cases were all decided before the passage of the act of February 15, 1876, "to define and punish criminal negligence," the provisions of which have been codified (Pen. Code, § 115) as follows: "If any person employed in any capacity by any railroad company doing business in this state shall, in the course of such employment, be guilty of negligence, either by omission of duty or by any act of commission, in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary not less than one nor more than two years, in the discretion of the court." In the case of *Cook v. Railroad*, 72 Ga. 48, which was an action by a widow for the homicide of her husband, this court, in a decision rendered by two justices, held, in effect, that, after the passage of the above-mentioned act, any negligence on the part of a railroad company or of its servants from which the death of an employé resulted was necessarily "criminal negligence." It seems, however, that the two justices by whom the case was decided entirely overlooked the fact that the act of 1876 expressly exempted from the operation of its provisions all cases in which deaths were caused. It is clear that the purpose of the general assembly in passing this act was to create a new class of criminal offenses, which should embrace all acts of

negligence on the part of railroad employes, whether of commission or of omission, from which serious bodily injury, "but not death," might result; and equally clear that there was no intention to change existing laws with respect to unlawful homicide, or the punishment therefor. We are, therefore, satisfied that a grave error was committed in making the Cook Case turn upon the act of 1876, which really had no bearing upon it. The court distinctly recognized the correctness of the settled rule that a railroad company could lawfully stipulate for exemption from liability to an employe for damages resulting from acts of negligence not criminal, but made a mistake in holding that the act of 1876 rendered any negligent act of a railroad employe from which death resulted per se felonious. Under a proper application of the rule just stated, the case should have been made to turn upon the question whether or not, under the law as it stood, without reference to the act of 1876, the negligence causing Cook's death was criminal and indictable. As this decision was not rendered by a full bench, it is not binding as authority; and, as it was manifestly based upon an erroneous view with respect to the true intent and meaning of the act of 1876, it will not be followed. This court, in *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322, upon a review of the cases above mentioned, reaffirmed the rule, in so far as the same was not modified by the act of 1876 touching railroad employes, that, "as between employer and employe, the latter in the contract of hiring may assume all risks appertaining to the service, save such as arise from criminal negligence." We have endeavored to show that the act referred to has no application at all to an action against a railroad company for a homicide, and that when, in defense to a suit, a contract like that relied on in the present case is set up by the company, its efficacy should be made to depend upon whether or not the act causing the death was criminal, without regard to the provisions of section 115 of the Penal Code, which was, as above stated, codified from the act of 1876. The evidence in the present case did not, so far as this court is informed, show that any employe of the company was guilty of a criminal act from which the death of the plaintiff's son resulted. In this connection the bill of exceptions merely discloses that "the testimony for the plaintiff tended to support the declaration as to the allegations of negligence." We have carefully read these allegations, and they neither declare nor even intimate that any employe of the defendant was guilty of a criminal or indictable act. It must, therefore, be assumed that no such acts were proved, and it follows that the plaintiff in error has not made it appear that the court below erred in holding that the contract into which he

entered was, as applied to the facts proved, void, because contrary to the public policy of this state. If the plaintiff in error had brought up all the evidence, and an examination of it showed that, as matter of law, the defendant's employes were guilty of criminal negligence, the question before us would be altogether different.

As the contract relied on, had it been between the deceased and the company, would certainly, but for the act of 1895, which will presently be more fully noticed, have been binding, to the extent herein laid down, upon him, it must, to that extent, be binding upon the father, unless the act just referred to contains something requiring a holding to the contrary. It is "An act to declare all contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant, arising from the negligence of the master or his servants, as such liability is now fixed by law, void as against public policy." Acts 1895, p. 97. The provisions of this act now appear in Civ. Code, § 2613, which reads as follows: "All contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be null and void, as against public policy." Whatever change the passage of this act made in existing laws, it is certain that by its express terms it applies exclusively to "contracts between master and servant." It cannot, therefore, by construction, be applied to any other contracts. To attempt to do so would be an effort to legislate, which we have neither the inclination nor the authority to do.

It is proper to remark, before concluding, that this court cannot assume that the court below, without undertaking to pass upon the evidence bearing on the question of negligence, directed the verdict complained of on the theory that the effect of the contract was to manumit the plaintiff's son, and therefore deprive the father of all right to the son's services during his minority, and consequently of all right to compensation for the loss thereof. There is nothing in the bill of exceptions from which it could even be inferred that the court based its action in directing the verdict upon any such view of the contract. Indeed, it does not appear that the court undertook to pass at all upon the question whether or not the contract did operate to manumit the minor; and, as such was not its effect, it is certainly not to be presumed that the court erroneously held to the contrary, and in this way arrived at the conclusion that the plaintiff was not entitled to recover.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 92)

DUFFEL v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

CRIMINAL LAW—NEW TRIAL.

1. There being no error of law complained of, and the evidence, although entirely circumstantial, being sufficient to warrant the verdict, the judge did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Madison county; H. M. Holden, Judge.

Thomas Duffel was convicted of crime, and brings error. Affirmed.

Geo. C. Thomas and Jno. E. Gordon, for plaintiff in error. David W. Meadow, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.**LEWIS, J.,** absent on account of sickness.

(115 Ga. 999)

MATHESON et al. v. MAYOR, ETC., OF CITY OF TENNILLE.

(Supreme Court of Georgia. July 22, 1902.)

DIRECTING VERDICT.

1. This case involved disputed issues of fact, which should have been passed upon and determined by the jury, and was not one which could properly be disposed of by the direction of a verdict.

(Syllabus by the Court.)

Error from superior court, Washington county; H. M. Holden, Judge.

Action between Matheson and Neel, receivers, and the mayor and council of the city of Tennille. From the judgment, the receivers bring error. Reversed.

T. W. Hardwick, Rawlings & Howard, and John C. Harman, for plaintiffs in error. Evans & Evans and Jas. K. Hines, for defendant in error.

PER CURIAM. Judgment reversed.**LEWIS, J.,** absent on account of sickness.

(115 Ga. 1021)

WALL v. BREWER.

(Supreme Court of Georgia. July 22, 1902.)

DIRECTING VERDICT—HARMLESS ERROR.

1. This being an action of trover, and the evidence demanding a finding for the plaintiff, there was no error in directing the jury to return a verdict in his favor; and that the court also instructed the jury to relieve the defendant of the costs certainly affords her no just cause of complaint.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by S. S. Brewer against Bessie Wall. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Tutt & Son, for plaintiff in error. J. N. Worley and I. C. Van Duzer, for defendant in error.

PER CURIAM. Judgment affirmed.**LEWIS, J.,** absent on account of sickness.

(115 Ga. 1000)

HODGES et al. v. CUMMINGS.

(Supreme Court of Georgia. July 22, 1902.)

RECOVERY OF PERSONALTY—JUDGMENT FOR DAMAGES—NEW TRIAL.

1. In an action by the seller in a conditional sale of personal property to recover possession of the property on the ground that the purchase price has not been paid, the plaintiff may elect to take a verdict for damages alone, when it appears that a demand for the possession of the property was made prior to the bringing of the suit, and the defendant refused to deliver possession of the same.

2. The evidence, though conflicting, authorized the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by M. F. Cummings against P. C. Hodges and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. T. Burkhalter and Jas. K. Hines, for plaintiffs in error. E. J. Giles, for defendant in error.

COBB, J. This was an action for the recovery of an article of personal property. The plaintiff elected to take a verdict for the damages alone, and the trial resulted in a verdict in favor of the plaintiff. The defendants assign error upon the refusal of the court to grant a new trial.

1. The evidence authorized a finding that the chattel in question was sold by the plaintiff to the defendants for a stated sum, that title was reserved until the purchase price should be paid, and that no part of the same had been paid. Upon this state of facts the judge charged the jury that the plaintiff was entitled to elect to take a verdict for the amount due on the purchase price of the property, and this charge is assigned as error. It is contended that, while it is the general rule that a plaintiff in an action for the recovery of personal property may elect to take a verdict for the damages alone, still in suits to recover personal property which has been the subject of a conditional sale the plaintiff is compelled to take an alternative verdict permitting the defendant to return the property in satisfaction of the judgment, if he sees proper to do so. It is said that an action to recover the property in such a case amounts to a rescission of the contract of sale, and that upon such rescission the seller is entitled to demand the property which was the subject of the sale, but not the value of the same. When the law authorizes a seller to rescind the sale,

he may demand of the buyer the possession of the property, and a surrender of the property in compliance with such demand will release the buyer from the obligation imposed upon him by the contract of sale; but when such a demand is made, and the buyer refuses to deliver the property, such demand and refusal constitute a conversion, and the seller may bring an action for the recovery of the property in the nature of an action of trover; and when this is done the seller is entitled to all the rights which a plaintiff in such an action is entitled to under the statute of this state, and one of these is a right to take a verdict for damages alone, if he sees proper. The right of the buyer to discharge the obligation imposed by the contract of sale by mere delivery of the property to the seller is lost by a refusal to surrender the same upon demand made prior to the institution of the suit, if the seller in the suit subsequently brought to recover the property elects to take a verdict for the damages alone. In cases of conditional sales, where the title is reserved, while the plaintiff may elect to take a verdict for damages alone, the measure of damages is not in all cases the value of the property. If the value of the property is greater than the balance due on the debt, then the measure of damages is the balance due on the debt at the date of the verdict. If the value of the property is less than the balance due on the debt, the measure of damages is the value of the property. In the present case the value of the property was admitted by the defendants in their plea to be the amount stated in the plaintiff's petition, and the amount so admitted was the balance due on the purchase price of the property. It was, therefore, not erroneous for the judge to charge the jury that, the plaintiff having elected to recover the damages alone, he was entitled to recover the amount admitted in the defendant's plea.

2. The foregoing division of this opinion disposes of the only question made in the record which requires special notice. The other charges complained of were not erroneous for any reason assigned. The evidence, though conflicting on several of the material issues in the case, was sufficient to authorize the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 159)

SOUTHERN RY. CO. v. WEBB.

(Supreme Court of Georgia. Aug. 7, 1902.)

CARRIERS—INJURY TO PASSENGER—PROXIMATE CAUSE—INTERVENING ACT—OWNERSHIP OF TRACKS—ADMISSIBILITY OF EVIDENCE—MODE OF INJURY—SUFFICIENCY OF EVIDENCE.

1. While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself suffi-

cient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such as its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act.

2. There was no error in any of the rulings complained of which required the granting of a new trial. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Louis Webb against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiff in error. H. C. Hammond and C. H. Cohen, for defendant in error.

COBB, J. This was an action by the father of John W. Webb against the Southern Railway Company for damages alleged to have been sustained by the plaintiff on account of the homicide of his son. The trial resulted in a verdict in favor of the plaintiff, and the defendant complained that the court erred in refusing to grant it a new trial.

1. The petition alleged that John W. Webb was a passenger on one of the trains of the defendant; that while in one of the cars of the train, in the exercise of all ordinary care and diligence, and just as he was about to take a seat near the rear door of the car, the train was negligently, suddenly, forcibly, and with great violence jerked, jarred, and jolted, and as a result Webb was suddenly and without fault on his part thrown through the rear door of the car, and fell across the platform at the end of the car onto the track on a bridge over which the train was passing at the time the jolt took place; that he was stunned by the fall, and rendered insensible; and that while upon the track in a stunned, insensible, and injured condition, and unable to walk or protect himself, he was negligently run over and killed by another engine passing along the track over the bridge. There was evidence authorizing the jury to find that Webb was a passenger upon a train of the defendant, and that while this train was going over a bridge a sudden and violent jolt occurred, sufficient to throw one from his feet who was standing in the train, and which had the effect of jostling the passengers and throwing down bundles from the racks of the car; that Webb was seen upon the train just before this jolt occurred, and he was then near the rear door of the car; that he was not seen afterwards by any one who was in the car; that shortly after the train upon which he was last seen had pass-

ed over the bridge an engine belonging to the Georgia Railroad Company ran over and killed Webb, who was lying across the track on the bridge just at the point where the train was when the jolt occurred; that, while the defendant had no control over this engine, the engines of the Georgia Railroad Company had a right to use this track, and it was known to the defendant that the engines of that company might pass along the track at any time when it was not otherwise in use. While the evidence was conflicting as to some of the points above referred to, there was ample evidence authorizing the jury to find all of the facts above stated. It is contended by the counsel for the plaintiff that from this evidence the jury could have inferred that Webb was thrown from the rear door of the car upon the track, and was there in a stunned condition at the time the engine ran over him. Counsel for the railway company contends that the jury were not authorized to draw any such inferences, and that the plaintiff has failed to establish the case made in the petition, but that, even if this position is not correct, and the jury were authorized to infer, from the facts above referred to, that Webb was thrown from the inside of the car through the rear door of the same upon the track, and stunned by the fall, still the plaintiff could not recover, for the reason that the negligence of the defendant which resulted in Webb's being hurled upon the track was not the proximate cause of his death, but that the immediate cause of his death was the intervention of another independent agency,—that is, the running of the engine of the Georgia Railroad Company upon the tracks at that point.

As we have reached the conclusion, for the reasons which will be hereafter stated, that the jury were authorized to infer, from the facts above detailed, that Webb was negligently thrown from the inside of the car through the rear door upon the track, it becomes necessary to determine whether this negligence on the part of the defendant was so far the proximate cause of the death of Webb that the defendant would be liable, notwithstanding the death was not actually brought about by the fall from the train, but by the running of the engine which ran over and killed him while he was lying in an insensible condition upon the track. See, in this connection, *Hopkins*, Pers. Inj. §§ 14-16. "No branch of the subject of personal injuries presents greater difficulty than the determination of liability for a specific loss, with reference to its naturalness and proximity as a consequence of the wrongful act complained of." *Watson*, Pers. Inj. § 25. As was said by *Elbert, J.*, in *Car Co. v. Barker*, 4 Colo. 344, 84 Am. Rep. 89: "What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life." Chief

Justice Shaw, in *Marble v. City of Worcester*, 4 Gray, 397, said: "The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery." In *Scott v. Hunter*, 46 Pa. 195, 84 Am. Dec. 542, *Strong, J.*, said: "Indeed, it is impossible by any general rule to draw a line between those injurious causes of damage which the law regards as sufficiently proximate and those which are too remote to be the foundation of an action." In *Smith v. Telegraph Co.*, 83 Ky. 114, 4 Am. St. Rep. 126, Judge *Holt* remarked: "The line between proximate and remote damages is exceedingly shadowy; so much so that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect." It has been said that, notwithstanding the maze of doubt and difficulty with which this subject seems to be involved, still it is possible to take a more practical and simpler view than the observations of learned jurists would indicate; that the practical administration of justice prefers to disregard the intricacies of metaphysical distinctions and subtleties of causation, and to hold that the inquiry as to natural and proximate cause and consequence is to be answered in accordance with common sense and common understanding. *Watson*, Pers. Inj. § 28. From the author just cited we quote the following: "A natural consequence is one which has followed from the original act complained of in the usual, ordinary, and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as, upon a calculation of chances, would be found possible of occurrence, or such as extreme prudence might anticipate, but only those which ensue from the original act, without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from." Section 33. "From the very outset the practical distinction between causes and consequences should be borne in mind in this particular: a consequence of an original cause may, in turn, become the cause of succeeding consequences. But such a cause should not, manifestly, be regarded as an intervening cause, which will relieve from liability the author of the original cause, but rather as only a consequence along with the other consequences. A tortious act may have several consequences, concurrent or successive, for all of which the first tortfeasor is responsible. It is not intervening consequences, but intervening causes, which relieve. The test is to be found, it has been said, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as

It affirmatively appears that the mischief is attributable to the original wrong as a result which might reasonably have been foreseen as probable, legal liability continues." Section 58. "Some authorities have formulated rules on this subject designed for general application,—as that the defendant is not responsible where there has intervened the willful wrong of a third person, or is liable where such act is of a negligent character merely. But the better doctrine is believed to be that whether or not the intervening act of a third person will render the earlier act too remote depends simply upon whether the concurrence of such intervening act might reasonably have been anticipated by the defendant." Section 71. In *Railway Co. v. Taylor*, 104 Pa. 815, 49 Am. Rep. 580, Mr. Justice Paxson said: "In determining what is approximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." In *Lane v. Atlantic Works*, 111 Mass. 189, Colt, J., said: "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." In *Seale v. Railway Co.*, 65 Tex. 278, 57 Am. Rep. 602, Chief Justice Willie said: "What character of intervening act will break the causal connection between the original wrongful act and the subsequent injury is also left in doubt by the decisions. If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken." See, also, *Investment Co. v. Rees* (Colo. Sup.) 42 Pac. 42, 45; 21 Am. & Eng. Enc. Law (2d Ed.) p. 496 et seq.

Treating it as established in the present case that Webb was upon the track of the defendant in an insensible condition as a result of the negligence of the defendant, is it reasonable or unreasonable to hold that the defendant should have apprehended that a person in this condition, in such a place, might be injured or killed by the running of an engine upon the track? Was the defendant bound to anticipate that injury or death might result to a person in such a condition in such

a place? The track was under the control of the defendant, and, if Webb had been killed by an engine of the defendant which came along the track after the train from which Webb was thrown had passed, the defendant would have been liable, although the employees in charge of the engine had been wholly free from negligence. *Railroad Co. v. Nix*, 68 Ga. 572. In that case Mr. Chief Justice Jackson said: "Suppose there had been a prosecution for murder, who would be found guilty thereof,—the conductor of the train who did the deed of throwing him off and under, or the conductor of the other train who ran unconsciously over him? Clearly, he who did the intentionally wrongful act, and whose act caused his death." The principle upon which the ruling in the *Nix Case* is founded is that a railway company is bound to know that its tracks may be used at any time by the engines and trains of the company, and is bound to anticipate and apprehend any consequence that may result to one who, on account of its negligence, is left in a condition in which and in a place where he is liable to be injured by the running of such trains. If a railway company is bound to anticipate and apprehend that one left in a helpless condition in a perilous place upon its tracks through its negligence may be injured by one of its own engines or trains running thereon, is it not equally bound to so anticipate and apprehend any injury which might result to such a person from an engine of another company, which the first company knew had a right to and did actually use the tracks from time to time? It would, indeed, bring about a curious result if the defendant would be liable in such a case only when the second engine or train was owned by it. It must be kept in mind that in such cases no negligence is claimed against the persons in charge of the second train or engine. They are blameless. If there is any liability, it results from the negligence of those in charge of the train which left the person killed in a perilous situation upon the track. It would seem that ownership of the second engine or train would be entirely immaterial, and the only question to be considered would be whether the first company knew, or ought to have known, that the second engine or train, no matter by whom owned, had a right to, or did actually from time to time, use the track at the place at which the person was killed. When a railway company negligently leaves a person upon its track in a helpless condition, it will certainly be held liable for any injurious consequences which may result to such a person growing out of the running of trains along the track, without regard to the ownership of such trains, if the company knew or ought to have apprehended that the trains would pass along the track at that point. The present case is very similar to the case of *Byrne v. Wilson*, 15 Ir. C. L. 332. That was a case brought in 1862, under Lord Campbell's act, by William

Byrne, as administrator of Mary Byrne, against a person who was alleged to be the proprietor of certain omnibuses, and as such engaged in the business of a common carrier of passengers. Mary Byrne was a passenger in one of the omnibuses, and through the negligence of the servants of the defendant the omnibus was precipitated into the lock of a canal, and Mary Byrne was there in an insensible condition, when the keeper of the lock turned the water therein, and she was drowned. It was held that, although the death of Mary Byrne was not caused immediately by the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action. *Lefroy, C. J.*, said (page 340): "It was not the negligence of the defendant that was the immediate occasion of her death, but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action." The defendant knew that the Georgia Railroad Company had a right to use these tracks. It also knew that it might use them at any time. When, therefore, Webb was negligently thrown upon the tracks, and left there in a helpless condition, the defendant was bound to apprehend and anticipate that injurious consequences would likely result to him from the use of the track by the servants and agents of the Georgia Railroad Company in charge of its engines and trains. This being so, the negligence of the defendant which resulted in leaving Webb helpless upon its tracks was in law the proximate cause of his death, notwithstanding his death was actually brought about by another agency.

We do not think this ruling is in conflict with any of the cases cited in the brief of counsel for the plaintiff in error. In *Perry v. Railroad Co.*, 66 Ga. 746, the plaintiff had deposited his luggage in a car of the defendant, intending to go upon the train as a passenger, and left the car, and engaged in conversation with another person in the depot. While so engaged, his attention was called to the fact that the train had moved off, and he ran until he reached the end of the car shed. While passing through the gateway of the car shed, he came in contact with the engine of another company, which was coming into the shed, and as a consequence received serious injuries. It was held that the negligence of the railroad company in starting its train without giving a signal was not the proximate cause of the injury which the plaintiff subsequently received by running against the engine of another train in his effort to catch the defendant's train. The defendant could not have foreseen, nor was it bound to antici-

pate or apprehend, that, as a result of its negligence in starting its train without a signal, a passenger would, in attempting to catch the train, run against the engine of another train, and receive serious injuries. In the case of *Mayor, etc., v. Dykes*, 108 Ga. 847, 31 S. E. 443, a street car company had negligently constructed its track so that the rails were above the surface of the street. The plaintiff, while driving a horse attached to a two-wheel road cart, attempted to drive across the track at an angle of about 45 degrees. The wheels of his cart came in contact with the iron rails of the track, slipped along the track, and made a scraping noise, which caused the horse to take fright and run away. The cart collided with a wagon, and plaintiff was thrown to the ground and seriously injured. Although the street car company may have been negligent in the way it constructed its track, it certainly could not have foreseen that, as a result of this negligence, a scraping noise would be made, and that this noise would frighten a horse, and the horse would run away, and the vehicle to which he was hitched would collide with a wagon, and the plaintiff would, as a result, be injured. Of course, if the cart had been overturned as a result of the tracks being built too high above the surface of the street, and injury had resulted from an accident of this character, the case would have been different. In *Railroad Co. v. Price*, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246, the plaintiff was a passenger who had been carried wrongfully beyond her station, and when this fact was discovered she was requested to alight at another station, which she did, and was carried to a hotel by the conductor. While at the hotel a lamp in her room exploded, and as a consequence she sustained damage. It was held that the railway company was not liable for the injury thus sustained. The defendant could not have foreseen, apprehended, or anticipated that the plaintiff would suffer injuries of the character received by her at the hotel; and hence its negligent act in carrying her beyond her station could not be said to be the proximate cause of the injuries thus received. In *Railway Co. v. Edwards*, 111 Ga. 528, 36 S. E. 810, the plaintiff was a brakeman on a freight train, and was ordered by the conductor to jump off the train for the purpose of changing the switch. In obedience to this order, the plaintiff jumped from the car on which he was standing, and, being unable to see the ground beneath him, his right foot was caught in a frog of the switch, the frog not having been blocked so as to prevent such an accident, and the wheels of the car ran over and crushed his foot. The distinction between that case and the present will be apparent when the following language of Mr. Justice Little in the opinion in that case is considered: "The direct and proximate cause of the injury which the plaintiff sustained was his jumping from the train,

and, if he is entitled to recover damages from the defendant company therefor, it is because of some negligence on the part of said company which caused the jump from which the injury resulted, or negligence in not protecting the place where in fact he did jump. As we have seen, it is not charged in the petition that the railroad company was, through its conductor, negligent in directing the plaintiff to jump from the car at the time he did." It was held that the failure to block the switch was not an act of negligence.

In the determination of the question just presented we have been very much aided by the carefully prepared brief of counsel for the defendant in error. The brief shows not only laborious research, but ability and power of discrimination, and we take occasion to express our appreciation of the valuable aid thus brought to us in the decision of this puzzling question.

2. The motion for a new trial contains numerous assignments of error on rulings upon the admissibility of evidence. Several grounds complain that the court erred in not allowing testimony to be offered for the purpose of impeachment, which related to matters which were immaterial and irrelevant. While the judge seems to have permitted the cross-examination of different witnesses laying the foundation for impeachment to take a very wide range, we cannot say that any evidence he admitted was altogether irrelevant. But, even if it was, the error thus committed would not be sufficient to have required the granting of a new trial. The defendant offered in evidence a chain of title showing that the South Carolina & Georgia Railroad Company was the proprietor of the tracks at the point where the injury occurred and the yards adjacent thereto, and also offered a contract between the city council of Augusta and this railroad company; the purpose in offering this evidence being to show that the engine of the Georgia Railroad Company was upon the tracks at the point where Webb was injured, not by permission of the defendant, but in its own right under a contract made with the city council and the predecessor in title of the South Carolina & Georgia Railroad Company. This evidence was rejected, and error is assigned upon this ruling. It was immaterial who owned the tracks and the yards adjacent thereto. The defendant was shown to be in control of the tracks at the place where the injury occurred, and also the adjacent yards in the state of South Carolina. It was immaterial whether the Georgia Railroad Company ran its engine over the track by its own right or by permission of the defendant. It did not matter under whose authority the engine was operated upon the track. The only material question was whether the defendant knew or should have known that the Georgia Railroad Company was in the habit of using the tracks at that point. There was evidence authorizing the jury to find that such was the case.

What has just been said disposes of that ground of the motion which complains that the court erred in allowing a witness, who was an employé in charge of the Georgia Railroad engine, to testify, in effect, that the engine was on the tracks by permission of the defendant. Even if the judge committed any error in any of the rulings complained of in the motion for a new trial, we do not think, after a careful examination of the motion for a new trial and the entire record in the case, that there should be a reversal of the judgment for any of the reasons assigned in the motion.

It remains only to dispose of that assignment of error which complains that the verdict was not warranted by the evidence. It was earnestly argued by counsel for the plaintiff in error that there was no evidence authorizing a finding for the plaintiff. It was contended that, as the petition alleged that Webb was thrown through the rear door of the car across the platform at the end of the car and onto the tracks, and, as a result, was stunned and rendered insensible, the plaintiff cannot recover upon a general presumption of negligence against the company, but his recovery must be based upon evidence authorizing the jury to find that he was injured in the manner described in the petition; that is, by being thrown from the inside of the car through the door across the platform onto the tracks. Under the view we have taken of the case, it is unnecessary to determine whether a recovery could be had if the evidence failed to show to the satisfaction of the jury that Webb was thrown from the car in the manner described in the petition. There was abundant evidence authorizing the jury to find that Webb was upon the train as a passenger, and that while he was upon the train there was a jolt of the train, which was sudden, unusual, and violent, its character being such that the passengers were jostled in their seats, bundles were thrown from the seats and racks, and a person in the aisle of the car would probably have been thrown from his feet. There was no one who saw Webb actually thrown through the door to the platform and upon the track. The last that was seen of him, which was just before the jolt came, he was making his way towards the rear of the car, looking for a seat, and had reached a point near the door of the car. Nothing more was seen of him until he was found in a mangled condition by the employés in charge of the railroad engine which had run over him. All of the evidence in the record which bears upon the question as to whether Webb was thrown from the car as described in the petition is contained in the testimony of the witness Shinall, and we quote the exact language of this testimony: "We got on at Broad street together. John Webb got on the first step between the coaches, and I got on the next one, and he was on the platform; and I turned and went towards the back end of the car, and had a

couple of bundles in my hand. As I was going along, Mr. Pardue asked me what I was doing there, and I sat on the side of the car, and was talking to him, when John Webb came through the train and passed by us, and went on toward the rear of the train. At or about that time the train stopped inside of the bridge all at once. I mean, by stopping all at once, it was going along ten or fifteen miles an hour, and all at once it stopped. It was a hard jerk. It would have jerked a man down if he had been standing on his feet. That occurred right immediately after I saw Mr. Webb standing up near the rear of the train. It was not more than a minute, or something like that. I was talking to Mr. Pardue, and then the jerk came, and people was making remarks about the jerk coming, and still I did not pay no attention to him. I did not know anything was the matter with him at that time. I did not find out for certain what had become of him until the next morning. After I got off at Bath, I asked for him, but nobody had seen him. I don't think I changed my position on that seat after I saw him. It is just a short run from Augusta to Bath, and I sat there talking to Mr. Pardue. The reason I didn't look around for John Webb, I was talking, and never put my mind on it. I thought maybe he was sitting behind us." To sustain the verdict it is not necessary for us to hold that this testimony of Shinnall required a finding that Webb was hurled through the rear door of the car by the jerk of the train. If the jury could legitimately infer from this testimony that such was the case, we have no right to disturb their verdict after it has been approved by the trial judge. The able and learned counsel for the plaintiff in error presented the case to us in such a way that, if we had been sitting as a jury, or even as a court of appeals, with power to pass upon the weight of testimony, we would probably have decided with him at the close of his argument. It is, however, not within our province to pass upon cases like a jury, nor have we any desire to do so. Our authority extends simply to determining whether, under a given state of facts, the jury could legitimately arrive at a given result. While we do not think it is probable that Webb was thrown through the door of the car in the manner claimed, still it is possible that this took place, and under the evidence disclosed by the record we think the jury were authorized to so find. There is some mystery about the case, but, as was said by Mr. Chief Justice Bleckley in *Railroad Co. v. Rouse*, 77 Ga. 407, 3 S. E. 808, "juries have no more important function than to solve mysteries." The jury have solved this mystery to their own satisfaction. The trial judge has approved their solution, and we have no authority to interfere.

The judgment must be affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 134)

HOLDER et al. v. JELKS et al.

JELKS et al. v. HOLDER et al.

(Supreme Court of Georgia. Aug. 7, 1902.)

MANDAMUS—REVIEW—"FAST" BILL OF EXCEPTIONS.

1. No judgment in a mandamus case, though the same be one finally disposing of it upon its merits, can be properly brought to the supreme court except by a "fast" bill of exceptions. The decision of this court in *Thompson v. McGhee*, 19 S. E. 32, 93 Ga. 254, is, upon a review thereof, approved.

(Syllabus by the Court.)

Error from superior court, Pulaski county; D. M. Roberts, Judge.

Petition for mandamus by W. P. Jelks and others, trustees, against T. J. Holder, chairman, and others. Judgment on a verdict directed for plaintiffs, and both parties bring error. Writ in each case dismissed.

W. L. Grice & Sons and J. H. Martin, for plaintiffs. Hardeman, Davis, Turner & Jones and T. C. Taylor, for defendants.

LUMPKIN, P. J. A petition for mandamus and injunction by Jelks and others against Holder and others, composing the board of education of Pulaski county, and Sanders, county school commissioner, was presented to his honor D. M. Roberts. He granted an order requiring the defendants to show cause on the 3d day of February, 1902, why the writ of mandamus should not issue. There was a postponement of the hearing until February 5th. On that day "the said case came up for a hearing, and was heard and tried" upon the petition, a demurrer and answer thereto, which had been filed by the defendants, and upon evidence submitted by both sides. The judge passed an order overruling the demurrer, and directed that the case be returned to the ensuing February term of the court, on the ground that it involved issues of fact which should be passed upon by a jury. The defendants excepted *pendente lite* to the overruling of their demurrer. The case coming on for a hearing in term, the defendants again presented and insisted upon their demurrer, which had been overruled as stated. The judge, there being no objection on the part of counsel for the plaintiffs, heard argument on this demurrer, and at the conclusion of the discussion announced orally that he would sustain the same on the ground that injunction and mandamus could not be joined in one and the same action. Thereupon the plaintiffs amended their petition so as to eliminate therefrom "the injunction feature" of the case. The court then passed another order overruling the demurrer, and the case went to trial before a jury, both sides introducing testimony. After the same had been closed, the court ruled out all the evidence of the defendants, and directed a verdict for the plaintiffs. Subsequently the defendants presented to the judge a bill of ex

ceptions. It was not, however, tendered within the time allowed by law for suing out "fast" writs of error. In this bill of exceptions error was assigned upon the first order overruling the defendants' demurrer to the plaintiffs' petition to which exception had been taken *pendente lite*; also upon the order overruling this demurrer the second time; also upon the ruling out of the testimony introduced for the defendants at the trial before the jury; and also upon the direction of the verdict in favor of the plaintiffs. There are in the bill of exceptions numerous other assignments of error upon rulings made while the trial was in progress before the jury, but they are wholly immaterial to the present inquiry, which is whether or not this court should sustain a motion to dismiss the writ of error made by the defendants in error when the case was called here, and based on the ground that the bill of exceptions was not tendered to the judge in due time. Counsel for the plaintiffs in error sought to meet this motion by another, which was to transfer the case to the next term on the ground that it properly came here upon an ordinary or "slow" writ of error, and that the clerk had erroneously placed it upon the docket of the present term. We think the motion to dismiss should prevail. Though the obvious purpose of the bill of exceptions is to reverse a final judgment adverse to the plaintiffs in error which had been rendered in a mandamus case, and they are seeking to bring about this result by setting aside rulings which led to the rendition of that judgment, we are nevertheless of the opinion that the bill of exceptions was tendered too late. Indeed, we do not regard the question as an open one. Section 4874 of the Civil Code reads as follows: "Upon refusal to grant the mandamus nisi, petitioner may have his bill of exceptions to the supreme court as in cases of the granting and refusing injunctions, and either party dissatisfied with the judgment on the hearing of the answer to the mandamus nisi may likewise file his bill of exceptions." This section was codified from the act of September 26, 1883, "to fix the time and method of trial in cases of mandamus before the judges of the superior courts, and in the superior and supreme courts." Acts 1882-83, p. 103. This act was under construction in the case of *Thompson v. McGhee*, 93 Ga. 254, 19 S. E. 32, in which this court ruled that "a bill of exceptions assigning error upon the refusal of the court to grant a mandamus absolute must be tendered and certified within twenty days from the date of the decision complained of, whether rendered in term or vacation"; and that when "the bill of exceptions is certified more than twenty days after the date of such decision, the writ of error must be dismissed." Plainly and unmistakably this decision means that no judgment in a mandamus case, though the same be one finally dis-

posing of it on its merits, can be properly brought to this court except by a "fast" bill of exceptions. We were asked to review and overrule the ruling made in the case cited. We decline to do so, but adhere to it as correct. As the writ of error upon the main bill of exceptions must be dismissed, it is not necessary to pass upon the cross-bill of exceptions.

Writ of error in each case dismissed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 136)

BACON et al. v. JONES.

(Supreme Court of Georgia. Aug. 7, 1902.)

WRITS OF ERROR—ORDINARY OR "FAST"
WRITS—PROHIBITION.

1. Where a writ of prohibition has been applied for and granted in vacation, and the defendant takes no exception to the granting of the writ, and the case is returned to the superior court, and, the pleadings making a question of fact, the jury at the trial term return a verdict in favor of the defendant, a writ of error filed by the plaintiff to rulings of the judge pending the trial is an ordinary, and not a "fast," writ of error.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Writ of prohibition on petition of A. S. Bacon & Sons against G. Noble Jones. Judgment for defendant, and petitioners bring error. Motion to dismiss writ denied, and case transferred to the next term.

Wm. R. Leakin, for plaintiffs in error.
Beckett & Beckett, for defendant in error.

SIMMONS, C. J. In November, 1899, A. S. Bacon & Sons applied to the judge of the superior court for a writ of prohibition against a magistrate, seeking to prohibit him from exercising jurisdiction in a certain case. The judge granted the writ, and to his action no exception was taken. The case was regularly returned to the superior court, and in February, 1902, it was reached upon the docket, and was tried before a jury upon the issues of fact made by the petition and answer. Evidence was introduced by both parties. The jury found for the defendant, whereupon the plaintiffs filed their bill of exceptions complaining of certain rulings as to the admissibility of evidence and of the refusal of the judge to direct a verdict in their favor. This bill of exceptions was not presented to the judge within 20 days after the trial of the case, but was presented within the proper time for an ordinary bill of exceptions. When the case reached this court, the clerk placed it on the docket as a "fast" writ of error. When it was reached in its order in this court, the defendant in error moved to dismiss the writ of error, on the ground that the bill of exceptions had not been sued out within the time prescribed for "fast" writs of error. The plaintiffs in error, on the other hand, moved to transfer

the case to the docket of the next term, on the ground that it was not a "fast" writ of error, but an ordinary one. These motions are in order for consideration, but, of course, we cannot now consider the merits of the case. Prior to 1870 every such case brought to this court came up under the general law, which required a bill of exceptions to be signed and certified within 30 days from the adjournment of the court. In 1870 the legislature enacted that in cases of application for injunction and the granting or refusing of the same, in applications for the appointment of a receiver or other extraordinary remedy in equity, the dissatisfied party might bring the case to this court within 10 days thereafter. Subsequently this time was increased to 20 days. The terms of this act show plainly that it applied to interlocutory, and not to final, judgments. The provisions of the act were afterwards extended to other cases, including those in which complaint was made of the granting or refusal of temporary alimony, the granting or refusal of attachments against fraudulent debtors, applications for the discharge of the defendant in bail trover proceedings, applications for mandamus absolute, quo warranto, and to all criminal cases. Each of the acts thus extending the act of 1870 applied to interlocutory judgments, or to judgments rendered without the verdict of a jury, except the acts relating to mandamus, to quo warranto, and to criminal cases. These latter acts by their very terms applied to final judgments after a trial before a jury. The writ of prohibition has never been expressly made by the legislature a case for a "fast" writ of error. It becomes so only by the adoption of the present Code, in which it is embraced in the words "or other extraordinary remedy" (Civ. Code, § 5540), as follows: "In all cases where an application for an injunction or receiver is granted or refused; in all applications for discharge in bail trover and contempt cases; granting or refusing application for alimony, mandamus, or other extraordinary remedy; the granting or refusing an application for attachment against fraudulent debtors; and in all criminal cases, the bill of exceptions shall be tendered and signed within twenty days from the rendition of the decision," etc. In this section the codifiers seem to have undertaken to consolidate all of the cases for "fast" writs of error, including within one section cases in which there was a "fast" writ of error from interlocutory judgments, and also cases in which the legislature had provided for a "fast" writ of error even after final trial. Considering the history of the legislation upon this subject, we cannot conceive that it was intended to make "fast" the writs of error in all the cases mentioned, whether the judgments were interlocutory or final. We cannot conceive that it was intended, by placing all these cases in one section, that a case in which there was an application for

an injunction or receiver, which had never been passed upon by the judge at chambers, but had gone its regular course to final trial before a jury, and in which the injunction or receiver was granted or refused, should come to this court by a "fast" writ of error; nor that it was intended that on the final trial of a divorce case, where the jury awarded permanent alimony, exceptions to the decree could be brought up by a "fast" writ of error. Nor would such a writ of error lie in case of a final judgment in an attachment proceeding against a fraudulent debtor. The enumeration in the code section would seem, therefore, not to change the existing law as to any cases which had been made "fast" writ of error cases by an act of the legislature. An examination of the statutes shows that the legislature has never enacted a law applying the provisions as to "fast" writs of errors to writs of prohibition, as it did to mandamus and criminal cases. By the act of 1870 these provisions were applied to applications for injunction or receiver, "or other extraordinary remedy in equity." As the writ of prohibition is not an equitable remedy, it, of course, was not included within the act of 1870. The codifiers in 1895 struck out the words "in equity," leaving the provision to apply to "other extraordinary remedy." Invoking the history of the legislation upon these subjects, we find that there were but three classes of cases which the legislature provided should be brought to this court by "fast" writ of error after final trial before a jury,—criminal cases, and applications for mandamus absolute or quo warranto. And quo warranto cases are not required to be returned or tried during term. All the other legislation upon the subject referred to judgments and decrees rendered at chambers or on final trial without a jury. It was never contemplated by the legislature, nor has it ever been the practice of the courts, that upon final trial of an equitable petition seeking an injunction, or the appointment of a receiver, attachments against fraudulent debtors, the granting of permanent alimony, it should be proper to bring the cases to this court in any other than the usual and ordinary way. If a "fast" writ of error is not proper in these cases, why should it be held necessary upon the final trial of a writ of prohibition? We think that the legislature did not so intend when the Code of 1895 was adopted. In the codification of the laws it is almost impossible to go into all the details of the different statutes codified. Where the code sections are incomplete or ambiguous, they must be construed in connection with the original acts. Resorting to this rule, we have this day held that a writ of error to the granting of a mandamus absolute must be brought as a "fast" writ, because the act expressly so provided. See *Holder v. Jelks*, 118 Ga. —, 42 S. E. 400. And so with regard to quo warranto and criminal cases. With regard,

however, to other cases mentioned in section 5540, there is no act requiring a final judgment, rendered at a regular trial before a jury, to be brought up in this manner. We therefore conclude that this bill of exceptions was properly certified. Nothing herein said conflicts with the ruling in *Mayor, etc., v. Grayson*, 104 Ga. 106, 30 S. E. 693, as, though the case arose upon an application for a writ of prohibition, the judgment was interlocutory, and not final. The present case will be transferred to the docket of the next term of the court, to be then heard in its order.

Ordered accordingly. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 1021)

WALL v. MATTOX.

(Supreme Court of Georgia. July 22, 1902.)

DIRECTING VERDICT—HARMLESS ERROR.

1. The court properly construed the instrument relied on by the plaintiff as a bill of sale passing title. This being so, and the evidence demanding a finding in his favor, the court committed no error in directing the jury to find accordingly; and it was not error, as against the defendant, to instruct the jury to relieve the defendant of the cost in the case.

(Syllabus by the Court.)

Error from city court of Elbert county; P. P. Proffitt, Judge.

Action by J. R. Mattox against Bessie Wall. Judgment for plaintiff. Defendant brings error. Affirmed.

W. D. Tutt & Son, for plaintiff in error. J. N. Worley and I. C. Van Duzer, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1022)

BARNETT v. HINES et al.

(Supreme Court of Georgia. July 22, 1902.)

NEW TRIAL—REFUSAL.

1. The evidence in this case demanded the judgment rendered by the judge of the city court, and consequently there was no error in refusing to grant a motion for a new trial, based exclusively upon the general grounds.

(Syllabus by the Court.)

Error from city court of Washington.

Action between A. A. Barnett, administrator, and Hines & Toomey. From the judgment, Barnett brings error. Affirmed.

Colley & Sims, for plaintiff in error. S. H. Hardeman and Wm. Wynne, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 86)

WHATLEY v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

MANSLAUGHTER—INSTRUCTIONS.

1. In view of all the testimony introduced on the trial of this case, the court erred in not giving in charge to the jury the law of voluntary manslaughter. Aside from this, no material error was committed at the trial.

(Syllabus by the Court.)

Error from superior court, Fayette county; E. J. Reagan, Judge.

Wright Whatley was convicted of murder, and brings error. Reversed.

J. W. Wise and A. O. Blalock, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(115 Ga. 1000)

WOOD v. TATTNALL COUNTY.

(Supreme Court of Georgia. July 22, 1902.)

WRIT OF ERROR—RECORD—REFUSAL OF CERTIORARI—REVIEW.

1. The fact that a judge of a superior court, to whom a petition for certiorari is presented, in refusing to sanction the same, enters thereon, and signs an order that it be filed in the office of the clerk of such court, and that it be made a part of the record in the case, does not make the petition a part of such record, and a certified copy of it cannot be brought to this court as record. In order for the supreme court to review a refusal to sanction a petition for certiorari, the petition must be incorporated in the bill of exceptions, or otherwise verified by the judge. *Railway Co. v. Whitehead*, 30 S. E. 814, 105 Ga. 492; *Anthony v. State*, 38 S. E. 79, 112 Ga. 751.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action between J. N. Wood and the county of Tattnall. From the judgment, Wood brings error. Dismissed.

C. W. Seals and W. T. Burkhalter, for plaintiff in error. Isalah Beasley, for defendant in error.

PER CURIAM. Writ of error dismissed.

LEWIS, J., absent on account of sickness.

(116 Ga. 23)

DAVIS, Coroner, v. BIBB COUNTY.

(Supreme Court of Georgia. July 23, 1902.)

CORONERS—FEES.

1. A coroner is, under Pen. Code, § 1112, entitled to demand \$10 from the county "for summoning an inquest on a dead body and returning an inquisition," in every case where an inquest is required under Pen. Code, § 1255, and where he has not already received more than \$1,500 as his fees during the year in which the inquest is taken.

2. It is not essential that either the summons in an action brought by a coroner in a justice's

court for services rendered in holding inquests, or the account attached to such summons, should show under which particular class of the cases provided for in Pen. Code, § 1255, such inquests were held, nor that they were not held under section 1256 of that Code.

3. A coroner who himself summons a jury to hold an inquest is not entitled to any fee for such service.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by A. J. Davis, coroner, against the county of Bibb. Judgment for defendant, and plaintiff brings error. Reversed.

M. G. Bayne and R. D. Feagin, for plaintiff in error. W. G. Smith and Hall & Wimberly, for defendant in error.

FISH, J. A. J. Davis brought an action in a justice's court against the county of Bibb on an account for services rendered by him, as coroner, in connection with the holding of certain inquests. The case, at the first term, was by consent appealed to the superior court. The copy of the account attached to the petition was as follows:

County of Bibb to A. J. Davis, Coroner.
To services in holding inquests in the following cases:

Edmund Morris, September 7th, 1900.....	\$10
Charles Pope, September 11th, 1900.....	10
G. W. Dunlevy, March 8th, 1900.....	10
To summoning jury in 49 cases, \$1 each, as coroner	49

Names of cases on paper attached..... \$79

Attached to the account was a statement showing the cases in which plaintiff, as coroner, had summoned juries for inquests, giving dates which were from May 31, 1900, to July 28, 1901, inclusive. The summons was amended in the superior court to the effect that plaintiff had not received \$1,500 in fees, as coroner, out of the county treasury of Bibb county during the year 1900 or the year 1901. Plaintiff's case was dismissed upon demurrer in the superior court, and he excepted.

1. One of the points made by the demurrer was that there is now no law in this state which makes a county liable directly and in the first instance for fees of coroners for taking inquests. Counsel for defendant in error contend that while under the Code of 1882 (section 594), and the provisions of all previous Codes of the state, the fees of coroners for holding inquests were payable out of the county funds, there is no such provision in the Code of 1895, and the omission by the codifiers to place in the last Code such a provision amounts to a repeal of the prior law; that, under the law as it now stands, when coroner's fees are payable at all they are payable "(a) in the first instance by the person demanding the inquest, who may be 'repaid' out of the county treasury, upon an order from the judge of the superior court, as provided in section 1256 of the Penal Code; (b) out of the fine and forfeiture fund, as

provided in section 1080 of the Penal Code."

We cannot concede the correctness of any of these contentions. It is made the duty of coroners to take inquests. Pol. Code, § 497. Our constitution (article 7, § 6, par. 2; Civ. Code, § 5892) gives the general assembly power to delegate to any county the right to levy a tax to pay coroners, and section 404 of the Political Code provides that a county tax shall be assessed "(4) to pay coroners all fees that may be due them for holding inquests." Section 1112 of the Penal Code declares that coroners' fees shall be as follows: "For summoning an inquest on a dead body and returning an inquisition, \$10.00. * * * No coroner shall receive out of the county treasury of any county more than fifteen hundred dollars per annum, either as fees for holding inquests or for burying dead bodies." We think that the section last quoted clearly indicates that the coroner shall receive his fees out of the county treasury, and that the codifiers must have been of the opinion that the section manifested this intention, without an express provision to that effect, such as was contained in the prior Codes. The legislature, under constitutional authority, has delegated to the counties the right to levy a tax for the payment of the fees due coroners, has required them to levy such tax, and has fixed the amount of such fees for which any county shall be liable in any one year. While a county is not liable to suit for any cause of action unless made so by statute, we think that when the statute provides that a coroner shall not receive, as fees, out of the county treasury of any county, more than a specified sum per annum, and provides what his fees shall be, it is clearly manifest that he shall receive out of the county treasury his fees up to that amount, and that, if the county should refuse to pay them, it is liable to an action therefor. As to the other contentions of counsel for defendant in error, section 1256 of the Penal Code provides: "No inquest shall be held over any dead body, when the cause of the death was violence or accident, or act of God, in the presence of witnesses, unless some person makes affidavit of facts raising a suspicion of foul play, when an inquest shall be had, but at the expense of the party making the affidavit. Upon such inquest, if it should appear that the death was caused by violence and foul play, and the person guilty of the act is arrested, the person paying the cost of the inquest shall be repaid by the county treasurer upon an order from the judge of the superior court of the county." Section 1080 of the same Code is as follows: "If any person is convicted of murder or manslaughter, in a case where an inquest has been held over the body of the person for slaying whom he is convicted, the costs of the inquest make a part of the costs of conviction, and must be so charged." It will be readily seen that the provisions of these sections only apply to the fees of coroners under the circumstances therein

specified, and are mere exceptions to the general rule as to how such fees shall be paid.

2. Section 1253 of the Penal Code provides: "Coroners shall take inquest, over dead bodies in their respective counties as follows: (1) Of all violent, sudden, or casual deaths, when there are no eye-witnesses to the killing or cause of the death. (2) Of all sudden deaths in prison without an attending physician. (3) Of all dead bodies found, whether of persons known or unknown, when it is apparent from the body that violence caused the death, or when the person died or disappeared under suspicious circumstances. (4) Whenever ordered by a court having criminal jurisdiction," etc. The demurrer raised the point that the summons and statement of account thereto attached failed to show that the inquests for which the plaintiff claimed fees fell within any of the cases provided for in this section, and that therefore the suit was not properly brought. If the suit had been instituted in any court other than a justice's court, this point might have been good, but, as is well known, the same degree of particularity in pleading is not required in a justice's court as in the higher courts. In a suit upon an account in a justice's court, it is necessary to attach to the summons a copy of the account sued on. Civ. Code, § 4116. This rule was complied with in the present case, and, though the circumstances under which the inquests were taken were not particularly set out in the account, yet we think the statement of the account was sufficiently full, under the practice in justices' courts. Nor do we think that it was necessary that the summons, or the account thereto attached, should have shown that the inquests were not held under section 1253 of the Penal Code, which we have hereinafter quoted.

3. The suit was, in part, for \$49, for the plaintiff's services as coroner in summoning juries in 49 inquests he had held. As to so much of the action as sought a recovery for these services, the demurrer was properly sustained. The provision of section 1112 of the Penal Code that "for summoning an inquest on a dead body, and returning an inquisition," the coroner shall be entitled to a fee of \$10, means that \$10 shall be his entire compensation for all services rendered by him in and about an inquest. "Summoning an inquest," as here used, means summoning a jury. "The term 'inquest' is sometimes used to signify the jury itself before whom the question is brought." Brown, Law Dict. So the grand jury is often called the "grand inquest." When a constable summons a jury of inquest, he is entitled to a fee of \$1 (Pen. Code, § 1111), but there is no authority under our statutes for a coroner to charge the county a separate fee for such service. Counsel for plaintiff in error contend that the language in section 1112 of the Penal Code, that "when performing the duties of a sheriff [the coroner's] fees are the same as the sheriff,"

entitles a coroner to compensation for summoning a jury of inquest. We do not think so. This language clearly refers to such duties of a sheriff as a coroner may perform when the sheriff is disqualified, or for any reason cannot act. There is no law which makes it one of the duties of a sheriff to summon a jury of inquest, and the language above quoted cannot be construed to authorize a coroner to charge for such services.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 164)

GEORGIA SOUTHERN & F. RY. CO. v. CARTLEDGE.

(Supreme Court of Georgia. Aug. 7, 1902.)

CARRIERS—INJURY TO PASSENGER—SUBSEQUENT PRECAUTIONS—ADMISSION—PROXIMATE CAUSE OF INJURY—EVIDENCE—SUFFICIENCY.

1. That, after an occurrence resulting in injury to one person, another who is sought to be held accountable therefor took additional precautions to prevent others from being likewise injured, can neither justly nor logically be regarded as an admission on his part that he was negligent in not sooner observing such precautions. Prior decisions by this court virtually to the contrary reviewed and overruled.

2. It affirmatively appearing from the evidence in the present case that the proximate cause of the plaintiff's injury was his own independent act, for which there was no necessity, and which was in no way brought about by any default on the part of the defendant company, he was not entitled to recover.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by L. J. Cartledge against the Georgia Southern & Florida Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Hall & Wimberly and R. O. Jordan, for plaintiff in error. Guerry & Hall and M. F. Hatcher, for defendant in error.

LUMPKIN, P. J. This was a suit for damages against the railway company by Cartledge, who set forth in his petition the following allegations of fact: "On the 30th day of June, 1900, he was in the employment of the United States government in the railway mail service, and was, in the course of his employment, on said day riding upon the train and in a car of the said company." On that day, "while on the railroad train of said company in the discharge of his duties as mail clerk on his car furnished by said road, * * * the mail grab, which was fastened on the outside of said car, came in contact with a post standing upon the platform of said railway company at the station house at Sofkee." The result was that the "mail grab was turned from its fastenings to the side of said car and thrown down and upon the left hand of petitioner, who was at that time inside the car, where he had the right

and where it was his duty to be, and where he then was in the exercise of all the care incumbent upon him. * * * Petitioner's hand was terribly mutilated, wounded, and crushed; the bone in the first finger of said hand being broken [and] made permanently useless." The injury thus sustained by him "was caused by the negligence of said railroad company in erecting the said post too near the track of said railroad company, and allowing it to remain there." A recovery was had by the plaintiff in the court below, and the company is here complaining of a judgment denying it a new trial.

1. At the time of the plaintiff's injury the post above referred to "stood thirteen or fourteen inches from the side of the passing coach. The plaintiff was permitted to testify, over the objection of the defendant, that this post had been moved further back since the accident"; the objection urged against the admission of this testimony being that it was not "competent evidence for the purpose of showing negligence on the part of the defendant." Tested by rulings heretofore made by this court, this testimony was clearly admissible. In *Railroad Co. v. Renz*, 55 Ga. 126, it was held that, "Upon the trial of a suit against a street railroad company for an injury sustained by careless driving over a sharp curve and sudden elevation, it was competent to show that the defendant had altered the curve since the accident." A similar ruling was announced in *Central R. R. v. Gleason*, 69 Ga. 201. In *Railway Co. v. Flannagan*, 82 Ga. 580, 9 S. E. 471, 14 Am. St. Rep. 183, the question arose whether or not it was competent for the plaintiff to prove that after the homicide of her husband, who was run over and killed by an engine belonging to the defendant, "the engines of the company were run more slowly along the street which was the scene of the accident." Commenting upon the relevancy of evidence which had been introduced to establish that such was the fact, Chief Justice Bleckley, who delivered the opinion of the court, said (page 589, 82 Ga., page 472, 9 S. E., 14 Am. St. Rep. 183), "There is much authority to the contrary, * * * but we think consistency with our own decisions requires us to hold that it was admissible." Doubtless influenced by the intimation thus thrown out that the question presented, were it an open one, would admit of some doubt, counsel for the plaintiff in error in the present case asked and were granted leave to review these decisions. We have accordingly given them careful consideration, with the result that we are constrained to announce, after mature deliberation, that our faith in their correctness, which in the past had already been much shaken, has succumbed to the conviction that they cannot be defended either upon principle or by the weight of authority. We find upon investigation that they are not in accord with the rule which obtains in England. See *Hart v. Railway Co.*, 21 Law T.

Rep. (N. S.) 261. Nor are they in harmony with the consensus of judicial opinion which prevails in this country. See *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, and cases cited on page 207, 144 U. S., page 593, 12 Sup. Ct., 36 L. Ed. 405; *Railroad Co. v. Parker*, 5 C. C. A. 220, 55 Fed. 595; *Paving Co. v. Odasz*, 8 C. C. A. 471, 60 Fed. 71; *Motey v. Marble Co.*, 20 C. C. A. 366, 74 Fed. 156; *Southern Pac. Co. v. Hall*, 41 C. C. A. 50, 100 Fed. 761; *Railroad Co. v. Malone*, 109 Ala. 510, 20 South. 33; *Sappenfield v. Railroad Co.*, 91 Cal. 49, 27 Pac. 590; *Hager v. Southern Pac. Co.*, 98 Cal. 309, 33 Pac. 119; *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; *Nally v. Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Harvey v. Mining Co. (Idaho)* 31 Pac. 819; *Holt v. Railway Co. (Idaho)* 35 Pac. 39; *Giffen v. City of Lewiston (Idaho)* 55 Pac. 545; *City of Bloomington v. Legg*, 151 Ill. 10, 37 N. E. 696, 42 Am. St. Rep. 216; *Howe v. Medaris*, 183 Ill. 283, 55 N. E. 724; *Railroad Co. v. Clem*, 123 Ind. 16, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303; *Board v. Pearson*, 129 Ind. 450, 23 N. E. 1120; *Railroad Co. v. Lee*, 17 Ind. App. 216, 46 N. E. 543; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. Railroad Co.*, 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692; *Beard v. Guild*, 107 Iowa, 476, 78 N. W. 201; *Oil Co. v. Tierney*, 92 Ky. 368, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Dacey v. Railroad Co.*, 168 Mass. 479, 47 N. E. 418; *Turnpike Co. v. Case*, 80 Md. 36, 30 Atl. 571; *Thompson v. Railway Co.*, 91 Mich. 256, 51 N. W. 996; *Hammargren v. City of St. Paul*, 67 Minn. 6, 60 N. W. 470; *Ely v. Railway Co.*, 77 Mo. 34; *Hipsley v. Railroad Co.*, 88 Mo. 348; *Alcorn v. Railroad Co.*, 108 Mo. 81, 18 S. W. 188; *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Getty v. Town of Hamlin*, 127 N. Y. 636, 27 N. E. 399; *Clapper v. Town of Waterford*, 131 N. Y. 382, 390, 30 N. E. 240; *Lowe v. Elliott*, 109 N. C. 581, 14 S. E. 51; *Skottowe v. Railway Co.*, 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593; *Farley v. Veneer Co.*, 51 S. C. 222, 241, 23 S. E. 193; *Railroad Co. v. Wyatt*, 104 Tenn. 432, 58 S. W. 808, 78 Am. St. Rep. 926; *Railway Co. v. McGowan*, 73 Tex. 356, 11 S. W. 336; *Railway Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Bell v. Shingle Co.*, 8 Wash. 27, 35 Pac. 405; *Carter v. City of Seattle*, 21 Wash. 585, 59 Pac. 500; *Anderson v. Railway Co.*, 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203; *Jennings v. Town of Albion*, 90 Wis. 22, 62 N. W. 926; *Green v. Water Co.*, 101 Wis. 259, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911. See, also, authorities cited and commented on in note appended to the case of *Railway Co. v. Weaver (Kan.)* 57 Am. Rep. 183-187.

In the New York Reports instances are to be found where some of the tribunals of that

state at one time strayed from the path which all good courts should travel; but the true doctrine was expounded by its court of appeals in the case of *Baird v. Daly*, 68 N. Y. 547, and has since been consistently observed. More recently there have been other converts to the new faith which we now feel called upon to embrace. Notably among these is the supreme court of Minnesota; it having in the case of *Morse v. Railway Co.*, 30 Minn. 405, 16 N. W. 358, formally reviewed all of its prior decisions bearing on the point under consideration and pronounced them unsound, saying of the rule which had been laid down, "We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." We may also point to the fate which befell an early Colorado case (*Railway Co. v. Miller*, 2 Colo. 442), the ruling in which is no longer given recognition by the courts of that state. *Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; *Railroad Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345. The supreme court of New Hampshire has also reversed its position on the question. See *Aldrich v. Railroad Co.*, 67 N. H. 250, 29 Atl. 406, in which that court overruled a prior decision in the case of *Martin v. Towle*, 59 N. H. 31, to the effect that it was competent for the plaintiff to prove that, after he was injured by the overturning of a carriage belonging to the defendant, the latter discharged the driver thereof. So far as we have been able to ascertain, the courts of but two states still adhere to the view that one who is sought to be held accountable for an injury sustained by another cannot take additional precautions to prevent others from being likewise injured, without thereby tacitly admitting that such precautions should sooner have been adopted. *Railroad Co. v. McKee*, 37 Kan. 502, 15 Pac. 484; *Smelting Co. v. Tinchert*, 5 Kan. App. 130, 48 Pac. 889; *McKee v. Bidwell*, 74 Pa. 218; *Lederman v. Pennsylvania R. R.*, 165 Pa. 118, 30 Atl. 725, 44 Am. St. Rep. 644. Speaking for the supreme court of Kansas, Mr. Justice Valentine, in the case of *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176, undertook to defend the rule laid down in prior decisions therein cited; but the argument he advanced in its support impresses us as being far from convincing. Pennsylvania's pioneer case on this line is that of *Railroad Co. v. Henderson*, 51 Pa. 315, wherein the correctness of the ruling announced was assumed without any discussion whatever. It was subsequently held in *Railroad Co. v. McElwee*, 67 Pa. 311, that, "in an action for death by negligence from cars striking a cart on scales near to a railroad track, evidence was proper that after the accident the track was removed to a greater distance." With Quaker directness and simplicity, the question as to the admissibility of such evidence was

dismissed with the remark (pages 314-315): "If the proximity of the track to the buildings did not increase the danger, why was it moved?" Doubtless it was moved in order to insure greater safety in the future,—an act in and of itself perfectly legitimate, and prompted by a motive which was highly commendable. It may not be extravagant to say this action on the part of the company was something more than commendable, if at the time it had reason to apprehend that the ruling just referred to might be made. No one situated as was this company should be placed "in the embarrassing attitude of being compelled to choose between the risk of another accident by maintaining the status quo," and the equally uninviting alternative of taking proper steps to remove the danger, and thereby "making evidence against himself which would act prejudicially to his defense in the minds of the jury." *Railroad Co. v. Wyatt*, 104 Tenn. 434, 58 S. W. 308, 78 Am. St. Rep. 926. "The effect of declaring such evidence competent is to inform a defendant that, if he makes changes or repairs, he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. * * * True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting from experience and availing themselves of new information has nothing to commend it, for it is neither expedient nor just." *Railroad Co. v. Clem*, 123 Ind. 18, 19, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303. To the same effect, see the admirable opinion delivered by Mitchell, J., in *Morse's Case*, 30 Minn. 468, 16 N. W. 358, and the irresistible argument on the same line presented by Watts, J., in *Railway Co. v. Burns*, 4 Tex. Law Rev. 54, 56, and quoted approvingly in *McGowan's Case*, cited supra. We do not hope to conceal the fact that, in thus concentrating our attack upon the decisions pronounced by the Kansas and Pennsylvania courts, instead of bringing prominently into view and assailing the prior decisions of this, our own court, we have yielded to an ordinary impulse of human nature. We do, however, distinctly announce that those decisions are now overruled.

2. The only evidence introduced on the trial of the present case was the testimony of the plaintiff himself. He gave a clear and straightforward account of how he met with his injury, which was, in brief, as follows: He was attempting to pass "some mail under the grab" to the assistant postmaster at Sofkee, who "came out of his office just as the train was moving from the station, and the mail grab came in contact with a post that stood very close to the side of the car. * * * The grab was wrenched from the side of the

car," and plaintiff's left hand was caught by it and mashed against the car. The hand which was injured "was resting on top of the mail catcher." He held the mail in his "right hand, and stooped down to hand it under the catcher to the assistant postmaster, and the catcher came in contact with the post." A mail grab is made of iron, and "fits in a fastening on the side of the mail car, across the door, and works loose." It consists of a horizontal bar extending across the doorway, and a grab or "catch bar," operated by means of a handle from the inside of the car, which, when the contrivance is used in collecting mail at stations where the train does not stop, "pokes out and catches the mail bag as it hangs" on a crane erected near the track. It was the custom of the plaintiff to "deliver mail at Sofkee on the 'Shoo-Fly' trains by hand, and not with a sack." The assistant postmaster, who was also the agent of the railway company, had "to receive the mail at the car door." Plaintiff "had no right to leave [his] car and go and deliver the mail," his duty requiring him to be "at all times" in his car. "The reason [he] did not deliver the mail before the train started to pulling off was that the agent was inside of his office," and did not come to receive the mail till the train began to move. The post above mentioned was a semaphore post, and not a mail post. "There was no mail crane at that point. The grab is used for the purpose of taking the mail bag from the crane, and for no other purpose." The assistant postmaster "was standing five or six feet [from] the semaphore post when" the plaintiff "handed him the mail." Plaintiff rested his left hand "on the catcher, and handed the mail under the catcher with" his right hand; "was in a stooping position." He "had to stoop," and he rested his "hand on this grab as a support, and handed the mail underneath it, and in that condition this grab came in contact with the semaphore post." He "had to push this grab out thirteen or fourteen inches from the car in order for it to strike the post. It could not have possibly come in contact with the post unless it was pushed out, the post being off thirteen or fourteen inches. It would not have caught the post unless" the plaintiff had his "hand on it, and unless [he] pushed it out, either accidentally or purposely." He "had seen the semaphore post frequently," but had "never taken any particular notice of how close it was" to the track, "and didn't know how close it was." The plaintiff "had two newspapers to deliver" to the assistant postmaster at Sofkee; "could not have thrown them out, because they were not marked to 'throw out.'" In view of this evidence, it may be conceded not only that the railway company was negligent as alleged, but that the plaintiff, though he had frequently seen the post, was not himself guilty of any negligence in not taking note of its dangerous proximity to the track, and governing his actions accordingly. At the same

time, however, he could not possibly have been injured had he not, "either accidentally or purposely," pushed the "catch bar" out some 13 or 14 inches from the side of the car, when there was no necessity to do so, nor, indeed, any occasion for him to make any use whatever of the contrivance known as the "grab." This being so, his own independent act, whereby the accident was brought about, is to be regarded as the proximate cause of his injury, and the company cannot be held accountable therefor. See *Hardwick v. Railroad Co.*, 85 Ga. 507, 11 S. E. 832; *Lindsay v. Railway Co.*, 114 Ga. 896, 41 S. E. 46; *Railroad Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91, 52 Am. & Eng. R. Cas. 406 (note); *Railway Co. v. Sims* (Ind. App.) 63 N. E. 485. It follows that the trial judge erred in leaving to the jury the question of the company's liability, and in refusing to instruct them, at the instance of its counsel, to the effect that if they believed the injury to the plaintiff could not have occurred "but for his own conduct in pushing out the mail grab, whether intentional or by accident," he would not be entitled to recover.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 171)

ROBERT PORTNER BREWING CO. v. COOPER.

(Supreme Court of Georgia. Aug. 7, 1902.)

SERVANT—INJURIES—MASTER'S LIABILITY—PLEADING—AMENDMENT—EVIDENCE—INSTRUCTIONS.

1. Where a motion for new trial and the rule nisi thereon have been served upon the respondent, and an amendment thereto is afterward regularly filed and approved by the trial judge, who overrules the amended motion upon its merits, this court cannot refuse to consider the amendment because it was not served upon the respondent.

2. Where the condition of a set of harness is the subject of inquiry, it is error to overrule a proper objection to evidence as to the condition of a set of harness which is not identified as the one under investigation.

3. It is error for a trial judge to instruct the jury that given facts would constitute negligence, when the facts are not such as are made by law to constitute negligence per se.

4. It is also error to charge that, where an employer has agreed to furnish an employé a harness sufficiently strong to enable him to control a certain horse, the employer is thereby made an insurer of the quality of the harness furnished, and that he is not in the exercise of ordinary care unless he makes his assurance good.

5. Other assignments of error are covered by the opinion.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by J. J. Cooper against the Robert Portner Brewing Company and another. Judgment for plaintiff against the brewing company, and it brings error. Reversed.

Salem Dutcher, for plaintiff in error. W. K. Miller and Boykin Wright, for defendant in error.

SIMMONS, C. J. Suit for damages for personal injuries was brought by Cooper against the Robert Portner Brewing Company and its manager. The plaintiff alleged that he was employed to deliver defendant's beer from a wagon which, with horse and harness, defendants were to furnish. He was given a horse which had run away, but he was assured by defendants that it would not run away if carefully handled, and that a strong set of sound and suitable harness would be supplied him. Relying upon the promise to furnish him a strong and sound harness, he used the horse. While he was proceeding quietly along the street, the horse shied, the harness broke and caused the horse to try to run away, then other portions of the harness gave away, and plaintiff was seriously injured by the kicking of the horse. Defendant had failed to supply such a harness as was reasonably safe with such a horse, had failed to keep the harness in proper repair, and, after having undertaken to repair the harness, had negligently stopped the repairs, to have work done on other harness. See 112 Ga. 895, 38 S. E. 91. The defendants answered that plaintiff had, in spite of their warning, used this horse, rather than others offered him, because it was faster than the others, and that plaintiff's injuries were not due to the condition of the harness, which was sound, but resulted from plaintiff's own negligence. They also denied having agreed to supply plaintiff any unusually strong set of harness, and alleged that the harness furnished was reasonably safe and strong. The company's manager also denied that plaintiff was in his employment. On the trial the jury returned a verdict against the company, but in favor of its codefendant. The company moved for a new trial, and the judge overruled the motion. The company excepted.

1. The original motion for new trial contained but three grounds, and they were general in character. A rule nisi issued, in which it was provided that the movant should "have leave to amend said motion at or before" the hearing. Service of this motion and of the rule nisi was duly acknowledged by counsel for the respondent. Subsequently the movant amended his motion by adding quite a number of grounds, but this amendment was not served upon the respondent, so far as appears in the record. Counsel for the defendant in error claim that the matter contained in the amendment to the motion is not before this court, and cannot be considered. We are not aware of any requirement that such an amendment should be served, nor have we been referred to any case in which such a point has been decided. The original motion was duly served, or its service acknowledged, and the amendment

was allowed and its grounds approved by the judge. The respondent, after acknowledging service of the original motion and the rule nisi, was bound to look after his case, and to take notice of all that was afterward regularly done therein. Further than this, the judge passed upon the merits of this amendment, and it does not appear that any objection was made to his doing so. See *Fleming v. Roberts*, 114 Ga. 637, 40 S. E. 792, in which, however, the question as to the necessity for service was not passed upon.

2. Error is assigned on the refusal of the judge to rule out the evidence of a harness repairer to the effect that the harness was considerably broken up, and, from its appearance, had been considerably worn and in need of repair, and was not sufficiently strong for a spirited, "skittish" horse. On cross-examination the witness stated that he knew the harness about which he testified was that used by the plaintiff at the time of the injury, because witness "had been told so; that he did not know it of his own knowledge, only from the condition of the harness." It also appeared that his examination of this harness was after the time of the injury to plaintiff. The court ruled out what had been told witness. The latter then stated that the only knowledge he had that the harness was the same was derived from the fact that it was broken, and that at the time of repairing the harness in question he had repaired eight or ten other sets of harness for the defendant company,—all of them in need of repair. Counsel for the company then moved the court to rule out all of this evidence on the ground that the witness had no means of information as to the identity of the harness, except what had been told him, and that this was hearsay. The court admitted the evidence, and we think that so doing was error. The witness stated that the harness had been delivered to him by Johnson, who appears to have been on the wagon with plaintiff at the time of the injury, and that it was Johnson who told him that the harness was that used by plaintiff when he was injured. The court properly ruled out what Johnson had told the witness, and this left the statement that Johnson had delivered a set of harness to the witness. There was also evidence that there were eight or ten other sets of harness delivered to the witness for repair. Johnson was not present at the trial, and it was not shown that the harness delivered to the witness by Johnson was that the condition of which was under investigation. The fact that it was broken did not show this. There was nothing to show or to enable the jury to infer that the harness about which the witness testified was that used by plaintiff, and the evidence was therefore irrelevant, and should have been ruled out. See *Turner v. Tubersing*, 67 Ga. 161.

3, 4. The court charged the jury that if "both plaintiff and defendant knew that the

horse was dangerous, and the defendant assured the plaintiff that if he would use this horse in its business it would furnish such harness as would enable him to control a horse of this character, then * * * the duty to furnish such a harness was manifest and imperative, and the defendant was not in the exercise of ordinary care unless nor until it made its assurance good. Moreover, if such assurance was made, it removes all ground for the argument that the servant by continuing the employment engages to assume the risk." In so far as this charge stated what facts would constitute negligence, it was erroneous. While the language is taken almost verbatim from Cooley on Torts, as quoted in Cheeney v. Steamship Co., 92 Ga. 731, 19 S. E. 33, 44 Am. St. Rep. 113, we think that it was not proper to give it in charge to the jury. Under our system a judge should not instruct the jury that any given facts constitute negligence, except in cases where such facts are by law made to constitute negligence per se. *City of Mill-Edgeville v. Wood*, 114 Ga. 370, 40 S. E. 239. The charge was further erroneous in that, in fitting the quotation to the present case, the judge instructed the jury that the defendant would become practically an insurer of the quality of the harness furnished. We think that if the defendant had supplied plaintiff with a harness which to one reasonably and ordinarily prudent would have seemed to be of such quality as to enable plaintiff to control the horse, and the harness proved insufficient because of some defect hidden even from the ordinarily diligent, there could be no recovery.

5. Other complaints are made of the charge of the court. Portions of it are excepted to as intimating an opinion as to what had or had not been proved, as stating what facts would constitute negligence, as being unauthorized by the evidence, or as being given without sufficient qualification. After a careful study of these assignments of error, we find that none of them requires any special discussion. The errors, if any existed, are of minor importance, and of such character that they will probably not occur upon the next trial. Complaint is also made that the court erred in admitting evidence that the horse which plaintiff had been driving was used by the company in its business for some months after the injury to plaintiff. This evidence was objected to as irrelevant. This assignment of error was not argued or referred to here by the counsel for the plaintiff in error, and apparently was abandoned. Inasmuch, however, as the case has to be again tried, we will say that this evidence seems to us to have been inadmissible. If offered to throw any light on the contract or arrangement of the plaintiff with the defendant, it was, of course, irrelevant. If it was offered to show the use of the horse with a stronger harness, and to treat this as an admission by the company that the harness supplied the plaintiff

had been negligently weak, then it was inadmissible under the ruling in *Railway Co. v. Cartledge* (this term) 42 S. E. 405. If it was offered for the purpose of showing the character of the horse, it was inadmissible, (1) because it was conceded by both parties that the horse was wild and not easily controlled; (2) because it did not sufficiently appear that the horse was afterward used under similar conditions as by plaintiff, or what was the difference in the harness, or how much skill had to be employed to manage the horse; and (3) the fact that the horse had run away with plaintiff may have induced defendant, in its subsequent use of the horse, to employ harness stronger than even the most prudent would have thought necessary before the injury to the plaintiff.

Because of the errors pointed out in the second, third, and fourth headnotes, a new trial should have been granted. Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 182)

SAPP v. STATE.

(Supreme Court of Georgia. Aug. 8, 1902.)
CRIMINAL LAW—OBJECTION TO JUROR—WAIVER—INTOXICATING LIQUORS—SALE TO DRUNKEN PERSON.

1. When, in purging the jury in a criminal case, the accused is given a list of the petit jurors, and the indictment, on which appear the names of the grand jurors, and from these papers it appears that one of the jurors served on the grand jury which returned the indictment, a failure to object to such juror amounts to a waiver of his disqualification.

2. There was no material error in the charges complained of, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from superior court, Webster county; *Z. A. Littlejohn*, Judge.

P. E. Sapp was convicted of selling liquor to an intoxicated man, and brings error. Affirmed.

J. F. Souter and G. Y. Harrell, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

SIMMONS, C. J. Sapp was indicted under Pen. Code, § 443, which makes it a misdemeanor for any seller of spirituous liquors to "sell or furnish liquors or other intoxicating drinks to any person who is at the time intoxicated or drunk." He was found guilty of the offense charged, and his motion for a new trial was overruled. He excepted.

1. A new trial was asked on the ground that one of the grand jurors who returned the indictment against the accused, and whose name appeared upon the indictment, was a member of the jury that tried the accused and returned the verdict of guilty. From the evidence submitted to the trial judge upon the hearing, and from his note to the motion for new trial, it appears that the juror's name appeared on the indictment as a

member of the grand jury which returned the indictment, and also appeared on a list of 24 jurors which was given counsel for the accused. After the jury had been purged as to disqualifying relationships, it was suggested that some of the jurors might have served on the grand jury, and the court directed counsel for the accused to compare the list of petit jurors with the names appearing on the indictment, to see if such disqualification existed. After the announcement that certain jurors were disqualified, they were removed and the panel filled. There was some conflict in the affidavits submitted to the judge as to whether counsel for the accused participated in the comparison of the names on the list with those on the indictment, or left this matter entirely to the solicitor general and a third person not interested in the case. Inasmuch, however, as there is no intimation that any fraud or deception was practiced, this is immaterial. The court gave counsel for the accused an opportunity to discover and suggest this juror's disqualification, and the presence of the juror's name on the indictment and in the list afforded ample means to do so. When the accused or his counsel was given the list and the indictment, and told to look for any identity of names in the two papers, we think that he, in the absence of any fraud or deception, became chargeable with notice of whatever a proper examination of those papers would have revealed. He was thus chargeable with notice that this juror had served on the grand jury, and his failure or omission to challenge the juror or to suggest his disqualification must be held to amount to a waiver. Nor does it matter, as before remarked, whether counsel for the accused examined the papers himself, or left the examination and comparison to others. In the latter case those others would have acted as agents for counsel for the accused, and the latter would be chargeable with notice of whatever he should himself have discovered by a proper examination of the papers. When he left the comparison to others, he took the risk. For this reason, we think that, if the juror was disqualified by his prior service on the grand jury, his disqualification was waived, and is no cause for granting a new trial.

2. Complaint is made of a charge of the court to the jury as follows: "It is a question for you to determine, from all the facts and circumstances, as to whether this man * * * was intoxicated, or whether he was drunk. That is a question for you to determine from the testimony in this case. There is no direct rule that I know of that I could give you, gentlemen, whereby you could determine the issue, or whereby you could be guided, as to whether the man was intoxicated, or whether he was drunk. You would have to determine from the facts of the case. But under the law a man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquors that it so oper-

ates upon him—that it so affects his acts or conduct or movement—that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man to that extent under the influence of liquor that parties coming in contact with him or seeing him would readily know that he was under the influence of liquor by his conduct or his words or his movements, would be sufficient to show that such party was intoxicated." There is, as against the accused, no material error in this charge. The statute makes it an offense to sell to a person who is at the time either intoxicated or drunk. The indictment charged a sale to a person alleged to have been at the time intoxicated and drunk. Whether there is any difference between an intoxicated man and one who is drunk is in this case an immaterial question, for proof of a sale to either would support a conviction. The court's definition of "intoxication" may not have been in exact accord with that of the lexicographers, but there was no material error in it. Under statutes similar to the one under which the accused was indicted, it has been held that knowledge, on the part of the seller, of the intoxication of the purchaser, is not an essential ingredient of the offense. *Cundy v. Le Cocq*, 13 Q. B. Div. 207; *Black Int. Liq. § 423*, and cases cited. And see *Loeb v. State*, 75 Ga. 258. The charge of the court gave the accused the benefit of a contrary holding as to this question; for the jury were instructed not to convict unless the purchaser's intoxication was known to the accused, or could have been discovered by the use of reasonable diligence. This question is, therefore, not made in the present case. The court's definition of "intoxicated" was substantially correct, and we think a man whose condition was therein described would be an intoxicated or drunken man. In the *Standard Dictionary* the following definition of "drunk" is given: "Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and, commonly, to evince a disposition to violence, quarrelsomeness, and beastiality." In the same work "intoxicated" is given as synonymous with "drunk." In *State v. Pierce*, 65 Iowa, 85, 21 N. W. 195, it was held that one is drunk who is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired; and in *Elkin v. Buschner* (Pa.) 16 Atl. 102, it was held that "whenever a man is under the influence of liquor, so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he may attend to his business, and though he may not give any outward and visible signs to the casual observer that he is drunk." In the present case the charge of the court amounted to an instruction that to be intoxicated a man must be so under the influence of intoxicating liquors that his acts or words or conduct would be visibly and noticeably affected. Such an instruction was

not erroneous. There was no error in any other portion of the charge, so far as appears from the motion for new trial. The evidence fully warranted a finding not only that the accused, a regular dealer in liquors, sold whisky to an intoxicated man, but that he did so with knowledge of the purchaser's intoxication.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 90.)

HOPSON v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

CRIMINAL LAW—VENUE—SALES—CONSUMMATION OF CONTRACT—RECALLING JURY—ADDITIONAL INSTRUCTIONS—ABSENCE OF DEFENDANT—ERROR.

1. Where a dealer in one county receives from a person in another county an order for goods, and ships the same to an agent of the dealer in that county, to be delivered to the person sending the order, and this is accordingly done, the sale is consummated in the latter county; and this is so though the person ordering the goods pays for them in advance, and his name is marked on the package containing them when the same is shipped to the dealer's agent.

2. Recalling a jury in a criminal case, who had retired to consider of their verdict, and, in the absence of the accused and his counsel, and without their consent, giving a second charge, is cause for a new trial, even though this charge be the same in substance as that which had been delivered in the first instance.

(Syllabus by the Court.)

Error from superior court, Brooks county; W. N. Spence, Judge.

H. G. Hopson was convicted of illegally selling intoxicating liquors, and brings error. Reversed.

W. S. Humphreys and S. S. Bennet, for plaintiff in error. W. E. Thomas, Sol. Gen., and L. W. Branch, for the State.

LUMPKIN, P. J. The indictment charged H. G. Hopson with selling spirituous and intoxicating liquors in Brooks county. There was sufficient evidence to establish, among others, the following facts: Gornto and J. W. Hopson, as partners, were engaged in selling such liquors at Valdosta, in the county of Lowndes, and the latter had a store in Brooks county, in which H. G. Hopson was employed as a clerk. Several persons residing in Brooks county sent by mail orders to Gornto for whisky, in each instance inclosing with the order a remittance covering the price of the liquor desired. These orders were filled by expressing the liquors to J. W. Hopson, who informed the purchasers of the arrival thereof, and they called upon and received the same from H. G. Hopson. The name of each purchaser was upon every express package designed for him, but the shipments were, as stated, made to J. W. Hopson. A regular and systematic business, the nature of which was fully understood by

H. G. Hopson, was conducted on the plan indicated above.

1. It is plain that none of the sales were completed in Lowndes county, for in no instance was there in that county a delivery of the liquor to the purchaser. Had the shipments been made directly to the purchasers, the case would have been different; for delivery to the carrier would have been, in legal contemplation, delivery to the purchasers. As it was, the seller did not ship to the persons who ordered the liquors, but to his own agent; and the latter, through H. G. Hopson, made the deliveries. The latter was not acting ignorantly, but knew exactly what he was about. The facts that the liquors ordered were paid for in advance, and that each purchaser's name was placed on the packages intended for him, do not alter the case. For reasons of their own, the sellers, Gornto and J. W. Hopson, did not intend to make, and did not make, any deliveries in Lowndes county; and that is the vital point. It does not distinctly appear, but the testimony as a whole is pregnant with the suggestion, that the mail orders to Gornto were sometimes filled with greater celerity than could be accomplished by the usual course of mail and express. Be this as it may, the evidence fully warranted the finding of guilty against H. G. Hopson; and, the charge of the court being in substantial accord with the law applicable to the facts proved, there is no merit, either in the general grounds of the motion for a new trial, or in that in which exception is taken to the instructions given to the jury.

2. We are, however, constrained to order a new trial upon another ground of the motion, which complains that, after the court had charged the jury, and they had considered the case for some hours, the judge, in the absence of the accused and his counsel, and without any effort to bring them into court, gave to the jury a second charge, which was substantially the same as that which had been given before they retired in the first instance. This practice cannot be upheld. See *Wade v. State*, 12 Ga. 25; *Martin v. State*, 51 Ga. 587; *Bonner v. State*, 67 Ga. 500; *Wilson v. State*, 87 Ga. 583; *Tiller v. State*, 96 Ga. 430, 23 S. E. 825. There was no waiver of the right of the accused and his counsel to be present when the second charge was given. It does not appear that both were ignorant of its being given until after the trial had ended, but this makes no difference. It is an inevitable conclusion from the cases cited above that the accused may complain of such an irregularity after verdict, notwithstanding knowledge thereof by him or his counsel while the trial was in progress. Nor does the fact that the "re-charge" was, in substance, the same as the original charge, dispense with the necessity for ordering a new trial. The great point is that the accused and his counsel have the right to be present at every stage of the pro-

ceedings, and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with good law and good practice.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 985)

FOOTE & DAVIES CO. v. MALONY.

(Supreme Court of Georgia. July 22, 1902.)

CONTRACT FOR PENALTY—VALIDITY—PAROL EVIDENCE—OPINION EVIDENCE—DIRECTION OF VERDICT.

1. A written contract between two persons, stipulating that, if either fails to carry out his part of the same, "the party failing is to immediately pay to the other party the sum of five hundred dollars, besides all damages sustained by reason of such failure," is, so far as relates to the payment of the \$500, a contract for a penalty; there being in such contract no other words indicating any different intention of the parties in respect to such matter.

2. When there is no ambiguity as to the legal import of the language used in a written contract, parol evidence is inadmissible to show that the parties thereto intended it to have a different meaning.

3. It is not competent for a witness to testify to his opinion that the breach of a given contract by one of the parties thereto caused damages to the other in a lump sum stated.

4. When the plaintiff in an action makes out a prima facie case for the recovery of the amount sued for, and the defendant merely shows, by evidence offered in support of a plea of recoupment, a breach of a stipulation in the contract by the plaintiff, without showing any actual damages in consequence thereof, there is no error in directing a verdict in favor of the former for such amount. Under such circumstances, the defendant is not entitled to have the case submitted to a jury, in order that the amount of the proved claim of the plaintiff may be reduced by such nominal damages as they might find in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by T. J. Malony against the Foote & Davies Company. The court below directed a verdict for plaintiff, and defendant brings error. Affirmed.

Ulysses Lewis and C. W. Smith, for plaintiff in error. Tompkins & Alston and Lumpkin & Colquitt, for defendant in error.

FISH, J. Malony, who carried on business under the name of Malony Directory Company, brought an action against Foote & Davies Company, a corporation, for the recovery of an amount of money which he alleged was due him for certain expenses which he, in accordance with a contract between them, had incurred and paid in behalf of the defendant, and for which, under the contract, the defendant was to reimburse him. The defendant admitted the execution

of the contract, and that it had become indebted to the plaintiff in the amount for which he sued, but pleaded that the plaintiff had violated a certain stipulation in the contract, and was therefore indebted to it in the sum of \$500, as liquidated damages, under the following provision of that instrument: "Foote & Davies and Malony Directory Co. mutually agree, if either fails to carry out their part of this contract, that the party failing is to pay to the other party the sum of five hundred dollars, besides all damages sustained by reason of such failure." The main question which we are called upon to decide is whether the sum which the parties here agreed should, in the event of a breach of the contract, be paid by the party violating it to the other party, was, as claimed by the defendant, liquidated damages, or, as claimed by the plaintiff, a penalty. The court below held it to be a penalty, and, as the defendant proved no actual damages, directed a verdict in favor of the plaintiff for the amount sued for.

1. We are clearly of opinion that the above-quoted clause of the contract does not provide for the payment of liquidated damages, but for the payment of a penalty. "The intention of the parties is mainly to be considered in determining whether an agreement is a penalty or liquidated damages." *Sutton v. Howard*, 33 Ga. 536. "The only inquiry as to intention is whether or not the parties intended the sum to be accepted as compensation." 1 Sedg. Meas. Dam. § 408. The parties to the contract under consideration agreed that the party failing to carry it out should immediately pay to the other party the sum of \$500, besides all damages sustained by reason of such failure. They did not undertake to estimate and liquidate the damages which would result from a violation of the contract, for the amount which they agreed should be paid by the party failing to comply with the contract to the other party was to be in addition to all damages sustained by reason of such failure. The sum of \$500 stipulated to be paid for a breach of the contract could not be liquidated damages, because it was to be paid over and above all damages sustained. The agreement, in effect, was that the party failing to carry out the contract was to pay to the other party \$500 and all damages sustained. This being true, and there being nothing elsewhere in the contract to indicate a different intention, the sum named here was and could only be a penalty. It is a well-settled principle that, where a contract provides for the payment of a penalty for the doing or not doing of a particular act, no other sum can be recovered under the penalty than that which will compensate the plaintiff for his actual loss. Here the defendant failed to show that it had sustained any actual damages in consequence of the breach of the contract by the plaintiff.

2. One ground of the motion for a new

trial was that the court erred in rejecting certain parol testimony offered for the purpose of proving that at the time the contract was executed the parties discussed the matter, and "agreed that, if either party to the contract violated its terms, the damages could not be ascertained, because of the peculiar nature of the business, and that they therefore agreed to the sum of \$500 as liquidated damages in case of a breach." It is perfectly clear that the court did not err in rejecting this evidence. There is nothing ambiguous in the provision which we have been considering of this contract. This being true, the interpretation of the contract was for the court, and no evidence dehors the instrument could be received.

3. The court did not err in refusing to allow a witness for the defendant to testify that, in consequence of the breach of the contract by the plaintiff, the defendant's business was damaged "in an amount of more than \$500." The amount of the damages, if any, sustained by the defendant in consequence of the breach of the contract by the plaintiff, was one of the questions to be determined by the jury. It was a conclusion to be drawn by them from the facts testified to by the witnesses. It is the province of the jury to draw their own conclusion, from the facts produced in evidence, as to the amount of damages, if any, which a party has sustained by the conduct of the other party to the case. The ruling of the court below in excluding this testimony is sustained by repeated decisions of this court. *Woodward v. Gates*, 38 Ga. 205; *Railroad Co. v. Kelly*, 58 Ga. 107; *Smith v. Eubanks*, 72 Ga. 281; *Railroad Co. v. Senn*, 73 Ga. 705.

4. One ground of the motion for a new trial was that "the court erred in directing a verdict for the plaintiff, because the undisputed evidence showed that the plaintiff had broken the contract, and that defendant was entitled to recover general damages under its plea of recoupment." As the defendant showed no actual damages resulting to it from the breach by the plaintiff of the contract, its only claim could have been for the recovery of mere nominal damages. Counsel for the plaintiff in error have argued here that the case should have been submitted to the jury, in order that the amount admitted to be due the plaintiff under the terms of the contract might be reduced by the jury by such nominal damages as they might find the defendant had sustained in consequence of the breach of a stipulation of the contract by the plaintiff. Civ. Code, § 3801, provides: "In every case of breach of contract, the other party has a right to damages; but if there has been no actual damage, the plaintiff can recover nominal damages which will carry the costs." The court did not err in failing to submit the case to

the jury, in order that they might reduce the admitted claim of the plaintiff by some trivial sum which they might find in favor of the defendant as mere nominal damages. The point made in this ground of the motion has been decided by this court adversely to the contention of the plaintiff in error. The theory upon which and for the purpose for which nominal damages are awarded a party who sues to recover for the breach of a contract, and who shows the breach, but no actual damages, is not applicable to a defendant who seeks, under a plea of recoupment, to reduce the claim of the plaintiff, arising under a contract, by nominal damages, in consequence of some breach of the same contract by the plaintiff. Nominal damages are not given as compensation for the breach of a contract, but simply in vindication of the right of a person who brings an action upon a good cause, but fails to prove that he has sustained any actual damage, and to prevent his being mulcted in the costs after he has established his cause of action. In the present case the defendant, by being allowed mere nominal damages as a credit upon the amount of its indebtedness to the plaintiff, could neither obtain a verdict in vindication of its right, nor escape the payment of costs. The verdict was bound to be in favor of the plaintiff, and would naturally and inevitably carry the costs against the defendant. It is the plaintiff who, under the above-quoted section of the Civil Code, is entitled to nominal damages, sufficient to carry the costs, in an action upon a breach of a contract, where the breach, but no actual damage, is shown; and, in all the text-books and cases which we have examined, the doctrine of nominal damages is applied only to a plaintiff. We have found only one case in which the question whether the defendant, in a suit upon a contract, could reduce the amount of the proved claim of the plaintiff by mere nominal damages, has been made, and that is one decided by this court. In that case (*Chambers v. Walker*, 80 Ga. 642, 6 S. E. 105) it was held: "Where it is sought to foreclose a mortgage for purchase money of certain personalty, and defendants set up that the consideration of their purchase was not only the property, but good will, trade, and friendly influence of the seller and mortgagee, and that he has violated his contract as to these, the case is not one in which a charge on the subject of nominal damages is necessary or proper. If plaintiff violated the contract, and defendants were injured, they could set off whatever actual damages they sustained, but no other damages." This is conclusive of the question now before us.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 176)

BASS DRY GOODS CO. v. GRANITE CITY MFG. CO. et al.

(Supreme Court of Georgia. Aug. 7, 1902.)

PARTNERSHIP—DISSOLUTION — NOTICE — LIABILITIES OF PARTIES—JUDGMENT—RES ADJUDICATA—OBJECTIONS TO EVIDENCE.

1. A partnership is dissolved by the death of one partner, and it is not necessary to give notice of the dissolution to third persons.

2. The surviving partner or partners have the right, under the law, to wind up the partnership affairs. If in so doing one partner, acting as a surviving partner and traveling salesman, sells to a third person goods which have already been sold by a resident surviving partner, and which, for this reason, cannot be delivered, neither the partnership assets nor the estate of the deceased partner can be held liable for the failure to deliver the goods to the purchaser from the traveling partner.

3. A decision of this court, rendered upon one state of facts, is not res adjudicata upon another trial of the same case, when a new issue has been introduced, and the evidence is essentially different.

4. (a) Where the surviving partners delegate to one of their number the right to wind up the affairs of the partnership, the managing partner cannot, without further authority, bind one of the others by a contract which is of such nature that the partnership assets are not bound. (b) Where such managing partner sends written authority to an agent to sell certain goods of the partnership to a named person, and the sale is accordingly made, the managing partner is personally liable to the purchaser for a breach of the contract, necessitated by his having, without revocation of his agent's authority, and without notice to such agent or the purchaser, sold and delivered the goods to another prior to the sale by the agent, but after authorizing such sale. (c) Where such agent was also a surviving partner, he would be liable or not, according to whether he made the sale as agent or professed to act in his capacity as surviving partner; the purchaser knowing nothing of the delegation of the powers of the survivors to one of their number.

5. An objection made generally to the introduction of specified evidence as a whole is not well taken when some of it is admissible.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by the Bass Dry Goods Company against the Granite City Manufacturing Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Z. B. Rogers and Kilpatrick & McClelland, for plaintiff in error. Jos. N. Worley, for defendants in error.

SIMMONS, C. J. The Bass Dry Goods Company, a corporation, brought an action against the Granite City Manufacturing Company, a partnership, and against the partners individually, for a breach of a contract for the sale of goods. The record discloses that Brown, one of the partners, in his capacity as a member of the firm, made a contract of sale of certain goods to the plaintiff at a stipulated price. The defendants failed and refused to deliver the goods. The defendants contended that at the time the sale was made to the plaintiff the firm had been dissolved by the death of one of the partners (whose personal

representative is a party to this case); that the surviving partners had no right or authority to continue the business except to dispose of the goods on hand; that these goods had been already sold; and that, therefore, the partnership assets were not liable. The partners, as individuals, defended on the ground that they had acted in good faith in the matter, Brown believing at the time the sale was made that the goods were on hand. The defense of the estate of the deceased partner was, of course, similar to that made by the partnership as such. There was no demurrer to any of the pleadings, except that the partnership demurred generally to the petition, and no ruling on this demurrer is here invoked. On the trial the jury returned a verdict for the defendants. The plaintiff moved for a new trial. The motion was overruled, and the plaintiff excepted.

1. A partnership is dissolved by the death of one of the partners. When one of the partners dies, it is not necessary that notice should be given to third persons or to the world of the dissolution of the partnership. Para. Partn. (4th Ed.) § 351. "Dissolution by operation of law is presumed to be taken notice of by every one. It is of a public, and not a private, nature, and hence no notice is necessary. Thus, in case a partner dies, his estate at once ceases to be liable for future contracts entered into by the other partners, independent of notice of the fact." 2 Bates, Partn. § 610.

2. Before the partnership is dissolved, each member is the agent of the others, and the partnership will be bound by any contract made by a partner within the scope of the partnership business. After the death of one of the partners has dissolved the partnership, this general agency is changed by operation of law to a special agency. That agency is limited to selling the goods of the partnership, collecting the assets, paying the debts, and doing other acts which are necessary or proper to close and wind up the business. The surviving partner or partners have no right or authority after the dissolution to make any new contract to bind the partnership assets. Applying these well-known principles to the case under consideration, Brown, one of the partners, had no authority to bind the partnership or the deceased partner's estate by a contract with the plaintiff for the sale of goods not on hand. If in winding up the partnership affairs all the goods on hand had been sold, Brown could not bind the partnership to furnish goods which it did not have. The plaintiff in the court below, knowing as matter of law of the dissolution of the firm, was obliged to know of the limitations upon the power and authority of the surviving members in winding up the business. These limitations are imposed by law, and all persons are affected with notice of them. If the surviving partner exceeds the duties and

powers conferred on him by law, and sells goods which have already been sold, and which are not on hand at the time of the sale, the purchaser cannot hold the partnership liable. For the same reasons the purchaser cannot, in such a case, hold to accountability the estate of the deceased partner.

3. It was argued, however, that the law was laid down differently when this case was here before. 113 Ga. 1142, 39 S. E. 471. In that case this court held that the partnership was bound by the acts of a partner within the scope of the partnership business, and that when Brown sold these goods to the plaintiff the partnership was bound by the contract. But the facts in the record then before us were very different from those now shown. It was alleged in the declaration, and not denied, that this sale was made by Brown before the dissolution of the partnership, and before the death of the deceased partner. There was absolutely nothing in the evidence or any other part of the record to contradict this. The decision was, therefore, sound. From the present record it appears that after that decision the plea was amended so as to allege that the sale was made after the dissolution of the partnership, and the evidence clearly establishes this allegation of the plea. The facts in the two records make, therefore, different cases. A decision by this court upon one state of facts is not binding upon another trial of the same case when a new issue has been introduced in the pleadings, and when the facts in evidence are essentially different. See *Railroad Co. v. Smith*, 80 Ga. 526, 5 S. E. 772; *Clarke v. Havard*, 115 Ga. 832, 42 S. E. 204.

4. The question next arises as to whether the surviving partners are liable as individuals. In the present case there were three of them, but they had turned over to Arnold, one of their number, the winding up of the affairs of the partnership. Each had a right to do whatever was necessary or proper for the purpose of winding up the partnership affairs, but two of them could delegate this authority to the third. *Bank v. Cody*, 93 Ga. 127, 19 S. E. 831. Arnold thus represented in this matter the other surviving partners, but his powers and authority in this regard were as strictly limited as his powers and authority as a surviving partner. Without their acquiescence he could not bind them by any act which was beyond the authority delegated; that is to say, to wind up the affairs of the concern by any acts which would have been proper for them to do as surviving partners. One of the three surviving partners of this concern had nothing whatever to do with this contract with plaintiff. He had left Arnold to wind up the affairs of the partnership, and did not know of the disposition of the goods, or of the contract made with plaintiff. He could, therefore, not be held. As a member of the firm he is not bound, because the

partnership is not liable; and as an individual he is not bound, because he did nothing personally, and authorized Arnold, as his agent, to do nothing which, being beyond the authority of surviving partners, would bind him individually. Relatively to Arnold, the question is different. It appears that he wrote to Brown to call upon the plaintiff, and try to close out to him these identical goods. Three days later Brown made the contract, specifying the same goods which were enumerated in Arnold's letter. Brown was therefore authorized as Arnold's agent to make this contract with plaintiff, and, if Arnold desired to sell the goods to another, he should first have revoked the power given Brown. As he did not do this, he is in the same position as if he had first sold the goods as he did, and had then personally contracted to sell them to plaintiff. It was contended that he acted in good faith, and sold the goods before Brown had made the contract, but we think he should have been more diligent. He had given Brown express authority to make this contract with plaintiff, and he should have foreseen that trouble might ensue if he sold the goods without first communicating with Brown. He nevertheless went forward with the sale of the goods, and now, that an innocent party's rights have become involved, Arnold cannot escape liability because he did no intentional wrong. It was his business to do right, and he should have seen to it that the wrong was not done. We are therefore constrained to hold that the trial judge erred in refusing a new trial as to Arnold. Brown's position is not so clear. While he was a surviving partner, he seems to have delegated his authority as such partner to Arnold, and to have been sent out as Arnold's agent. If he acted as Arnold's agent, and had authority to sell the goods, his principal, and not he, must be held liable if the contract is broken. If, however, the plaintiff knew nothing of this arrangement between Brown and Arnold, and Brown represented himself as a surviving partner, and dealt with plaintiff in his capacity as a surviving partner, then Brown would be individually liable. As one of the surviving partners, he had authority to bind the partnership by no new or future contract, and the plaintiff was affected with notice of this fact. But if he represented to plaintiff that the partnership had on hand certain goods, and sold these goods to plaintiff, he would be liable, though the partnership would not. As a surviving partner, selling the goods of the partnership, it was his business to keep informed as to what goods were on hand, and to sell no other. When he sold goods without knowing whether they were on hand or not, he did so at his peril. If in so doing he relied upon a letter from a copartner, he may have a remedy over against him, but would not be himself relieved of liability to the person with whom he contracted. It therefore becomes material to ascertain the capacity in which Brown acted in making the contract

with the plaintiff. Brown was not introduced as a witness, but witnesses for the plaintiff testified that Brown held himself out to the officers of the plaintiff as a partner, and that the plaintiff dealt with him as such. If this be true, we think that Brown should not be held free from individual liability, and that the plaintiff should have been granted a new trial as to him as well as to Arnold.

5. There are other assignments of error as to the admission of certain evidence. In each ground some of the evidence was clearly admissible. Where evidence is objected to as a whole, and any part of it is admissible, this court will not reverse the trial judge for admitting it. *Railway Co. v. Gilmore*, 115 Ga. 890, 42 S. E. 220.

Judgment reversed, with direction. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 201)

EDWARDS v. MILLEDGEVILLE WATER CO.

(Supreme Court of Georgia. Aug. 8, 1902.)

INJUNCTION—RESTRAINING WATER COMPANY FROM SHUTTING OFF WATER.

1. Where a petition for injunction against a company owning and operating a system of waterworks showed that the defendant and the plaintiff entered into a contract by the terms of which the plaintiff was to bear the entire expense of the material and labor necessary to conduct water from the company's main to his residence, as well as the cost of the necessary plugs, faucets, etc., and to pay the company a stated amount per annum for the use of the water, and the company on its part was to furnish him with the water during a term of years, which still extended far into the future; that the plaintiff had expended a large sum of money in having a pipe laid from the company's nearest water main to his residence, and all the connections made, and faucets placed, and had for several years been using the water, and paying "his water rental promptly"; that the company had lately notified him that, unless he made with it a new contract, agreeing to pay a much larger sum annually for the use of the water, it would sever the connection between its main and his private pipe, thereby depriving him of the use of the water,—a case was stated for the grant of an injunction prohibiting the defendant from executing this threat.

2. The petition stated the terms, scope, and extent of the contract with sufficient fullness and certainty to authorize the grant of the injunction prayed for.

(Syllabus by the Court.)

Error from superior court, Baldwin county; John C. Hart, Judge.

Injunction by J. M. Edwards against the Milledgeville Water Company. Judgment for defendant, and plaintiff brings error. Reversed.

Allen & Pottle, for plaintiff in error. Roberts & Hines, for defendant in error.

FISH, J. Edwards brought a petition for injunction against the Milledgeville Water Company, in which he sought to enjoin the

defendant from disconnecting its water main from the private pipe running therefrom to his residence, and from in any way interfering with his use of the water at his residence, under the terms of the contract which he set up as having been made between the company and himself in the year 1897. Briefly stated, the terms of the contract which he alleged existed between the defendant company and himself were that he was to bear the entire expense of the material and labor necessary to conduct water from the company's main to his residence, situated about one mile and a quarter from the nearest water main of the company, as well as the cost of the necessary plugs, faucets, and other material, and to pay the company \$12.50 per annum for the use of the water, and the company, on its part, was to furnish him with the water during the entire term of its contract with the city of Milledgeville, which contract the petition alleged was entered into in the year 1891, and covered a period of 30 years from the date of its execution. The plaintiff alleged that he, "at an expense of \$800, or other large sum, had the pipe laid from defendant's nearest main to his residence, and all the connections made and faucets placed," under the supervision of the superintendent "having entire charge of the affairs of said Milledgeville Water Co."; and since then, for about four years, had used the water under said contract, "paying his water rental promptly." The petition, which was filed on March 29, 1900, further alleged that plaintiff had been lately notified by the company's superintendent that, unless he made with the company, on or before April 1, 1900, a new contract, "agreeing to pay an annual water rental amounting to more than one hundred dollars," it was its purpose "to annul said contract, and to cut off the water, thereby depriving him of the use under his said contract." The case was dismissed upon demurrer, and the plaintiff excepted. The demurrer was that the petition was wholly without equity; that there was an adequate remedy at law; that, though no specific performance was prayed for in express terms, the object of the petition was a specific performance of the alleged contract, which relief the court, acting as chancellor, had no power to grant; that the petition wholly failed to definitely and specifically set out the date, details, scope, and extent of the contract sought to be enforced, or whether the same was written or oral.

1. It is contended by counsel for the defendant in error that the object of the plaintiff's petition, "though not prayed for in express terms, is to obtain specific performance of an alleged contract"; and that "a court of equity can decree specific performance only when it can dispose of the matter in controversy by a decree capable of present performance; but it cannot decree a party to perform a continuous duty extend-

ing over a series of years, and will leave the aggrieved party to his remedy at law." While it is true that, if the injunction prayed for is granted, its effect will be that, so long as the defendant forces water in sufficient quantity through its main, and the plaintiff maintains his pipes, faucets, etc., in suitable condition for the purpose of conveying the water to and obtaining it at his residence, the defendant will be indirectly compelled to supply the plaintiff with water, yet the plaintiff does not ask that the court compel the defendant to specifically perform its contract. He does not seek to compel the company to continuously supply him with water during the term of the contract, but simply asks that it be enjoined from severing the connection between his pipe and its own. The relief for which he prays is not affirmative, but is negative and preventive. He asks that the company be compelled to let things remain as they are; that it be prevented from doing an act which will change the existing status of affairs. The company would not, by the grant of the injunction prayed for, be compelled to maintain and operate its plant and machinery and to force water through its main, in order to continuously furnish the plaintiff with water; and it is therefore unnecessary to determine whether or not a court of equity, in the case made, would compel it to do this. If the prayer of the plaintiff were granted, the company might stop its machinery, and let its plant lie idle, and yet obey the injunction by simply refraining from cutting off the connection of the plaintiff's pipe with its water main. But if it continued to force water through its mains, it would necessarily continue to supply the plaintiff with water at his residence, if he kept his pipe in proper condition to convey it there. The reason why a court of equity will not decree the specific performance of a contract which requires the discharge of continuous duties involving the exercise of skill, personal labor, trained judgment, etc., is not because of the want of natural justice and equity in a case where specific performance of such a contract is sought, but because of the difficulties with which the court would be confronted in undertaking to enforce the performance of such duties, and the necessity there would be for a constant supervision on the part of the court in order to compel continuous obedience to its decree. The case before us is not of this character. Here, by merely enjoining the defendant company from severing the connection between its main and the private pipe of the plaintiff, and from doing anything to prevent water in the main from passing into such pipe, the threatened breach of the contract will be prevented, and the plaintiff will be afforded the relief for which he prays, and to which he is entitled.

In *Horsky v. Water Co.*, 13 Mont. 229, 83 Pac. 680, the plaintiffs, who were the own-

ers of a large brewery, sought an injunction to prevent the defendant from shutting off water from the plaintiffs' private pipe, which connected with the defendant's system of piping. The court held: "An injunction will lie to enjoin a water company from breaking its contract to supply water to a brewery, when turning off the water would stop the brewing, destroy a large quantity of malt, and injure the brewers' trade." *Pemberton, J.*, in the opinion, said: "We think the facts stated in the complaint, which are confessed by the demurrer, entitle the appellants to invoke the equity jurisdiction of the court, and to the negative and preventive relief of injunction." In *Callery v. Waterworks Co.*, 35 La. Ann. 798, the court held: "Where a contract is made with the city waterworks company to procure water from the pipes and fire plugs of the company for a stipulated price for the purpose of watering and sprinkling the streets, the party complying with his contract may prohibit the company and its officers and employees from any interference with his business under the contract, and from any act to hinder or disturb him in using or procuring the required quantity from the water pipes for the aforesaid purpose." *Todd, J.*, said: "The plaintiff had the legal right to use the water from the pipes and fire plugs in his business in the manner and to the extent and for the purposes contemplated by the contract, and we can see no reason why he could not prevent the threatened invasion of his rights under such contract, and the stoppage of his water supply by an injunction. It was not, in our view, to compel the company to do an act, but to refrain from interference with or doing something to the prejudice of the plaintiff, and in contravention of a legal engagement." In *Brown v. City of Frankfort*, 9 S. W. 384,—a case decided by court of appeals of Kentucky,—it was held: "Where a city agrees, in consideration of the right of way granted, to allow the owner of land through which its water pipes are laid the free use at all times of two hydrants, a purchaser of its system of waterworks may be enjoined from digging up the pipes connecting the hydrants with the source of supply." *Pryor, J.*, said: "Brown is not asking that the city be compelled to keep the way in repair, or to furnish him with water as long as the corporation exists, but that the contract rights of the parties remain as they were in the year 1883, when the right of way was granted. * * * The right to this water in the mode provided for by the contract may be of great value to the land; and when the party injured is not even asking any affirmative relief we perceive no reason why the city should not be compelled to let the pipes remain, or be prohibited from severing the connection by the removal of the pipes between Brown's land and the spring or reservoir." *Sedalia Brewing Co. v. Sedalia Waterworks*

Co., 34 Mo. App. 50, was a proceeding in equity, brought by the plaintiff against the defendant to enjoin the latter from cutting off the supply of water to the former. It was held that injunction would lie; that the fact that under the contract "continuous duties arise does not prevent the aid of an injunction; and this, too, although equity might not, in the given case, decree the specific performance of the contract." In *Graves v. Gas Co. (Iowa)* 50 N. W. 283, the court held that a gas company which had contracted with the owner of a dwelling to furnish him with gas, free of charge, for 20 years, and which had a monopoly, could be enjoined from wholly cutting off the supply. See, also, *Sewickly Borough School Dist. v. Ohio Val. Gas Co.*, 154 Pa. 539, 25 Atl. 868, where a natural gas company was prevented by injunction from shutting off the supply of gas to a schoolhouse.

The plaintiff is without an adequate remedy at law. A court of law could neither prevent the defendant from depriving him of the use of the water, nor restore to him such use after he had been once deprived of it; and the damages which he would sustain in the future, during the long period covered by the contract, by being deprived of the use of a plentiful supply of pure water flowing through pipes upon his premises, and easily and conveniently accessible at all times for the varied necessities, and even the luxuries, of a household, would be very difficult to ascertain, and could not, with any certainty, be estimated. Even if the plaintiff could, by erecting and maintaining a private system of waterworks, supply his residence and premises with water in the same manner and to the same extent that the defendant now does under its contract with him, the damages which the plaintiff would sustain by being deprived of the use of the water, as now supplied to him, during the period of time required for him to complete his own water plant, would be practically impossible of ascertainment with any degree of certainty, to say nothing of the necessity, in order to arrive at the amount of his damages, of estimating the cost of constructing, keeping in repair, and operating, from year to year, such private works.

2. For the purpose of obtaining the injunction prayed for, the petition stated the terms, scope, and extent of the contract with sufficient fullness and certainty. The plaintiff showed the present existence of the contract, and that under it he would be entitled to the use of the water for many years to come. Consequently, his mere failure to give the precise date when the contract was entered into, and the exact date when it would expire, afforded no ground for the dismissal of the petition.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 101)

CONYERS v. COMMISSIONERS OF ROADS & REVENUES OF BARTOW COUNTY.

(Supreme Court of Georgia. Aug. 7, 1902.)

COUNTIES — ACTIONS AGAINST — CHANGING NAMES OF PARTIES—SCALING ORDINANCE OF 1865.

1. A suit was brought against the inferior court of a given county in 1868. In 1874 a board of commissioners of roads and revenues was established for the county. In 1876 an order was passed, which, properly construed, made the board of commissioners in its corporate capacity a party defendant to the case. A judgment was recovered by the plaintiff in 1901 for a sum less than that sued for. A motion for a new trial, filed by the plaintiff, having been overruled, the case was brought to this court, and a motion was made to dismiss the writ of error upon the ground that there was no defendant in error named in the bill of exceptions, the board of commissioners of the county therein named not being such a corporation as was authorized, since the adoption of the constitution of 1877, to defend suits in behalf of the county. *Held*: (1) That the provision of the constitution of 1877 that all suits by or against counties shall be in the name thereof did not affect suits pending at the time of the adoption of the constitution; (2) that an amendment changing the name of the defendant from the board of county commissioners to that of the county would have been regular and proper; (3) that the failure, however, to make such an amendment would not cause the writ of error to be dismissed, when it appears that the case brought to this court in the bill of exceptions is, as to the names of the parties, identical in all respects with the case tried in the court below.

2. This being a suit to which the scaling ordinance of 1865 was applicable, and it being palpably apparent that the verdict rendered was not in accordance with the principles of justice and equity, the court erred in not granting a new trial at the instance of the plaintiff.

(Syllabus by the Court.)

Error from superior court, Bartow county; Geo. F. Gober, Judge.

Action by J. T. Conyers against the commissioners of roads and revenues of Bartow county. Judgment for plaintiff granting insufficient relief, and he brings error. Reversed.

Jas. B. Conyers and B. J. Conyers, for plaintiff in error. A. S. Johnson, for defendant in error.

COBB, J. Joel T. Conyers, as administrator de bonis non with the will annexed of Bennett H. Conyers, obtained a verdict against the commissioners of roads and revenues of Bartow county; but, as the amount of the verdict was less than the plaintiff thought he was entitled to recover, he made a motion for a new trial, and, this motion being overruled, he excepted.

1. A motion was made to dismiss the writ of error upon the ground that there was no such corporation, copartnership, or natural person as the commissioners of roads and revenues of Bartow county, the defendant in error named in the bill of exceptions. In order to determine this motion it is necessary to give a brief history of this suit. On February

19, 1868, Christopher B. Conyers, as executor of the will of Bennett H. Conyers, brought suit in the superior court of Bartow county against the "inferior court of said county." On January 29, 1876, the following order was passed in the case: "It appearing to the court that Russell H. Cannon, David V. Stokley, R. Hayne Dodd, John C. Aycock, and John H. Wikle have each been served with scire facias requiring them, as county commissioners, to show cause why they should not be made party defendants in said case to represent the county in said case, and no sufficient cause having been shown, it is ordered that said commissioners be made parties, and the question as to the costs of this proceeding remain open for further decision." On January 29, 1895, Joel T. Conyers, as administrator with the will annexed of Bennett H. Conyers, was made a party plaintiff in the case. The case has proceeded from the time it was instituted in the name either of the executor or of an administrator with the will annexed. From the date the suit was filed until January 29, 1876, the case proceeded against the inferior court of Bartow county, and from the date just mentioned to the present time it has proceeded against the commissioners of roads and revenues of Bartow county. It is now contended that the order above quoted did not have the effect of making the commissioners in their corporate capacity parties to the suit, and that, if it did have this effect, there has been, since the adoption of the constitution of 1877, no party defendant in the case; and that for these reasons the writ of error should be dismissed. The proper way to sue the county at the date this suit was instituted was to proceed against the inferior court of the county. Irwin's Code 1867, § 526. The inferior courts were abolished by the constitution of 1868. Code 1873, § 5126. In 1872 the general assembly passed an act which was entitled "An act to define the method of perfecting service in suits in this state where a county may be or is a party," and it was provided that in all suits which had been or which might thereafter be commenced in the courts of this state in which a county was or might be a party service should be made upon the ordinary and clerk of the court of ordinary, if there was a clerk, and, if no clerk, then upon the ordinary alone, except that in those counties where the fiscal affairs of the county were committed to a board of commissioners service perfected upon a majority of the commissioners should be sufficient to all intents and purposes. Acts 1872, p. 39. There is nothing in this act which declares in terms who shall be named as the defendant in an action against a county. The business of a county, which was formerly conducted by the inferior court, was, after the adoption of the constitution of 1868, confided to the ordinary in all of those counties where the general assembly had not seen fit to create boards of commissioners of roads and revenues. In those counties where

such boards were created, they were given jurisdiction over county matters. As, under the old law, suits against a county were in terms required to be brought against the inferior court, and as the ordinary or the board of county commissioners, as the case might be, took the place of the inferior court, it would be natural to presume that thereafter the proper way to sue a county would be to sue either the ordinary or the board of county commissioners, as the case might be, in their official capacity. The codifiers of the Code of 1873 were evidently of this opinion, for there is contained in that Code a provision in terms that suits must be brought against the ordinary. Code 1873, § 492. Although there may be no ruling on the subject, it is certainly true that the uniform practice followed prior to the adoption of the constitution of 1877 in suits against counties was to make the person or persons charged with the duty of attending to the affairs of the county the defendant or defendants to the suits. From the time that the inferior court was abolished in 1868 until March 2, 1874, the ordinary of Bartow county had charge of the affairs of the county. On the date just named an act was approved providing for the appointment of a board of commissioners of roads and revenues for that county, and it was provided in the act that this board should be a body corporate, with power to sue and be sued, plead and be impleaded, in all matters falling within its jurisdiction as therein defined, and liable only in all such suits in its corporate capacity as the representative of the county. Acts 1874, p. 332, § 12. Of course, all suits brought against the county of Bartow after the date of the passage of the act just referred to and before the adoption of the constitution of 1877 would be properly brought against the board of commissioners in its corporate capacity. This being true, we know of no reason why the board of county commissioners, as the representative of the county, should not be made a party to a case which had been brought against the inferior court as the representative of the county. It is said, though, that the order above quoted, when properly construed, did not make the board in its corporate capacity a party defendant, but merely made the individuals named in the order parties to the case. We do not think this a correct construction to be placed upon the order. The language of the order is, in our judgment, sufficiently clear to indicate that the purpose of the court in passing the order was to make the board of county commissioners in its official capacity a party to the case. It will thus be seen that at the time of the adoption of the constitution of 1877 the plaintiff had pending against the county of Bartow a suit which in all respects complied with the law in regard to suits against counties prior to the adoption of that instrument. That constitution provided that "all suits by or against a county shall be brought in the name thereof." Civ. Code, § 5924. It has been

held that this provision was self-executing, and needed no legislation to carry it into effect, and that a suit brought since the adoption of that constitution against the county commissioners of a given county was not properly brought, and no amendment could be made substituting the name of the county as a defendant. *Jackson v. Dougherty Co.*, 99 Ga. 185, 25 S. E. 625, and cases cited; *Glaze v. Bogle*, 105 Ga. 295, 298, 31 S. E. 169, and cases cited. It has never been held that the effect of this provision in the constitution was to cause to abate a pending suit which had been properly brought before the adoption of the constitution, and it would be necessary to hold this in order to support the contention of the defendant in error. The suit was properly brought against the inferior court. The board of county commissioners was properly made a party defendant in 1876 to take the place of the inferior court. The county was sued in 1868, and sued in the name in which the law required it to be sued. By the order of 1876 the suit was amended so as to make it proceed in the name in which counties were then authorized to be sued. It would certainly have been better if an amendment had been offered, after the adoption of the constitution, changing the name of the defendant to conform to the rule there laid down. But, as the county had been properly sued in an authorized name, and a suit was pending against it in that name, we know of no reason why the plaintiff may not proceed against the county in that name; certainly until some one in behalf of the county raises the objection that the name of the defendant should be changed to that which would be in accord with the rule and practice growing out of the provision of the constitution of 1877. If the county of Bartow sees proper to litigate with this plaintiff—as it has a right to do—in the name in which suit might have been properly brought, and suffers a judgment to go against it in that name, it cannot raise the objection that the judgment is void on account of the failure of the plaintiff to make a formal amendment changing the name of the defendant to comply with the rule laid down in the constitution, which was never intended to apply to or affect pending suits. The plaintiff had a right to make this change, if he had seen proper, just as was done in 1876, when a change was made so as to make the name in which the county was sued correspond with the existing practice at that time; but we do not think it was incumbent upon the plaintiff, in order to maintain this suit after the adoption of the constitution of 1877, to amend the suit so as to make it proceed against the county in its name. Especially was it not incumbent upon him as long as the county saw proper to litigate under a name in which it could have been sued at the time the suit was instituted, or at the time the amendment of 1876 was made. The county has seen proper to litigate with this plaintiff continuously from the time

the constitution of 1877 was adopted until the present under the name in which it found the suit pending at that date, and we do not think it can raise the question in this court at this late day by moving to dismiss the writ of error.

2. This was a suit on a bond issued by the county of Bartow on October 27, 1863, and the principal sum named in the bond was \$9,785. The bond was payable on January 1, 1864, and bore interest at the rate of 7 per cent. per annum from date. This controversy has been pending in the courts of this state for nearly 40 years, and the case has several times been before this court. See *Pritchett v. Inferior Court*, 46 Ga. 462; *Same v. Commissioners*, 98 Ga. 736, 19 S. E. 896; *Id.*, 94 Ga. 731, 20 S. E. 256; *Commissioners v. Conyers*, 102 Ga. 588, 27 S. E. 789; *Id.*, 108 Ga. 559, 34 S. E. 351. When the case was last before this court, in 108 Ga., 34 S. E., it was held that the liability of the county on the bond sued on had been settled by the former decisions of this court; that the bond was a valid and binding contract; that the only question open in the case was what was the amount of liability on the part of the county, and that in determining this question the jury were to be controlled by the provisions of the scaling ordinance of 1865, which provided that all contracts made between the 1st day of June, 1861, and the 1st day of June, 1865, should receive an equitable construction, and verdicts and judgments thereon should be based on the principles of equity. This court has held that in the trial of cases to which the ordinance referred to is applicable the jury has a large discretion in the adjustment of the equities between the parties under the contracts, and where the verdict rendered does substantial justice between the parties this court will not reverse a judgment of the trial judge in refusing to grant a new trial, where no error of law has been committed. See *Lloyd v. Cheney*, 37 Ga. 497; *Green v. Jones*, 38 Ga. 347; *Cutcher v. Jones*, 41 Ga. 675; *Kille v. Johnson*, 48 Ga. 189; *Williams v. Phipps*, 49 Ga. 175; *Mitchell v. Butt*, 51 Ga. 274. On the other hand, it has been held that in such cases where the verdict is contrary to the evidence, and is grossly unjust, this court will reverse a judgment refusing to grant a new trial. *Slaughter v. Culppepper*, 35 Ga. 25; *Field v. Leak*, 36 Ga. 362. In *Oliver v. Coleman*, 36 Ga. 552, it was held that under the scaling ordinance juries should be allowed a liberal discretion in adjusting the equities of the parties by their verdicts; "but it is the duty of the courts to see to it that such discretion is not abused, and made the instrument of injustice," by granting a new trial whenever it is manifest that the verdict is contrary to the evidence and the principles of equity. It appears from the present record that the judge charged the jury, in effect, that there was nothing for them to determine except the amount the county should pay to the plaintiff, and that in arriving at this

amount they should be governed by the provisions of the scaling ordinance of 1865, which he read to them. While there are assignments of error in the motion for a new trial on the charge of the judge, we do not think any of them are well taken. The question, therefore, to be determined, is whether the verdict rendered by the jury is supported by the evidence, and in accordance with the principles of justice and equity. The verdict was for \$150, with interest from October 27, 1863, at 7 per cent. per annum. There was uncontradicted evidence that the consideration of the bond was 3,265 bushels of corn sold to the county by the plaintiff's testator, and the agreement between him and the officer of the county with whom the contract was made was that the county could take the corn, and fix its own price per bushel, so that the amount to be paid was not less than 50 cents per bushel in good money. The amount of the bond would indicate that the county had agreed to pay for the corn at the rate of \$3 per bushel in Confederate money, as the bond was payable in that money. This would seem to indicate that at the time the bond was made \$3 in Confederate money was worth at least 50 cents in gold. There was much evidence as to the value of Confederate money, there being some evidence that at the date the bond was executed \$1 in Confederate money was worth only 2 or 3 cents in gold. There was also much evidence as to the value of corn, and, according to the testimony of two witnesses, at one time corn was worth in Bartow county as little as 15 cents per bushel. It is to be said, however, in justice to these witnesses, that one of them said this was when the Indians were here, and the other simply said that he could remember when corn was worth only that amount, but that since railroads had been built a bushel of corn would be worth an ordinary day's work of unskilled labor. There was also evidence that between the date of the execution of the bond and the maturity of the same Confederate money was worth much more than 2 or 3 cents on the dollar in gold, and that corn was worth far more than 15 cents per bushel. If the verdict of the jury had been based on the value of Confederate money, they could not have found, even at the lowest proved value of that money, a verdict for less than \$195.30. If the jury had taken as a basis for their finding the lowest proved value of corn, their verdict would have been for \$489.75. We do not say it would have been equitable and just to do this, but it is most probably true that there never was a time in the history of Bartow county, or any other county of this state, that corn was worth less than five cents per bushel, and the verdict of the jury in this case would indicate that they were of opinion that sometime between the date and the maturity of the contract sued on corn was worth between four and five cents per bushel. The purpose of the ordinance of 1865 was to authorize the juries in the trial

of cases to which it was applicable to adjust the equities between the parties, and to do justice. It was never intended that that ordinance should be used as an instrument of oppression and injustice. Even giving to the jury the broad range which they have under the ordinance of 1865, the verdict rendered in the present case was wholly unwarranted. Using the language of Judge Walker in *Field v. Leak*, supra, "Can any one seriously contend that this is a verdict rendered on principles of equity and justice?" Let this case be tried again, and a verdict for an amount which is founded on the principles of justice and equity be rendered in favor of the plaintiff, and this long-standing controversy be terminated.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(115 Ga. 990)

HUTCHESON v. BENNEFIELD. SAME v. HODNETT. SAME v. MELSON.

(Supreme Court of Georgia. July 22, 1902.)
TRUSTS—LEASING TRUST PROPERTY—POWERS OF TRUSTEE.

1. A trustee in possession of land, charged with the duty of managing and controlling it, and using the income therefrom for the support, maintenance, and education of the beneficiaries of the trust, may grant leases of the same, provided the time fixed for the duration of the leases is not unreasonable, and the amount stipulated to be paid as rental is a reasonably fair compensation for the use of the land for the time specified in the leases; they being otherwise reasonable in their terms. Where such leases have been executed, a court of equity will not, in the exercise of its supervisory powers over trusts and trustees, set aside the leases, but will uphold and confirm them.

(Syllabus by the Court.)

Error from superior court, Clayton county; Jno. S. Candler, Judge.

Three separate actions by J. B. Hutcheson, receiver, against J. H. Bennefield, against Ella Hodnett, and against D. P. Melson. Decree for defendant in each case, and the receiver brings error. Affirmed.

F. E. Callaway and J. D. Bradwell, for plaintiff. W. L. Watterson and W. M. Wright, for defendants.

COBB, J. Hutcheson, as receiver, brought separate suits against Bennefield, Hodnett, and Melson, seeking in each case to recover possession of lands held by the defendant, to recover damages for acts of waste, and to enjoin future acts of waste. The three cases, together with the case in which Hutcheson was appointed receiver, were by order of the court referred to an auditor, who was authorized to make one report in all the cases, or separate reports in each, as he deemed proper. The auditor made separate reports in the three cases now under consideration; the report in each being, in effect,

that the defendant was entitled to a decree. To these reports numerous exceptions, both of law and fact, were filed. The judge disallowed all of the exceptions of fact, overruled all of the exceptions of law, and entered decrees in favor of the defendants. The receiver claimed the right to recover possession of the lands under the terms of two deeds executed by S. H. Gay, in which W. P. Archer was appointed trustee during the lifetime of his wife, Marietta Archer, to manage certain lands for the benefit of his wife and children. The defendant claimed the right to remain in possession of the lands under leases from W. P. Archer as trustee. Marietta Archer joined with her husband in the execution of all of the leases, and to some of them were affixed the signatures of some of the children of Marietta Archer, though it is conceded that at the date of the leases at least three of the children were minors. The leases were for terms running from three to eight years. That portion of the first deed from S. H. Gay, above referred to, which is material to the present investigation, is as follows: "Which land I hereby give to the said Marietta Archer during her natural life, and at her death to be equally divided between the children of the said Marietta Archer living at her death. I further direct and agree that her husband, W. P. Archer, shall have full power to manage and to control said property during the life of said Marietta Archer, as he thinks best, for the object of supporting, educating, taking care of, and making comfortable her and her children, and that the said W. P. Archer shall have full power to dispose of the proceeds of said lands for the purpose aforesaid, and for no other purpose; and I further direct and agree that the said W. P. Archer shall not be disturbed in the use and management of said property; that the said Archer shall not have power to sell or otherwise dispose of the said property aforesaid, without abuse to his trust,—only the proceeds, and that for the purpose aforesaid." That portion of the second deed from S. H. Gay which is material to the present discussion is as follows: "Which land I hereby give to the said Marietta Archer during her natural life, and at her death the land to be equally divided between the children of the said Marietta Archer living at her death; and should the said Marietta Archer die, leaving neither child nor children, or the representatives of children, then the said land is to revert back to me or my estate, as the case may be, and that the same be equally divided between my right heirs, share and share alike. And I further agree and consent that the said W. P. Archer shall control said land during the life of the said Marietta Archer, for the object and purpose of supporting and taking care of and maintaining the said Marietta Archer and her children, and the said W. P. Archer shall not be liable to the profits of said land, ex-

cept for the support, education, and maintenance of his said family; and I further direct and agree that he shall not be disturbed in the use and management or control of said property so long as he uses the same for the purposes aforesaid, and without abuse to his trust; that the said Archer shall not have the power to sell or otherwise dispose of said property, but only the proceeds aforesaid, and for the purpose aforesaid." It is not necessary to set forth the exact language of any of the leases under which the defendants claimed. It is sufficient to say that while some of them might be so construed as to pass no estate out of the landlord, and to give only the usufruct to the tenant, still others contained language from which it would be manifest that there was an intention to create an estate for years in the tenant. For the purposes of these cases, each of the instruments will be treated as a grant of an estate for years; that is, what is usually termed a "lease." See Civ. Code, § 3114. When so construed, the question arises whether the trustee had, under the terms of the deeds above referred to, authority to convey such an estate. It is not claimed that the leases were executed under the authority of an order of court. It must therefore be determined whether, under the terms of the deeds, there was either an express or implied power in the trustee to execute a lease of the trust property. A trustee, in this state, unless expressly authorized by the instrument creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the corpus of the trust estate, without an order of the superior court upon a regular application made. Id. § 3172. In the present cases the trustee is expressly prohibited from selling or otherwise disposing of the property of the trust estate, the right of disposition conferred upon the trustee in the deeds being limited simply to the income and profits arising from the trust property. The duty imposed upon the trustee under the terms of the deeds is to so manage the property as to produce an income to be expended for the purposes of the trust; that is, for the maintenance and support of his wife, and the maintenance, support, and education of his children. Without an income the purposes of the trust cannot be accomplished. The property of the trust estate consisting of agricultural lands, and there being nothing in the deeds which requires that the lands shall be tilled directly by the trustee, or under his immediate supervision, it is to be inferred that it was the intention of the creator of the trust that the trustee should have a right, in his discretion, to rent the lands for the purpose of making an income to carry out the purposes of the trust. It is conceded that the trustee had the right to make contracts of rental for a term not exceeding five years, provided the contracts were not of such a character as to vest an estate in

the tenant. See, in this connection, Civ. Code, § 3115. It is contended, however, that in all cases of contracts for rental, where the term is five years or more, an estate in the land passes to the tenant, and that such contracts are, in effect, sales by the trustee, and invalid, under the laws of this state, when not authorized by an order of the superior court, and would be invalid in the present cases, for the reason that under the terms of the trust deeds the power to sell is expressly denied to the trustee. Whether, under a contract providing for the rent of land, an estate in the land passes to the tenant, or he obtains merely the usufruct, and no estate in the land, depends upon the intention of the parties; and this is true without regard to the length of the term. While, under the Code, contracts of rental for terms of less than five years will generally be construed to give only the usufruct and to pass no estate, still such contracts may have the effect to pass an estate to the tenant where it is manifest from the instrument containing the contract that such was the intention of the parties.

An estate for years is a contract for the possession of lands or tenements for some determinate period, and this period may be less than a year, as a certain number of months, or even weeks. 11 Am. & Eng. Enc. Law (2d Ed.) § 380. A tenant for years is never seised of the lands leased. He acquires a right of entry upon the land, and when he enters he is possessed, not of the land, but of a term for years, while the seisin of the freehold remains in the lessor, and the lessee's possession is the possession of him who has the freehold. 1 Washb. Real Prop. (6th Ed.) § 612. A lease for a term of years is not a freehold estate, but a chattel. *Field v. Howell*, 6 Ga. 423. There is nothing in either of the deeds conferring upon the trustee the right to make either a contract of rental, giving to the tenant the mere use of the property, and passing to him no estate therein, nor a lease of the premises, under which the tenant would become possessed of an estate for years. It is conceded that the trustee must, from the necessity of the case, have the power to make contracts of rental, at least for terms not exceeding five years. Keeping in mind that the purpose of the trust is the maintenance and support of the wife and the maintenance and education of the children, would not the trustee, in the exercise of a sound discretion, be authorized to execute leases in order to secure an income payable from year to year, or to secure a gross sum payable at once, to be used for the purposes of the trust, when, in his judgment, it is to the interest of those whom he represents that this character of contract is to be preferred to contracts of rental made from year to year, or to contracts of rental for a short period of time, not exceeding five years? While the law of this state prohibits a trustee from

selling the corpus of the trust property (that is, from divesting himself of the title to the estate), there is nothing in the law of this state which prohibits one who by the terms of the trust is required to manage and control the property in such a way as to produce a given result from dealing with the same in any way which may be necessary for this purpose, which does not have the effect to pass out of him the legal title to the estate, or to pass to another the interest of those he represents in the corpus of the property. When a trustee is appointed to manage and control farm lands, it is to be presumed that it was the intention of the creator of the trust that the lands should be managed and controlled in the way that such lands are usually managed by owners of property of that character. It is not unusual in this state for an owner of farm lands to grant a lease of the same for a term of years, and a trustee would have the implied power to grant such a lease where there was nothing in the instrument creating the trust negating this power. Mr. Perry, in his work on Trusts (volume 2, 2d Ed., § 528), says: "When trustees are charged with the payment of annuities, debts, or legacies, or any other sums, out of the estate, but have no power of sale, they have an implied power of leasing upon the ordinary terms or custom of the state or town in which the land is situated. If the trust consists of farming lands, trustees can grant ordinary farming leases; if of houses in a city, they can grant the ordinary leases of such property." Mr. Beach says: "The power to lease the trust estate belongs to the general official powers of a trustee, where there is a general control of the property. And where this is necessary in order to raise the money for the preservation of trust property, or for the support of dependent beneficiaries, it becomes his duty to lease the estate." 2 Beach, Trusts, § 446. See, also, 1 Lewin, Trusts, *505; Underh. Trusts (Am. Ed.) § 47; Flint, Trusts, § 192; Loring, Trustee's Handbook, 61; *Middleton v. Dodswell*, 13 Ves. 268. While a trustee to manage and control property, when one of the objects of the trust is to raise an income and expend it for given purposes, has the implied power to lease the trust estate, this power is not an unlimited power. The lease cannot extend beyond the time the trusteeship is to last, and cannot in all cases extend even to the end of the trusteeship; the term of the lease being dependent upon the character of the property, the purposes of the trust, the custom of the place in reference to the management of like property, and the conditions surrounding and emergencies confronting the trustee in reference to the management of the property at the time the lease is executed. All such leases are, in any event, subject to the supervisory control of a court of equity. If a lease granted by a trustee is according to the custom of the place, reasonable and usual as to its du-

ration, and the amount of rental stipulated to be paid is, under all the circumstances of the trust at the time of the execution of the lease, whether payable in installments, annual or otherwise, or in a gross sum paid down, fair and adequate compensation, such a lease will be upheld as within the legitimate power of the trustee. On the other hand, if, under all the circumstances, the duration of the lease is for an unreasonable length of time, although within the period for which the trust is to continue, or for a stipulated rental, which is grossly inadequate, or for any other reason it was not to the best interest of the estate that the particular lease should have been granted, a court of equity might set aside the lease as an abuse of power on the part of the trustee; but in all such cases it would seem that if the person claiming under the lease had acted in good faith, and expended money on the faith of it, the decree should protect him, so far as he could be protected consistently with the principles of equity. See *Greason v. Keteltas*, 17 N. Y. 491. Mr. Perry says: "Trustees of lands must, of course, have a general power to lease them; otherwise they could obtain no income; but they must make reasonable leases. In one case a lease for ten years was allowed. Trustees have a general power of leasing, if the lease does not exceed the quantity of estate that is in them, and is a reasonable one." 2 Perry, *Trusts* (5th Ed.) § 484. Mr. Washburn says: "Trustees who have the legal fee in lands may lease them to any extent, the right being incident to the legal estate." 1 Washb. *Real Prop.* (6th Ed.) § 629. In *Naylor v. Arnitt*, 1 Russ. & M. 501, 502, 32 Rev. Rep. 254, where a testator devised lands to trustees upon trust out of the rents and profits to pay two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives, and after the decease of the survivor he devised the lands to their children, it was held that the trustees could grant a valid lease of the lands for a term of 10 years. In *Wood v. Patteson*, 10 Beav. 541, the master of the rolls held that the court could not authorize a trustee for an infant to grant a mining lease, although the legal estate is vested in the trustee, and the lease would be beneficial to the infant. While that case was clearly distinguishable from *Naylor v. Arnitt* (one involving a lease of farm lands, under the operation of which the value of the freehold would not in any way be affected, and the other a mining lease, in the operation of which the value of the freehold would necessarily be diminished), still the master of the rolls took occasion to criticize the ruling in *Naylor v. Arnitt*. In 1871, in the case of *In re Shaw's Trusts*, L. R. 12 Eq. 124, the vice chancellor refused to authorize a trustee to execute leases of real estate for a term

of 10 years, declining to follow the ruling in *Naylor v. Arnitt*, and approving the criticism made upon that case by the master of the rolls in *Wood v. Patteson*. While the case of *Naylor v. Arnitt* has thus been overruled in England, it has been followed in this country, and is cited with approval both by judges and law writers. See *Newcomb v. Ketteltas*, 19 Barb. 608, and the various works on Trusts above cited. In *Black v. Ligon*, Harp. Eq. 206, the testator by a will devised lands to three trustees for the support of a charity school, which land was never to be sold or alienated. The school was to be under the direction of five trustees, to be elected every two years. It was held that the power to lease the lands was in the five trustees elected for two years, and that a lease of a portion of the property of the trust estate, consisting of land and a mill, for a term of 99 years, for a gross sum, without the reservation of an annual rent, was valid, and not in violation of the testator's prohibition against the alienation of the land. While this case deals with a charitable trust, at the same time a trustee appointed to administer such a trust has no more authority to lease the property than an ordinary trustee; but, on account of the peculiar character of the trust and its long continuance, a lease for a term of years, which would be declared to be reasonable in point of time, might in an ordinary trust be held to be altogether unreasonable as to the length of time which it had to run. In the case of *Trustees of Madison Academy v. Board of Education of Richmond (Ky.)* 26 S. W. 187, it was held that where one conveys land to trustees for educational purposes, with reversion to himself and heirs on a failure of trust, and after many years the buildings become dilapidated, and the trustees have no funds for repairs or for carrying on the trust, such trustees have power to lease the land for a term of years to any one agreeing to erect ample buildings thereon, and to use them solely for the purposes of the original trust. The period for which the lease granted in that case was to extend was 99 years. We see no sufficient reason why a trustee, under the general powers conferred upon him by law, may not make a farm lease, provided the same is not unreasonable as to duration, is fair in its terms as to the rent to be paid, and is otherwise reasonable in its stipulations.

In the present cases the auditor found that no one of the leases was for a time that was unreasonable, unusual, or contrary to the custom of the country; that the rental to be paid, which was in some instances a gross amount to be paid at the beginning of the leases, and in other cases a sum to be paid, and certain work and labor to be performed upon the estate during the term of the lease, was a fair and reasonable compensation for the use of the land during the term of the

lease; that the amounts to be paid had actually been paid to the trustee, and had been expended by him for the benefit of the beneficiaries of the trust estate; and that the leases were entered into in good faith, and there was no fraud or collusion between the trustee and the lessees. These findings of the auditor were excepted to. The court disallowed the exceptions, and the plaintiff has assigned error in his bill of exceptions upon the judgment of the court disallowing the exceptions, but, in the brief filed, the questions thus made are not insisted on in this court; the only question argued, so far as this branch of the case is concerned, being as to the power of the trustee to make the leases. No other question than this was argued or insisted on in the cases against Bennefield and Hodnett. In the case against Melson, it appears that Melson defended not only upon the ground that Archer, trustee, had a right to make him a lease of the premises, but also upon the ground that the plaintiffs in the case in which the receiver was appointed had, prior to the bringing of that suit, brought a suit against Archer and Melson for an accounting, in which a decree was rendered that W. P. Archer was entitled to 100 acres of land belonging to the trust estate during his natural life, and that this 100 acres included the land leased to the defendant Melson, and that as W. P. Archer, as an individual, had signed the leases delivered to Melson, even if he had no authority to execute the same as trustee, the leases were valid during the life of W. P. Archer, as he was entitled to a life estate in the land, as against Marietta Archer and her children, under the decree above referred to. The auditor found that Marietta Archer and her children were concluded by the decree in the case above referred to, and that W. P. Archer had a life estate in the 100 acres embraced in the leases to Melson, and that therefore the lease to Melson of this land was valid during the lifetime of Archer. Exception was taken to this finding of the auditor, but the same was overruled by the court, and a decree entered in favor of Melson. In the case of Archer v. Archer, 115 Ga. 950, 42 S. E. 219, it was held that this decree was binding upon Marietta Archer and her children. That ruling is controlling here, so far as this question is concerned. Whether we treat Melson as claiming under a lease from Archer as trustee, or under a lease from him as an individual, he is entitled to the possession of the property; and, as both leases are valid, the duration of his lease is to continue to the end of the time fixed therein, provided either W. P. Archer or Marietta Archer live that length of time. The duration of his lease is to be determined by the life of the survivor of W. P. Archer and his wife, if both die during the term fixed in the lease.

Judgment in each case affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(64 S. C. 485)

EPPERSON v. STANSILL.

(Supreme Court of South Carolina. Sept. 4, 1902.)

NEW TRIAL—ADVERSE POSSESSION—TACKING.

1. It is error to grant a new trial for supposed misdirection of the jury, when in fact the instruction was correct.

2. Where an heir acquires possession of realty through his ancestor, and makes no new entry, the possession of the heir may be tacked to that of his ancestor in establishing the claim of adverse possession.

Appeal from common pleas circuit court of Sumter county; Aldrich, Judge.

Action by Mary A. Epperson against Charles W. Stansill. From judgment setting aside verdict in favor of defendant, defendant appeals. Reversed.

Haynesworth & Haynesworth and Cooper & Fraser, for appellant. L. D. Jennings and John H. Clifton, for appellee.

JONES, J. This was an action for partition of land between plaintiff and defendant as tenants in common, the complaint alleging the interest of plaintiff therein to be five-sixths interest in fee, and of the defendant to be one-sixth interest in fee. The answer denied that plaintiff had any interest in the premises, alleged sole ownership in defendant, and pleaded the statute of limitations. The issue of title thus raised was submitted to a jury. Judge Aldrich presiding, and the jury rendered a verdict in favor of the defendant. Whereupon plaintiff moved for a new trial, which was granted in the following order, from which comes this appeal: "A motion for a new trial having been made in this case on the minutes of the court, on the ground that the circuit judge read the defendant's fourth (4th) request to charge to the jury, but did not charge the same, and thereby misled the jury by the intimation that he had adopted the same, whereas he intended to refuse to charge the same, after a full argument by the counsel it is ordered that said motion be, and the same is hereby, granted, and a new trial ordered."

The request to charge referred to is as follows: "(4) That if the jury believe that James Wallace Epperson and James M. Epperson were ancestor and heir, and that they or either of them held ten years' consecutive possession of the land in dispute, claiming it as their own, then the plaintiff's right of action is barred, and they must find for the defendant. Turpin v. Sudduth, 53 S. C. 295, 31 S. E. 245, 308." The facts are thus stated in the "case": "The plaintiff introduced in evidence a deed of the land in dispute to James L. Epperson, signed by one John B. Johnston, executed in 1879. Plaintiff further proved that James M. Epperson was one of the children of James L. Epperson; that James Wallace Epperson was the son of James M. Epperson;

¶ 2. See Adverse Possession, vol. 1, Cent. Dig. § 220.

that James Wallace Epperson conveyed the land in dispute to the defendant, Stansill, in 1894; that James M. Epperson died in 1882, and James L. Epperson died in 1892. Plaintiff claimed, and introduced evidence in support thereof, that lot was an open lot, and that James L. Epperson had such possession as the nature of the case would permit, and also claimed, and introduced evidence in support thereof, that plaintiff and defendant claimed title from 'a common source.' Defendant claimed, and introduced evidence in support thereof, that James L. Epperson never had any possession, but that James M. Epperson was in possession before and at the time of his death; that the guardian of James Wallace Epperson had possession from the death of James M., his father, until he came of age; and that James Wallace had possession up to the deed to Stansill, and Stansill had had possession ever since."

The effect of the order was to grant a new trial, because, in the opinion of the trial judge, the jury had been misdirected by him. It is error of law to grant a new trial for misdirection of the jury if, in fact, the instruction is correct. The question, then, is whether the fourth request to charge was correct and applicable to the case. The theory of the plaintiff was that the defendant was entitled to one-sixth in fee of the land as grantee of the grandson of James L. Epperson, the alleged common source, but the contention of the defendant was that he was sole owner as grantee of James Wallace Epperson, the heir of James M. Epperson, and that his grantor had acquired title by adverse possession under claim of right, sole or connected with the possession of his ancestor. This rendered it proper to have the jury instructed as to the right of the heir to take his possession with that of his ancestor in making out title under the statute of limitations. Adverse possession of land for 10 years confers title in the possessor, provided the state has actually or presumptively parted with title. *Busby v. Railroad Co.*, 45 S. C. 313, 23 S. E. 50; *Duren v. Kee*, 50 S. C. 457, 27 S. E. 875; *Kolb v. Jones*, 62 S. C. 195, 40 S. E. 168. If possession of land is transmitted by the act of disselector before the statutory bar is complete, the grantee of the disselector cannot unite his possession with that of the disselector in order to show adverse possession for the requisite period. *Pegues v. Warley*, 14 S. C. 189; *Ellen v. Ellen*, 16 S. C. 132; *Burnett v. Crawford*, 50 S. C. 167, 27 S. E. 645. But when the heir is in of his ancestor's possession, and makes no new entry, the possession of ancestor and heir may be united in making out the statutory period (*Williams v. McAlley*, Cheves, 205; *Duren v. Kee*, 26 S. C. 224, 2 S. E. 4; *Johnson v. Cobb*, 29 S. C. 380, 7 S. E. 601; *Turpin v. Sudduth*, 53 S. C. 311, 31 S. E. 245, 306); the distinction being that, when possession is cast by operation of law from ancestor to heir in possession, there is no break in the continuity of possession, whereas, in the case of disselector

and grantee, there is a new entry and a break in the continuity of possession. The fourth request to charge was therefore correct and applicable to the case. It cannot be said that the charge was faulty in failing to state that the possession must be adverse, for as shown in *Kolb v. Jones*, 62 S. C. 195, 40 S. E. 168, a possession is adverse when it is under claim of right. Nor can it be said that the charge was faulty in failing to state the law when the parties claim from a common source, for the jury were fully instructed as to that in other portions of the charge.

The judgment of the circuit court is reversed.

(64 S. C. 491)

PROCTOR v. SOUTHERN RY.

(Supreme Court of South Carolina. Sept. 4, 1902.)

PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

1. A complaint alleging a willful tort cannot be amended so as to also allege a cause of action based on mere negligence, and the rule is not changed by Act 1898 (22 St. at Large, p. 693) § 2, which provides that in all cases where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury the plaintiff shall not be required to state such single acts separately, nor to elect on which he will go to trial, but shall be entitled to submit his whole case to the jury, etc.

Appeal from common pleas circuit court of Greenwood county; Townsend, Judge.

Action by John M. Proctor against the Southern Railway. From the circuit order refusing motion to amend complaint, plaintiff appeals. Affirmed.

Graydon & Giles, for appellant. T. P. Cothran, for appellee.

JONES, J. The appeal herein is from an order refusing to grant an amendment to the complaint. The paragraph of the complaint sought to be amended is as follows: "(4) That the plaintiff, seeing that the said engine and train of freight cars attached thereto had come to a full stop, then drove his wagon and team back into the said public road, and attempted to pass the said engine and train of freight cars attached thereto while standing; but as soon as the plaintiff approached near and opposite to the said engine, he being in the said public road, the defendant, its agents, servants, and employees, who were in charge of said engine and train of freight cars attached thereto, and being in full and plain view of the plaintiff and his wagon and team, with intent to frighten and scare the plaintiff's team and injure the plaintiff willfully and wantonly and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine, so that the said team of mules became frightened and unmanageable, and were made to run away, and threw the plaintiff out of said wagon, and the wheels

of said wagon were made to pass over the body of the plaintiff, inflicting serious and painful wounds and bruises on the plaintiff's back, foot, and injuring the plaintiff internally so that he became ill and sick, and for a long time was unable to attend to his business, and was confined to his bed, and suffered intense pain from the injuries to his left kidney; and he fears that from the effects of said injuries he will never be well and strong again." The amendment proposed was to strike out the words "with intent to frighten and scare the plaintiff's team and injure the plaintiff willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine," and insert in lieu thereof the following words: "willfully, wantonly, recklessly, negligently, and carelessly, and without regard to the rights of the plaintiff, let off steam from said engine in an unusual and unnecessary manner and in large quantities." On the former appeal in this case (61 S. C. 170, 39 S. E. 351) this court held the complaint only alleged a willful tort, and that the plaintiff could not recover for mere negligence. The object of the proposed amendment was to change the complaint so as to permit a recovery not only for a willful tort, but for negligence. The order refusing the amendment was in these words: "In the above-stated action a motion was made before me at Greenwood, S. C., at the August term, 1901, to amend the complaint in several particulars. The first I allow with hesitation, but the second—the really important one—I cannot allow. At the hearing I thought that the amendment might be allowed under the act of 1898 (22 St. at Large, p. 693), and reserved my opinion, in order that I might consider the matter more thoroughly. On examination of said act, however, and of recent opinion of the supreme court in this same case, I conclude that the amendment asked for cannot be allowed, and it is so ordered."

Appellant contends that the single question presented by this appeal is, "Did the presiding judge err in holding that he had no power to allow the plaintiff to amend his complaint?" We do not so construe the order, for in the same order another amendment was allowed. All that the judge meant by the language used was that the particular amendment proposed was not one which he could properly allow. In this, we think, he was right. The Code does not authorize the insertion of a new cause of action by way of amendment. The amendment proposed should be material to the case which has been defectively stated, and must not substantially change the cause of action. Section 194 of the Code of Civil Procedure, which has been construed and applied in numerous cases, among which see *Trumbo v. Finley*, 18 S. C. 305; *Whaley v. Stevens*, 21 S. C. 221; *Kennerty v. Phosphate Co.*, Id. 240, 58 Am. Rep. 669; *Skinner v. Hodge*, 24

S. C. 165; *Sullivan v. Sullivan*, Id. 474; *Clayton v. Mitchell*, 31 S. C. 190, 9 S. E. 814, 10 S. E. 390; *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 934; *Mayo v. Railroad Co.*, 43 S. C. 225, 21 S. E. 10; *Brown v. Railroad Co.*, 58 S. C. 468, 36 S. E. 852. The opinion on the former appeal in this case shows that an action based upon negligence is wholly distinct from an action based upon a willful tort. The same evidence will not support both, for the former is for an injury done inadvertently, while the latter is for an injury done willfully. The same measure of damages does not apply to both, for in an action for negligence actual damages alone are recoverable, while in an action for a willful tort not only actual, but punitive, damages may be recovered. The same defenses are not available in both, for in an action based upon mere negligence the plea of contributory negligence is available to the defendant, while in an action for a willful tort, such plea is not available. These are some of the tests in determining whether a new cause of action is alleged in the proposed amendment. 1 Enc. Pl. & Prac. 556. The amendment proposed in this case, subjected to these tests, attempted to allege a new and distinct cause of action, and there was, therefore, no abuse of discretion in refusing to allow the amendment.

We do not think the act of 1898 (22 St. at Large, p. 693) to regulate the practice in the courts of this state in actions *ex delicto* for damages applies to the particular question before us. That act, by section 1, allows actual damages to be recovered in an action *ex delicto* in which punitive damages are claimed, and provides that no party shall be required to make any separate statement of facts as a basis for the claim of either actual or punitive damages, or to elect whether he will claim actual or punitive damages. In section 2 of said act it is provided: "That in all cases where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court and to recover such damages as he sustained, whether such damages arose from one or another or all of such acts or wrongs in the complaint." The effect of this act is to change the rule as stated in *Spellman v. Railroad*, 35 S. C. 486, 14 S. E. 947, 28 Am. St. Rep. 858, to the effect that, when the cause of action is for exemplary or punitive damages, actual damages may not be recovered (*Glover v. Railroad*, 57 S. C. 234, 35 S. E. 510), and also to change the rule laid down in *Ruff v. Railroad Co.*, 42 S. C. 114, 20 S. E. 27, that, when two or more unconnected acts of negligence are stated as caus-

ing the injury, the plaintiff may be required to elect. The statute also permits the jumbling together in one statement of all acts of negligence and other wrongs, which include acts of willful wrong, but the statute does not expressly or by implication undertake to declare that an action based upon mere negligence is not wholly distinct from an action based upon a willful tort. If plaintiff had originally alleged as proposed by the amendment, he could not have been required to make a separate statement of the acts or facts showing negligence on the one hand or willful wrong on the other, and could not have been required to elect upon which acts or class of acts he would rely; but, having elected to bring his action for willful tort in the first instance, he cannot now be permitted to insert a new cause of action based on mere negligence.

The judgment of the circuit court is affirmed.

(64 S. C. 489)

SAUNDERS et al. v. STROBEL et al.

(Supreme Court of South Carolina. Sept. 4, 1902.)

PARTITION—HOMESTEAD—ATTORNEY'S FEES.

1. Where a homestead is set apart to a widow, it may during her lifetime be partitioned among herself and the collateral heirs of her husband, there being no minor children to postpone the partition, under Rev. St. § 2129.

2. Where a widow executes a mortgage to secure attorney's fees for defending suit for possession of her husband's land, it may properly be paid out of the widow's distributive share.

Appeal from common pleas circuit court of Spartanburg county; Klugh, Judge.

Action by Eliza Saunders and others against Amanda Strobel and others. From the decree, Strobel appeals. Affirmed.

Simpson & Bomar, for appellant. Nicholls & Jones and S. T. McCravy, for appellees.

JONES, J. In 1891 Jack Floyd died, leaving as his only heirs at law and distributees his wife, Amanda Floyd, now Amanda Strobel, and the plaintiffs, who are children of the deceased brothers and sister of Jack Floyd, and selsed and possessed of the real and personal property described in the complaint. Thereafter a homestead in said property was set off to said widow, and she, with her present husband, Strobel, now resides upon said real estate, and is in the possession of said personal property. This action was begun in 1896 by the plaintiffs, as heirs at law of Jack Floyd, for the partition of said real and personal property, and J. E. Bomar and S. J. Simpson were made defendants, because they held a mortgage executed by Amanda Floyd on said real estate. The widow resisted the right of plaintiffs to partition the property during her life, because it had been assigned to her as a homestead. The circuit court con-

firmed the report of the master, and decreed for partition.

1. The exceptions by appellant, Amanda Strobel, as stated by her counsel, raise but two questions, the first of which is, whether plaintiffs, as collateral heirs at law, have the right to partition while the widow is alive. We agree with the circuit court that plaintiffs have the right to partition. This question has been practically decided in the case of *Ex parte Worley*, 54 S. C. 208, 32 S. E. 307, 71 Am. St. Rep. 783. In that case the right to partition in the lifetime of the widow was held to exist in an adult son, who lived apart from the homestead, was married, and the head of a family himself, on the ground that homestead is no new estate, but a mere exemption from the claims of creditors, and therefore does not interfere with the statute of distribution. This principle could not, in the absence of a statute for that purpose, be limited to direct descendants or heirs at law, but must logically be applied to all heirs at law, having an interest as such under the statute of distribution. We find no statute postponing partition of homestead until after the death of the widow. Section 2129, Rev. St., postpones the right of partition among the widow and children or among the children until the youngest child is of age, unless the court, upon satisfactory proof, deems it best for the interest of the minor children to make partition sooner; but this statute does not apply to plaintiffs, because they do not fall within the class named.

2. As to the remaining question, we see nothing in the record which would justify us in disturbing the conclusion of the circuit court that the mortgage to Bomar and Simpson must be paid out of the interest of Amanda Strobel, who alone executed the mortgage.

The judgment of the circuit court is affirmed.

(64 S. C. 496)

PEEPLS v. ULMER et al.

(Supreme Court of South Carolina. Sept. 4, 1902.)

**JUDGMENT—SETTING ASIDE—EXCUSABLE
NEGLECT—ORDER—CONSTRUCTION.**

1. It is error to set aside a judgment under Code Civ. Proc. § 195, for mistake, excusable neglect, etc., in a case where the moving party was represented and defended the action, on the ground that the judgment relied on in the case and received without objection was afterwards set aside by the court as fraudulent.

2. An order in a partition suit reciting facts tending to show that partition had been made of land not mentioned in the complaint, and that in the opinion of the judge "a sufficient showing has been made to open the order of confirmation mentioned in the petition herein," and preceeding, "wherefore it is ordered and adjudged that the prayer of the petition looking to the opening of the order and judgment of confirmation be sustained, and that said order be, and the same is hereby, set aside and vacated as far as the petitioners are concerned, and leave is granted them to show cause why the return of said commissioners should

not be confirmed," etc., cannot be considered as setting aside the judgment as fraudulent, but merely as setting aside the order confirming the report of commissioners, and as giving the applicant leave to show why their return should not be confirmed.

Appeal from common pleas circuit court of Hampton county; Benet, Judge.

Action by W. H. Peeples against T. E. Ulmer and others. From order setting aside judgment, plaintiff appeals. Reversed.

W. S. Tillinghast, for appellant. E. F. Warren and A. M. Boozer, for appellees.

JONES, J. This was an action for trespass on realty, and resulted in a verdict and judgment in favor of the plaintiff. The "case" states that a motion was made to set aside said judgment "on the ground of mistake, inadvertence, and excusable neglect." The exact terms of the notice of the motion and the order therefrom are as follows: "Take notice that on the pleadings herein, the testimony, taken at the trial of this cause, the records in the case of W. H. Peeples and Mary Ann Mixon, Plaintiffs, v. Laura L. Peeples, L. A. Tuten, et al. and the proceedings in re W. H. Peeples and Mary Ann Mixon, Plaintiffs, v. Laura L. Peeples, L. A. Tuten, et al., together with the order of Judge O. W. Buchanan therein, setting aside the judgment in the last-mentioned cause, the undersigned will move before the presiding judge of this court at Hampton S. C., on the 12th day of June, 1901, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment herein, which judgment was rendered on — day of October, 1900, for the reason that said judgment was rendered against the defendants through their mistake, inadvertence, surprise, and excusable neglect: (a) That a judgment, to wit, judgment in partition in case of W. H. Peeples and Mary Ann Mixon against Laura L. Peeples, L. A. Tuten, was introduced on the trial of this cause, when defendants had had no notice of such judgment, nor could have discovered the same with due diligence. (b) That the judgment in partition—W. H. Peeples and Mary Ann Mixon against Laura L. Peeples, L. A. Tuten, et al.—has been set aside by Hon. O. W. Buchanan, circuit judge, as fraudulent. (c) That the judgment herein is predicated solely upon the judgment in case of W. H. Peeples, Mary Ann Mixon against Laura L. Peeples, L. A. Tuten, et al., which judgment has been set aside by Hon. O. W. Buchanan, circuit judge, as fraudulent, and all things flowing out of it."

The order of Judge Buchanan in the partition suit of W. H. Peeples et al. against Laura L. Peeples et al., to which reference was made, is as follows: "This proceeding comes up by petition in the original cause, and seeks to set aside a certain judgment and order in a proceeding for partition. It

is alleged that partition was made of lands not mentioned in the complaint for partition. It is charged that, although the Morass Bay tract was the only land sought to be partitioned, other land, and not the Morass Bay place, was partitioned. In the original cause Laura Peeples answered the complaint, and denied that she had any interest in the Morass Bay tract. An order of the court directing a writ of partition to issue directed to the usual number of commissioners was obtained. It commanded them to divide the Morass Bay tract of land, one-third each to W. H. Peeples and Mary Ann Mixon, and the remaining one-third to the defendants L. A. Tuten, Mabel Tuten, Mary Sue Tuten, and Charles Tuten. The surveyor and the agent, Laura L. Peeples, met the commissioners in an attempt on the part of the commissioners to go upon the land belonging to Laura L. Peeples as indicated. The surveyor, it seems, after examining the plat and titles of Laura L. Peeples, refused to proceed further. Afterwards the commissioners procured the service of another surveyor, and, without notifying the surveyor of the ownership of such land, and, so far as the record shows, without notice of Laura L. Peeples, proceeded to cut off from the land of Laura L. Peeples 197.7 acres, without any plat or other guide or reliance, and divided the same among the plaintiffs, W. H. Peeples and Mary Ann Mixon, and the defendants, L. A. Tuten and his four children, assigning the plaintiffs each one-third, and to the defendant L. A. Tuten and his four children the remaining one-third. There is not a shadow of a doubt that the commissioners did not enter upon and divide the land mentioned in the complaint upon which the whole proceeding rested for its validity. The land which they did enter upon and divided was not the Morass Bay, but the separate property of Laura L. Peeples. There was no warrant of law for such a proceeding. Such land was not in the scope and purview of the action. If the court had intended to divide the land other than that mentioned in the complaint, it was without power to do so. The court merely intended to divide the land mentioned in the complaint, and none other under such a complaint could be divided. The action of the commissioners was not in pursuance of law. The land was the property of Laura L. Peeples, and cannot thus be taken from her, or her heirs now claiming it. It was small wonder that L. A. Tuten, Mabel Sauls, Mary Sue Nettles, Annie Cook (the last three of whom have married), and Charles Tuten did not (and do not) set up any claim to the part assigned them. Now, has anything occurred since that action of the commissioners which debars the petitioners in this proceeding to set aside the order of confirmation? I do not think so. Indeed, it would be a reflection upon the administration of justice (if the showing made on this proceeding be true) if the petitioners herein are not allowed

to come before the court and show the utter invalidity of the return of the commissioners and of their action in going on the land of Laura L. Peebles. If their contention is untrue, the court will so determine it upon the hearing before it. If their contention be supported by the facts of the case, then a great wrong will be remedied. I think a sufficient showing has been made to open the order of confirmation mentioned in the petition herein. Wherefore it is ordered and adjudged that the prayer of the petition looking to the opening of the order and judgment of confirmation be sustained, and that said order be, and the same is hereby, set aside and vacated (and all proceedings dependent thereon), as far as the petitioners are concerned, and leave is granted them to show cause why the return of said commissioners should not be confirmed, and such other relief in the proceeding, as is indicated by a setting aside of the judgment or the scope of that proceeding, may be demanded. Let the affidavits and papers herein be filed. O. W. Buchanan, Judge Presiding. February 13, 1901."

Judge Benet passed the following order: "This is a motion by the defendant to set aside the judgment herein, rendered at the October, 1900, term of this court, upon the grounds set out in the motion. After hearing arguments of counsel engaged herein, and hearing the evidence offered, it appearing to the satisfaction of the court that the judgment rendered in this cause is predicated upon a judgment which has been set aside as fraudulent, it is ordered, adjudged, and decreed that the judgment rendered in this case at the October, 1900, term of this court be, and the same is hereby, vacated and set aside."

Appellant's exceptions to the order of Judge Benet are as follows: "That Judge Benet erred in granting the motion of defendants to set aside the judgment recovered by plaintiff herein on the ground set out in the notice of the motion herein, namely, 'mistake, inadvertence, surprise, and excusable neglect,' against objections of plaintiff, the defendants having answered and defended the action. (2) That his honor erred in granting the motion and setting aside the said judgment on the ground set out in the notice of the motion, namely, that Judge Buchanan had set aside the judgment in another case, the said order of Judge Buchanan showing that he did not set aside the judgment as stated in the notice of the motion, and, if he had, such order was not relevant or competent herein because it was made in another proceeding between different parties. (3) That his honor erred in holding that a judgment of record and in another cause was a legal ground for vacating a judgment for 'mistake, inadvertence, surprise, and excusable neglect.' (4) That his honor erred in not holding and deciding, as contended by plaintiff, that a judgment could not be set aside and vacated on the ground of

'mistake, inadvertence, surprise, and excusable neglect,' where defendants were represented at the trial and defended the action, as in this case."

1. We think Judge Benet's order was erroneous. The motion before him was undoubtedly made for relief under section 195 of the Civil Code of Procedure, which authorizes the court to relieve a party from a judgment, order, or other proceeding taken against him through his "mistake, inadvertence, surprise, or excusable neglect." It has been repeatedly held that this section of the Code was intended only for the relief of parties who by reason of some mistake, inadvertence, etc., may have lost the opportunity to be present at the trial or to be represented there. *Steele v. Railroad Co.*, 14 S. C. 331; *Ex parte Jones*, 47 S. C. 396, 25 S. E. 393. In this case the party was duly represented by counsel, had made answer, denying plaintiff's title, setting up title in the defendant, and further alleged, doubtless, with the view to meet plaintiff's claim of title under the partition proceedings in *W. H. Peebles et al. against Laura L. Peebles*, *supra*, that the premises described in the complaint was no part of the "Morass Bay Tract," which was the tract sought to be partitioned in the said partition suit. On the trial in this case evidence was offered pro and con on the question whether the land in dispute was a part of the land sought to be partitioned in said suit of *Peebles v. Peebles*. The plaintiff, in order to show his title, offered in evidence the judgment in partition without objection, his possession of the land thereunder, and the identity of the land in dispute with the land partitioned and set off to plaintiff. The judgment of the court in the case must be deemed final and conclusive of the issue, unless a new trial is allowed under the methods prescribed for that purpose. Section 195 of the Code furnished no authority for setting aside said judgment on the ground stated by the circuit judge.

2. We think, also, that it was a mistaken construction of Judge Buchanan's order to hold that said order set aside as fraudulent the judgment in the partition suit upon which plaintiff's right to recover was predicated. A careful reading of Judge Buchanan's order shows that he merely set aside the order of confirmation of the return of commissioners to the writ in partition, and gave the appellant leave thereafter to show cause why the return of the commissioners should not be confirmed. The order of confirmation was not set aside for fraud, as we read Judge Buchanan's order, but because, in his view, a prima facie showing had been made warranting the opening of the order of confirmation and the permitting Laura L. Peebles to resist thereafter the confirmation of the commissioners' return on the ground that the commissioners had partitioned property belonging to Laura L. Peebles in her own right, and not embraced within the partition proceedings. This, for all that appears, was

nothing more than a mistake of the commissioners in the partition suit in identifying and locating the land to be partitioned, for which the law provided ample remedy in that suit.

The judgment of the circuit court is reversed.

(64 S. C. 457)

SIRRINE v. STONER-MARSHALL CO.
(Supreme Court of South Carolina. Aug. 18, 1902.)

BANKRUPTCY—ILLEGAL PREFERENCE.

1. Under Bankr. Act 1898, providing that a transfer from an insolvent shall be an illegal preference where the creditor had reasonable cause to believe that it was intended thereby to give a preference, it is not enough that the creditor had some cause to suspect the insolvency of the debtor, but he must have had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt.

Appeal from common pleas circuit court of Greenville county; Townsend, Judge.

Action by Wm. G. Sirrine, as trustee of the estate of W. F. Nesbitt & Co., bankrupts, against the Stoner-Marshall Company and the Geo. D. Witt Shoe Company. From the decree the plaintiff appeals. Affirmed.

Haynesworth, Parker & Patterson, for appellant. Carey & McCullough, for appellee.

JONES, J. This is an action by the plaintiff, as trustee in bankruptcy of W. F. Nesbitt & Co., to recover certain payments made by the bankrupts to the defendant within four months before adjudication of bankruptcy, on the ground that said payments were illegal, and preferences, under the United States bankrupt act of 1898. The master sustained the plaintiff's contention, but the circuit court reversed the master, and dismissed the complaint. The circuit decree—which cites *Loveland, Bankr. § 194*; *In re Eggert (D. C.) 98 Fed. 843*; *Id., 43 C. O. A. 1, 102 Fed. 735*; *Grant v. Bank, 97 U. S. 80, 24 L. Ed. 971*; *Stucky v. Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640*—correctly states the four elements that constitute an illegal preference under the bankrupt act of 1898, as follows: "First. The transfer must be made from an insolvent person to a creditor. Second. The effect of such transfer must be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Third. The person receiving it or to be benefited thereby, or his agent acting therein, must have had reasonable cause to believe that it was intended thereby to give a preference. Fourth. The transfer must have been made within four months before the filing of a petition in bankruptcy, or after filing the petition and before the adjudication." While we think the testimony sufficient to establish the first, second, and fourth conditions above named, we do not think the

preponderance of the evidence is against the conclusion of the circuit court that the third condition was not shown to exist. Under the bankrupt act of 1867 a transfer was invalidated if the creditor had reasonable cause to believe the debtor insolvent, while under the bankrupt act of 1898 a transfer is invalidated if the creditor has "reasonable cause to believe it was intended as a preference." Under the act of 1867 insolvency existed when the debtor was unable to pay his debts as they became due in the ordinary course of his daily transactions, while under the act of 1898 insolvency exists when the debtor's whole property, at a fair valuation, is insufficient in amount to pay his debts. The rule established by the decisions of the United States supreme court as to the meaning of the words "reasonable cause to believe," etc., under the act of 1897, is applicable in determining the meaning of the words "reasonable cause to believe it was intended as a preference," under the act of 1898, since a reasonable cause to believe a "preference" was intended by the debtor involves a reasonable cause to believe the debtor to be insolvent, as a "preference" depends upon insolvency. The rule is thus stated in *Grant v. Bank, 97 U. S. 80, 24 L. Ed. 972*: "It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. * * * He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." To the same effect are the cases of *Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478*; *Stucky v. Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640*; *Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481*; *Hall v. Wager, 16 Wall. 584, 21 L. Ed. 504*; *Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280*; *Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130*; *Bank v. Cook, 95 U. S. 343, 24 L. Ed. 412*. In the recent case of *In re Eggert, 43 C. O. A. 1, 102 Fed. 735*, the foregoing cases were considered, and the rule applicable under the act of 1898 is shown to be as follows: "In determining whether the taking of a security by a creditor constitutes an illegal preference under Bankr. Act 1898, § 60b, the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of or belief in his debtor's insolvency, but it is sufficient if he has reasonable cause to believe him insolvent. If facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry

¶ 1. See *Bankruptcy*, vol. 4, Cent. Dig. §§ 255, 256.

should reasonably be expected to disclose." It would not subserve any useful purpose to discuss the testimony in detail, but, considering it in the light of the principles stated, we agree with the circuit court that plaintiff failed to show that the defendant at the time of said payments had reasonable cause to believe that said payments were intended as a preference, for it was not shown that the defendant or its agents had reasonable cause to believe that the assets of W. E. Nesbitt & Co. were insufficient to pay their indebtedness. The evidence shows that plaintiff, who was then acting as attorney for W. E. Nesbitt & Co., and who made said payments from the proceeds of the policy of fire insurance collected by him upon the order of W. E. Nesbitt & Co., believed at the time that W. E. Nesbitt & Co. were solvent, and so informed the agents of defendant. Mr. Stoner, the agent for the Stoner-Marshall Company, and Mr. McCollough, the attorney for the Geo. D. Witt Shoe Company, both testified that they had no reason at that time to believe that W. E. Nesbitt & Co. were insolvent, and no knowledge of any fact was brought home to them that should have put an ordinarily prudent man upon inquiry, beyond such as they made of the plaintiff.

The judgment of the circuit court is affirmed.

(64 S. C. 461)

In re DUNCAN.

(Supreme Court of South Carolina. Sept. 2, 1902.)

**SUPREME COURT—JURISDICTION—DISBARMENT
OF ATTORNEY—PROCEDURE—EVIDENCE
—CONSENT ORDER.**

1. The supreme court has jurisdiction of proceedings for the disbarment of an attorney.

2. Proceedings for the disbarment of an attorney should more properly be instituted at the instance of a majority of his bar.

3. In proceedings to disbar an attorney, the witnesses, at his instance, are properly examined in open court.

4. The conduct of an attorney in depositing his client's money in his own name, and taking it out for his own use, though able to replace it at any time, while not to be commended, is not fraudulent, so as to furnish grounds for his disbarment.

5. Where, in an action against an attorney, defendant consented to an order approving the master's report, which, in effect, found, as matter of fact, that the attorney had committed a fraud in a proceeding for disbarment, and in disbarment proceedings such order was introduced to show such fraud on the part of the attorney, he could show that, because of certain erasures made in the report before the consent was given, it was so modified as to amount only to a finding that the attorney was indebted to the plaintiff; and such agreement, though binding in the principal cause, would not prevent the attorney in the disbarment proceeding from showing the motive and intent of the consent so as to prevent its being regarded as conclusive admission of guilt.

In the matter of the application for the disbarment of John T. Duncan. Petition denied.

¶ 1. See Attorney and Client, vol. 5, Cent. Dig. § 49.

Petition by D. W. Robinson, Esq., for disbarment of John T. Duncan, Esq., in the original jurisdiction of this court:

"D. W. Robinson, an attorney at law in state of South Carolina, would respectfully show to the honorable supreme court of the state of South Carolina, by way of information and petition:

"(1) That petitioner is an attorney at law duly licensed by this honorable court, resident and practicing in the state of South Carolina.

"(2) That John T. Duncan is also an attorney at law duly licensed by this court, residing in Richland county, in this state, and practicing law in said state.

"(3) That on the 21st day of December, 1900, the said John T. Duncan, as attorney for Ella Taylor, received the sum of \$250 from one M. Frank, which moneys were loaned by said Frank to said Ella Taylor upon the faith and security of a mortgage of real estate given by said Ella Taylor at the same date, to wit, December 21, 1900.

"(4) That said loan was made to said Ella Taylor for the purpose of paying the purchase price of the real estate mortgaged, which purchase price was to be paid to Ella Mitchell.

"(5) That the loan was made by said M. Frank to said Ella Taylor upon the faith and representations as to the title and covenants in regard thereto (which were the usual covenants of title) contained in said mortgage, and upon the further positive statements and representations of the defendant John T. Duncan, who drew and prepared the note and mortgage, that the title to the said lot was all right, was complete, and was in the defendant Ella Taylor.

"(6) That the title to said real estate was not at that time, had not been at any time prior thereto, and has not been at any time subsequent thereto, in said Ella Taylor; and this the defendant John T. Duncan knew at the time of negotiating and obtaining the said loan and money.

"(7) That said money, to wit, \$250, was paid by said M. Frank to and was received by John T. Duncan, as attorney for Ella Taylor, for the purpose of being paid and applied on the purchase price of the said lot, and said John T. Duncan received the said money with full knowledge of the purpose for which the same was loaned to Ella Taylor and paid to him.

"(8) That the said money was never applied by said attorney to the uses and purposes for which the same was received, but was placed in the Bank of Columbia, S. C., and was by him (John T. Duncan) checked out and used for his own purposes, and said money was never paid either to Ella Taylor or Ella Mitchell.

"(9) That after the said note and mortgage became due, demand was made by said M. Frank upon said John T. Duncan for the payment of said money, which payment was

refused; that thereupon said M. Frank instituted an action in the court of common pleas for Richland county against Ella Taylor, John T. Duncan, and Eliza Mitchell, for the recovery of the said money, a copy of the complaint in which action, marked 'Exhibit A,' a copy of the answer of John T. Duncan, marked 'Exhibit B,' a copy of the report of the master, marked 'Exhibit C,' a copy of the exceptions of defendant John T. Duncan, marked 'Exhibit D,' a copy of the order of his honor O. W. Buchanan, confirming the master's report, marked 'Exhibit E,' and a copy of the order of the Honorable Geo. W. Gage, marked 'Exhibit F,' are hereto annexed, and hereby referred to and made a part of this information and petition, and reference is here made to the same for a full particular knowledge of the terms and facts and circumstances of the said matter.

"(10) That the facts stated in the foregoing petition and information are based upon the findings of facts by the master, John S. Verner, in the action entitled 'M. Frank v. Ella Taylor, John T. Duncan, and Eliza Mitchell,' which action is above referred to.

"(11) That the report of the master was duly confirmed by his honor O. W. Buchanan, circuit judge, on the 23d day of April, 1902, and said report was made the order of the court, and the said John T. Duncan was, by the order of the said circuit judge, directed and required to pay said money, to wit, \$250, and interest from May 8, 1901, into this court within ten days from the date of said order, to which said order said John T. Duncan signed his consent.

"(12) That said John T. Duncan failed to comply with the order of his honor, Circuit Judge O. W. Buchanan; and his honor Geo. W. Gage, after issuing a rule to show cause, and after due notice, on the 12th day of May, 1902, adjudged said John T. Duncan in contempt of court, for failure to pay said money in accordance with the order of his honor O. W. Buchanan, circuit judge, and ordered and directed the imprisonment of said John T. Duncan until he complied with said order of Circuit Judge O. W. Buchanan, or until the further orders of the court.

"(13) That the said moneys were not paid by said John T. Duncan until after the order of his honor Judge Gage, and until after he had received notice of said order of Judge Gage, and said moneys were paid, as petitioner is informed and believes, by said John T. Duncan, on the 13th day of May, 1902, in the evening.

"Wherefore your petitioner submits to this honorable court that said John T. Duncan, by reason of the facts and matters above set forth, has been guilty of deceit, malpractice, and conduct unbecoming a lawyer, and that he should be disbarred from further continuance in the practice as an attorney and counselor at law."

(Verified.)

The return of John T. Duncan is as follows:

"John T. Duncan, Esq., respondent, who upon the verified information and petition of D. W. Robinson, Esq., has been required by order of his honor Y. J. Pope, senior associate justice, presiding, served upon respondent on 19th May, 1902, to show cause before this honorable court on 2d June, 1902, at 10 o'clock a. m., why he should not be removed and disbarred, and why his name should not be stricken from the roll of attorneys of this court, makes answer to the statements made in the information upon which such rule was issued, and respectfully submits the same as his return to the rule to show cause in this proceeding:

"(1) Respondent admits the allegations contained in the first, second, twelfth, and thirteenth paragraphs of the petition.

"(2) Respondent denies each and every other allegation in the petition, except such as are admitted by the statements made in the following paragraphs of this return.

"(3) For some years prior to the summer of 1900, respondent had been attorney for a colored woman of Columbia, S. C., named Ella Taylor, and as such had represented and served her in several matters, for which he had charged and received as fees proper compensation.

"(4) Some time after 13th August, 1900 (according to respondent's best recollection, it was 18th October, 1900), said Ella Taylor brought to respondent a letter from one Eliza Mitchell to Ella Taylor, wherein the writer stated her willingness to sell a lot of land on Laurel street, in Waverly, just east of Columbia, for \$350 cash; and said Ella Taylor informed respondent that she would accept the offer, and employed him to examine the titles, and prepare the necessary papers, and assist her in making the purchase.

"(5) Respondent proceeded to make an examination of the title, and found that no deed was of record conveying the title of this lot to said Eliza Mitchell, but that her deceased husband, Frank Mitchell, had gone into possession more than twenty years before under a contract to purchase from one Latta Johnston or his mother; that the greater part of the purchase money had been paid, but a small unpaid balance, of about \$25, was still claimed; that Latta Johnston was dead, and his mother had predeceased him, and his rights were controlled by his widow, who was represented by W. H. Lyles, Esq., an attorney of this city.

"(6) Respondent stated these facts to Ella Taylor, and on 4th December, 1900, wrote to Eliza Mitchell and informed her of the status of her title. Respondent also learned that Frank Mitchell had died intestate, leaving as his heirs at law, his widow, Eliza, and a son, named Edward.

"(7) By letter dated 5th December, 1900, respondent was informed by Eliza Mitchell that she wished him to get everything straight for her, and he was shown letter by the same

woman to Ella Taylor, saying she did not know of the Johnston claim, but was willing for it to be satisfied out of the purchase money of the lot.

"(8) At this time, respondent was seeking to get a title deed from Mrs. Johnston to the heirs of Frank Mitchell, and was willing and offered to pay the \$25 claimed to be the balance due. It seemed to be the opinion of Mr. Lyles that the full payment and long possession of Mitchell would give good title to the heirs of Mitchell; but respondent wanted a deed, and therefore had prepared a proper deed, and left it with Mr. Lyles for execution, which respondent certainly expected to have executed, as that was his understanding of conversation had with Mr. Lyles.

"(9) Respondent was informed by Ella Taylor that she would get the \$350 from M. Frank. On 21st December, 1900, Ella Taylor brought Frank to respondent's office, when the whole matter was discussed, but no mention made, as respondent can now recall, of the amount to be loaned. Respondent then and there fully informed both Ella and Frank that to have good titles it would be necessary to get title from Mrs. Johnston to the heirs of Mitchell, which he had prepared and left with Mr. Lyles, and expected soon to get back again, and that the heirs of Mitchell must then make deed to Ella Taylor, and that the money would not be paid until these deeds were delivered. Later, on same day, respondent was with Ella Taylor in Frank's store, and he then learned that Frank would lend Ella \$250 (but no more), without interest, and Ella was required to otherwise raise the remainder. Respondent agreed to help Ella raise the remainder. After being so informed, Frank instructed respondent to draw note and mortgage from Ella Taylor to M. Frank, and he would pay over the money. Said Frank and respondent both expected the money to be used in perfecting this title, and both knew that the title was not then in Ella Taylor.

"(10) Respondent then returned to his office; at once drew note for \$250 and mortgage; the mortgage containing the usual general warranty clause. These papers were properly executed by Ella Taylor, and she and respondent went together to Frank's store. Frank read these papers, and then gave to respondent a check for \$250, and asked respondent to give him a receipt setting out the facts as to the title as before stated, whereupon respondent gave to Frank the following statement and receipt, which was introduced in evidence in the case of Frank v. Taylor et al.: 'Columbia, S. C., December 21st, 1900. This is to certify that I have examined and traced title to the lot mortgaged by Ella Taylor to M. Frank, and that some days since drawn deed to same, and delivered same to Wm. H. Lyles, Esq., for signature of his client; and, having had the mortgage and note for \$250 to M. Frank drawn and properly executed, I hereby acknowledge the receipt of check from him on the Bank of Columbia

for \$250. John T. Duncan, Attorney for Ella Taylor.'

"(11) Soon thereafter respondent arranged with Ella Taylor for a second mortgage for \$162.50, which included \$12.50 for discount and recording fees, and \$150 in money, which he was to negotiate for her; thus realizing \$400, of which \$350 was to be for the purchaser of the lot, and \$50 to himself as compensation for his services. And in part security for this second mortgage debt, Ella Taylor gave to him her note, indorsed for \$112.50 by one McDougal. But by reason of events subsequently occurring, this second mortgage and the McDougal note were never used.

"(12) Very soon after receiving Frank's check for \$250, respondent drew the money thereon, and went with it to Mr. Lyles' office, and offered to pay him the \$25 for Mrs. Johnston's deed, but did not get it. There followed delays caused by respondent's inability to get deed. On 19th February, 1901, respondent, by letter, advised Eliza Mitchell of the delays.

"(13) Respondent did not keep this \$250 separate and apart from his own private funds, and, as a result thereof, he did use the same along with his other funds; but he was at all times able, with cash in hand, or on short notice, and on the security of his individual assets, to raise and replace the amount, and properly disburse it in payment for the lot.

"(14) After advertisement in a small evening paper of this city, which advertisement respondent never saw, this lot of land was sold for unpaid taxes by the secretary of state on first Monday of April, 1901, of which sale respondent had no notice until after sale was completed. He then made efforts to acquire title from the purchaser at such sale by repayment of bid and costs, but said purchaser refused to yield his tax title.

"(15) Before that time, however, Frank had demanded this money of respondent, which he then refused to return, as Eliza Mitchell had rights therein prior to said tax sale, and after such sale he offered to refund if Frank would allow to Ella Taylor the amounts which she had paid to Frank, as stated by Ella Taylor, in part repayment of this loan, which Frank refused to allow.

"(16) On May 23, 1901, two actions were commenced in the court of common pleas for Richland county, one of which was by M. Frank, plaintiff, against Ella Taylor, John T. Duncan, and Eliza Mitchell, defendants, and the other by Ella Taylor, plaintiff, against John T. Duncan and Eliza Mitchell, defendants, to restrain this respondent from paying out this money, and demanding that he account for same. In both of these cases, respondent, by order of Associate Justice Pope, was enjoined from paying out this money.

"(17) The action instituted by Ella Taylor was discontinued some time after 16th November, 1901, upon her allegation that she

had never authorized it, but the other action was referred to the master, who made his report on January 29, 1902, in which were several findings of fact, based, respondent alleges, upon testimony which was untrue, which reflected severely on this respondent, which findings are largely quoted in the information filed in this court by D. W. Robinson, Esq., and upon which findings the allegations of the petition are based. To all of these findings of fact, respondent duly excepted.

"(18) This case being reached for trial in the circuit court in April last, respondent felt that judgment would be given against him for the repayment of this \$250 to Frank (Eliza Taylor having in her testimony made no claim to any part thereof), and he therefore said to Mr. Robinson that he would consent to a proper order confirming the master's report. Thereafter, on the same day, Mr. Robinson sent to respondent a proposed decree of confirmation, the first order in which read as follows: 'That the report of the master, his findings of fact, and his findings and conclusions of law be, and the same is hereby, in all things confirmed and approved.' Deponent intended only to consent to an order directing him to pay the money; and so, when this proposed order was sent to him to affix his name to the consent, he returned the proposed original, and wrote to Mr. Robinson a note, of which he has no copy, declining to sign his consent unless the words which carried an approval of all the master's findings were left out. The same order was then returned to him for signature, with the words 'his findings of facts and his findings and conclusions of law' plainly erased. Deponent then took his pen and further erased the words 'be and the same' and 'in all things,' and then signed the consent. So that this order, as consented to by him, read, 'That the report of the master is hereby confirmed and approved.' And respondent declares that he never intended by this action of his to admit the correctness of any finding of the master, beyond his conclusion that respondent should pay to Frank this \$250.

"(19) Respondent readily agreed to the ten-days limit fixed by Judge Buchanan's order, for he felt sure of his ability to make full payment within that time; but he was delayed partly by his unavoidable absence from home for three days, and partly by the bank from whom he expected to get the money, and by whom it was promised before this absence, and from whom he did get it.

"(20) On 13th May, 1902, he made full payment of debt and costs to J. F. Walker, clerk of court, who thereafter paid principal and interest to D. W. Robinson, Esq., attorney for M. Frank.

"(21) Respondent believes that the exhibits to the information are correct copies, except that the copy of Judge Buchanan's decree is incorrect in the particulars shown in paragraph 18 of this return.

"(22) And respondent reiterates his denial of all improper and unprofessional conduct on his part, charged in the information, and of any intentional wrongdoing, unless the same can be found in the true narrative contained in the foregoing return.

"Wherefore, respondent prays that this return be held to be a full and satisfactory return, and that the proceedings be dismissed."

The report of the master in case of M. Frank, Eliza Taylor, John Duncan, and Eliza Mitchell is as follows:

"To the Honorable Court of Common Pleas for Richland County, Spring Term, 1902: The above-entitled action having been referred to me by his honor R. C. Watts, presiding judge of the Fifth circuit, by his order dated at Columbia, S. C., November 16, 1901, 'to take the testimony, and report the same, with the findings of law and fact, and any special matter herein, to this court,' I held reference on January 8, 9, 22, and 23, 1902, respectively, after due notice to the attorneys for the respective parties. The plaintiff was represented by his counsel, D. W. Robinson, and the defendant John T. Duncan was present in his own behalf and as attorney for Eliza Mitchell, at each of the said references. The defendant Eliza Taylor filed no answer in this cause, but was present in person at the several references, and testified as a witness in behalf of the plaintiff herein. On January 23, 1902, the taking of testimony was closed, both sides having announced that they had introduced all the evidence they respectively desired, and the case was then argued by counsel for both sides. The testimony was taken by consent in stenographic notes, and the reading and signing thereof waived, and a typewritten copy thereof is filed and transmitted with this report to this honorable court. At the opening of the reference on January 8, 1902, Mr. D. W. Robinson moved to strike out and disallow the answer of the defendant Eliza Mitchell in this cause, and for judgment for want of an answer against said Eliza Mitchell, upon the grounds (1) that said answer is not a denial of the allegations of the complaint, and raises no issue; (2) that said answer is unverified,—and filed his notice of motion, which had been previously served on John T. Duncan for himself and Eliza Mitchell. Mr. Duncan excepted to the passing upon that question at this time, because the notice was to appear before the circuit judge, and noted his exception to the overruling of the answer of Eliza Mitchell. I ruled that (1) the answer is not a proper denial, under the Code; (2) and it is not properly verified. To this Mr. Duncan, attorney for defendant, excepted. Mr. Duncan moved for leave to amend the answer, and leave to amend was granted, provided he filed the answer within ten days from that date (January 8, 1902). But no other or amended answer was filed within the ten days allowed, or within any

other time up to the date of the final hearing and up to the date of making this report, either with the master or to his knowledge.

"From the evidence taken in this cause I find the following facts:

"(1) That the defendant Ella Taylor in February, 1900, entered into negotiations with the defendant Eliza Mitchell for the purchase from Eliza Mitchell and her son Frank Mitchell of that lot situate in the city of Columbia, and mentioned and described in paragraph 5 of the complaint, and agreed to purchase said lot at the price of \$350, and the defendant John T. Duncan was employed as and acted as the attorney and adviser for said Ella Taylor in examining the title, preparing the same, and making and executing the mortgages hereinafter mentioned, and negotiating the loans hereinafter mentioned, and that after December 5, 1900, the said John T. Duncan also acted as the attorney for Eliza Mitchell and Frank Mitchell in regard to the same lot, and the perfecting of the title thereto, and conveyance thereof.

"(2) That in order to pay the purchase money for the said lot, plaintiff, M. Frank, agreed to and did on the 21st day of December, 1900, loan to Ella Taylor, through her said attorney, John T. Duncan, the sum of \$250, and took as security therefor the note of said Ella Taylor for said sum, payable ninety days after date, without interest, and for further security took the mortgage of Ella Taylor on the said lot (the said note is filed with the evidence, and marked 'Exhibit A,' and the mortgage is likewise filed with same evidence, and marked 'Exhibit B'); and to raise the balance of the said purchase money said Ella Taylor executed a second note, with one McDougal as surety or indorser, and gave a second mortgage on said lot, for the sum of \$112, which second note was afterwards surrendered and released by said John T. Duncan,—not having been used, upon the demand of said McDougal, upon the discovery of the worthlessness of said security.

"(3) That the loan made by plaintiff, and the money furnished by him, to wit, \$250, was furnished and paid to the defendant John T. Duncan as attorney for the defendant Ella Taylor, and same was received by said John T. Duncan, as her attorney, for the purpose of being paid and applied on the purchase price of the said lot; and said John T. Duncan received the said money with full knowledge of the purpose for which the same was loaned to Ella Taylor and paid to him.

"(4) That the said loan was made by plaintiff to said Ella Taylor upon the faith and security of the mortgage of the said lot mentioned in the pleadings and in said mortgage, and upon the faith and representations as to the title, and the covenants in regard thereto, contained in the said mortgage, and upon the further positive statements and representations of the defendant John T. Dun-

can, who drew and prepared the note and mortgage, that the title to the said lot was all right, was complete, and was in the defendant Ella Taylor.

"(5) That the title to said lot was not in the said Ella Taylor, was not good or complete, at the time the said loan was made, and at the time the money was paid to and received by the defendant John T. Duncan, attorney for the defendant Ella Taylor, and this the defendant John T. Duncan knew at the time of negotiating and obtaining the said loan and money; and the said defendant Ella Taylor did not have on the 21st day of December, 1900, at the time of executing said note and mortgage, and at the time the said \$250 was received by the said defendant John T. Duncan as her attorney, either the title or right to possession of said lot mentioned in the pleading and in the mortgage, and the said defendant Ella Taylor has not had either the title or the right to possession of said lot at any time, either prior to said 21st day of December, 1900, or subsequent thereto.

"(6) That the said lot was sold as delinquent lands by the sheriff of Richland county on sales day in April, 1901, under execution from M. R. Cooper, secretary of state, and U. X. Gunter now has possession thereof, claiming from and under said sale, and, so far as the evidence in this case discloses, the title is outstanding in said U. X. Gunter.

"(7) That the said sum of \$250 loaned by plaintiff to defendant Ella Taylor, as set forth in the foregoing findings numbered 2, 3, and 4, respectively, was received by the defendant John T. Duncan by check, was placed in the Bank of Columbia, S. C., and was by him checked out and used for his own purposes; and said sum of money was never received by the defendant Ella Taylor, in her own person, and said sum of money was never received by Eliza Mitchell or Frank Mitchell, and said money was never applied or used for the payment of the purchase money of the said lot, or any part thereof.

"(8) That no part of the said loan of \$250 so made by plaintiff to Ella Taylor, as set forth in the foregoing findings numbered 2, 3, 4, and 5, respectively, has been repaid to plaintiff M. Frank, but same and every part thereof is still due and owing to said plaintiff.

"(9) That after the said note and mortgage became due, and after the plaintiff had discovered, upon inquiry, the condition of his note and mortgage security, to wit, on the 8th day of the month of May, 1901, and before the commencement of this action, the plaintiff made demand on the defendant John T. Duncan for the return and repayment to him of the moneys, to wit, the \$250 loaned by him as aforesaid, and the said defendant refused to pay or refund said moneys.

"I find as a conclusion of law:

"(1) That the said moneys, to wit, \$250,

loaned by the plaintiff to Ella Taylor, and received by the defendant John T. Duncan, as set forth in the foregoing findings of facts, were received by said defendant John T. Duncan, as attorney and trustee for the defendant Ella Taylor, and the object and purpose for which the loan was made, and the trusts upon which and for which money was loaned and paid, having entirely failed of execution, the plaintiff has a right to recover the said fund of the defendant John T. Duncan, and that said defendant John T. Duncan should be required to pay said fund, with interest thereon from May 8, 1901, into this court, for the use and benefit of plaintiff, and should also be required to pay into this court the costs of this action."

The decree of Judge Buchanan confirming the master's report is as follows:

"This cause being heard by me upon the report of the master herein, and upon motion of D. W. Robinson, attorney for the plaintiff,—the defendant John T. Duncan, for himself and as attorney for Eliza Mitchell, being present and consenting, and the defendant Ella Taylor having failed to appear and file answer or demurrer in this cause,—it is considered, ordered, and adjudged by the court that the report of the master be, and the same is hereby, in all things, confirmed and approved, and made the order of this court; that the defendant John T. Duncan be, and he is hereby, ordered, directed, and required to pay into this court, to the clerk thereof, within ten days after the date of this order, for the use and benefit of the plaintiff, the sum of \$250, with interest thereon from May 8, 1901, together with the costs of this action (the said costs to be paid in accordance with the statement thereof to be furnished by said clerk to said John T. Duncan at any time he requests the same); that the clerk of this court be, and he is hereby, authorized to pay to the plaintiff or his attorney the sum above directed to be paid into this court, when so paid, for the use and benefit of said plaintiff, and that said clerk pay the said costs so paid into his office under this order to the respective parties to whom the same is due."

D. W. Robinson, pro se. Jos. Daniel Pope, Le Roy F. Youmans, Robt. W. Shand, Frank G. Tompkins, and W. D. Mayfield, for respondent.

BENET, A. A. J. This proceeding comes up on information and petition in the original jurisdiction of this court. The petitioner, D. W. Robinson, Esq., is a member of the bar of South Carolina, as is also the respondent, John T. Duncan, Esq. Mr. Robinson charges that Mr. Duncan "has been guilty of deceit, malpractice, and conduct unbecoming a lawyer," in certain matters of professional business placed in his hands. He therefore prays that Mr. Duncan "be disbarred from further continuance in the practice as an attorney and counsellor at law."

This forum has not been made familiar with proceedings of this character. So far as the writer of this opinion is aware, this is the first petition of the kind which has been preferred at the bar of this court. Such proceedings, fortunately very few in number in this state, have usually been instituted in the circuit courts. But there is no question concerning the jurisdiction of this court, and we have no hesitation in entertaining this petition.

There is another feature of this case which is somewhat novel. The proceeding was instituted by only one member of the bar, who is the sole petitioner, acting in his individual capacity. It has been customary in cases such as this to call a meeting of the members of the bar to which the respondent belongs, and in a proper case, after due and thorough deliberation on the accusations brought against him, to select one or more brethren of this bar to institute proceedings for disbarment. By this usual method, charges against a respondent are more thoroughly sifted. The serious step of moving to disbar is only taken when a majority of the respondent's brethren of the bar are satisfied that his name should be stricken from the roll of attorneys, and the proceeding is happily relieved of all suspicion of personal or private animosity and prejudice. We do not wish to be understood to condemn the course pursued by Mr. Robinson in this case, nor to question the purity of his motives. We simply wish to indicate the more commendable method. We know of no previous deviations, except when an attorney general or a circuit solicitor moved for the disbarment of an attorney who had been convicted of a felony or an infamous offense, submitting the record as the ground of the motion.

The petition in this case was submitted on the 19th May, 1902. On motion of Mr. Robinson a rule was issued forthwith, requiring Mr. Duncan to show cause on the 2d June "why his name should not be stricken from the roll of attorneys." On that day the respondent made his return, and a hearing was had. It appeared from the petition and the accompanying exhibits that the accusations of deceit and malpractice and unprofessional conduct brought against Mr. Duncan were based upon matters arising in two suits in the circuit court in which Mr. Robinson and the respondent had been opposing counsel, and especially upon the findings of fact in a report of the master of Richland county filed in one of these cases. It would overload this opinion to embody those records. But we ask the court reporter to set out in his report the petition, the return, the master's report, and the order of his honor Judge Buchanan confirming that report. It is enough in this opinion to state briefly the main grounds relied on by the petitioner. He charges that the respondent, Mr. Duncan, as the attorney of one Ella Taylor, received from one M. Frank the sum

of \$250 as a loan made upon the faith and security of a mortgage of real estate given by Ella Taylor at the time of the loan; that the loan was made for the purpose of paying the purchase price of the lot of land mortgaged; that the loan was made upon the positive statements of the respondent, Mr. Duncan, that the title to the mortgaged lot was in Ella Taylor, and that it was a good title; that the title never was in Ella Taylor, and that the respondent, Mr. Duncan, knew this when the loan was made; that the money was paid to Mr. Duncan, as Ella Taylor's attorney, for the purpose of being applied to the purchase price of the lot, and that he received the money with full knowledge of that purpose; that the money was never so applied, but was placed by Mr. Duncan in bank, and was by him checked out and used for his own purposes; that when the note and mortgage became due, and demand had been made and refused, an action for the recovery of the money was brought; that the master, to whom the matter was referred, found the charges made to be true, and reported Mr. Duncan liable for the amount, with costs; that Mr. Duncan consented to an order confirming the master's report, which was signed by Judge Buchanan, said order requiring him to pay the amount due into court within 10 days; that Mr. Duncan failed to comply with this order; that thereafter, upon a rule to show cause issued by his honor Judge Gage, Mr. Duncan was adjudged in contempt of court, and ordered to be imprisoned until he complied with the terms of Judge Buchanan's order; that the money, though paid by Mr. Duncan, was not paid until after Judge Gage made the order already referred to; that, by reason of these various facts and matters, John T. Duncan has been guilty of deceit and malpractice and conduct unbecoming a lawyer; and that he should be disbarred. To these grave charges the respondent in his return made an emphatic denial as to all that accused him of improper or unprofessional conduct or of any intentional wrongdoing. He denied that he had made any false or deceitful representations as to the title to the land. He admitted having mixed and used the money borrowed from Frank with his own in the bank, but claimed that he was able at any time to replace the same. He claimed that the several damaging findings of fact contained in the master's report were based upon testimony which was untrue, and that to all of them he had duly excepted. He claimed that, when the proposed decree confirming the master's report was submitted to him, he consented only to an order directing him to pay the money; that he therefore returned the original to Mr. Robinson, with a note stating that he declined to subscribe his consent unless the words confirming and approving the master's findings of fact were left out; that Mr. Robinson then erased the words "his findings

of fact and his findings and conclusions of law," and sent the decree back to the respondent, who, before signing it, took his pen and erased the words "be and the same," and also the words "in all things." The concluding words of the decree had originally read, "That the report of the master, his findings of fact and his findings and conclusions of law, be, and the same is hereby, in all things confirmed and approved." As signed by Mr. Duncan, after the erasure referred to, the order, he declared, read, "That the report of the master is hereby confirmed and approved;" and he claimed that he never intended by his consent to admit the correctness of any finding of the master, beyond his conclusion that he (the respondent) should pay Frank the money.

When the petition and the return had been read, the petitioner, Mr. Robinson, proposed to offer in support of his accusations not only the pleadings in the actions in the circuit court, and the report of the master, and the order confirming the same, but also the testimony taken in writing before the master, upon which his findings of fact were founded. Counsel for the respondent objected to the introduction of that written testimony, and claimed for their client that he was entitled to see the petitioner's witnesses face to face at the hearing, that they might be examined and cross-examined in the presence of the court, and that he might, if necessary, adduce testimony in rebuttal. The court very properly allowed this claim; taking the reasonable view, which is well sustained by authority, that in proceedings for disbarment it is not safe to rely upon testimony taken before a referee or master, or any other tribunal, but that the court or judge that hears the petition should also hear the witnesses examined in the presence of the respondent. In such proceedings the court or judge decides the issues of fact as well as of law, and to do so satisfactorily, and in justice and fairness to the attorney accused, the same opportunity should be given which is given to a jury to determine the credibility of witnesses by observing their demeanors, as well as by hearing what they say. See *State v. Finley*, 30 Fla. 331, 11 South. 674, 18 L. R. A. 405, and cases cited. Besides, in this case the respondent had pleaded in his return that the master had based several of his findings of fact upon untrue testimony. That this rule is a wise and salutary one was clearly shown in this very case, when, under the cross-examination of the respondent's counsel, two of the petitioner's witnesses, M. Frank and Ella Taylor, varied materially in the statements they made before this court from what they had said before the master as to what occurred at the execution of the note and mortgage. This decision of the court to hear oral testimony caused a suspension of the hearing until the afternoon of the next day, when the hearing was resumed, and witnesses were examined on both sides. At the conclusion of the argu-

ments the court reserved its decision until the next morning, when the following short order was filed: "It is the judgment of this court that the prayer of the petition herein be refused, and the said petition dismissed. The reasons for this judgment will be filed hereafter. Y. J. Pope, Senior Associate Justice, Presiding. 3d day of June, 1902." We shall now proceed to state the reasons for the foregoing judgment:

Proceedings in disbarment have been and still are of very rare occurrence in the annals of the bar of South Carolina. One can tell perhaps on the fingers of one hand all the instances of similar accusations on record in our courts. This is greatly to the credit of the legal profession of this state, showing that the high standards of honor and integrity appropriate to the profession of the law have been maintained by the lawyers of South Carolina with extremely few exceptions. This deservedly high reputation should be jealously preserved. It is the duty of the brethren of the legal profession throughout the state—those on the bench as well as those at the bar—to uphold the good name of the South Carolina lawyer, and guard it with jealous care. It has been the just pride of the legal fraternity from the earliest days that theirs is an honorable profession, as well as a learned and liberal profession. As far back as the days of Edward the First of England, that statute of Westminster enacted that "if any sergeant, barrister, pleader, or other, do any manner of deceit or collusion in the king's court, or beguile the court or a party and be thereof attained, he shall be imprisoned for a year and a day, and from thenceforward shall not be heard to plead in that court for any man." From that time to the present day the legal fraternity has exercised the right in a proper case to accuse a brother of unprofessional conduct or of dishonorable practices, and to demand, if he be a judge, his removal by impeachment; if he be a lawyer, his dismissal by the court. Nor should courts hesitate to order disbarment in a case made out, not by way of punishment so much as by way of showing that the man whom they have admitted into the ranks of an honorable brotherhood has proved himself unworthy of his high calling, and that his name should be expunged from the roll of attorneys, which can only thus be justly regarded a roll of honor. Of great importance to the bench and the bar, the disbarment of an unworthy brother is of hardly less importance to the public at large. It is to the dearest interest of the layman that the lawyer he employs should not only be a man learned in the law, but also a man of honor and uprightness of character. The client places himself in his lawyer's hands when it may be his life, his liberty, or his property is at stake. In business difficulties and in family troubles he confides in his legal counselor, and imparts to him information which he would not dream of giving to any other. It is all-important to the layman,

therefore, that his attorney should be a man of honor as well as a man of law. Not for literary embellishment, but because of its peculiar appropriateness, and as embodying the sound and sensible views of a learned lawyer and a high judicial officer, Sir Walter Scott, we make the following extract from *The Antiquary*. He puts the words in the mouth of his hero, the Laird of Monkbaron: "In a profession where unbounded trust is necessarily reposed, there is nothing surprising that fools should neglect it in their idleness, and tricksters abuse it in their knavery. But it is the more to the honor of those—and I will vouch for many—who unite integrity with skill and attention, and walk honorably upright where there are so many pitfalls and stumbling blocks for those of a different character. To such men their fellow citizens may safely intrust the care of protecting their patrimonial rights, and their country the more sacred charge of her laws and privileges." *The Antiquary*, vol. 2, c. 48. When a court is asked to exercise its summary jurisdiction over an attorney to the extent of expelling him from the profession, as in the case before us, it is proper to consider what the courts have the right to require of a lawyer. All the books and authorities that treat of this subject agree that the three main requisites are learning, diligence, integrity, but that the greatest of these is integrity. Ignorance of law and neglect of business may keep a lawyer in the lowest ranks of his profession, and render him liable in damages to his clients for any loss caused thereby, but such would afford no ground for disbarment. But the man who is lacking in integrity, and who does not deal honestly and fairly with his client, the court, and the other party, but who practices deceit or fraud or dishonesty or overreaching craft, no matter how learned and diligent he may be, is unworthy of his profession, and should be disbarred. It has therefore been held that the court may strike the name of an attorney from the rolls for fraudulent conduct, although it may not be so gross as to be criminally punishable. *U. S. v. Porter*, 2 Cranch, C. C. 60, Fed. Cas. No. 16,072. Gross misconduct is always good and sufficient ground for disbarment. *Tidd*, Prac. 60; *State v. Holding*, 1 McCord, 238, and cases therein cited. But the case must be clear against the attorney, not only as to the act charged, but that it was committed with a bad or fraudulent motive. *State v. Finley* (Fla.) 11 South. 674, 18 L. R. A. 412, and cases cited. This is all the more necessary, because, though a proceeding such as this is, strictly speaking, a civil one, yet it is highly penal, and in the nature of a criminal forfeiture in its possible consequences. 6 Enc. Pl. & Prac. 709, note, and cases cited. "The consequences of striking an attorney from the roll are so severe, both in degrading him in the eyes of the community, and in depriving him of the means of living to which he may have devoted most of his mature life, that

courts have taken that step only when the misconduct of the attorney might properly be characterized as gross." In *re Lentz* (N. J. Sup.) 46 Atl. 761, 50 L. R. A. 415. We read, on the other hand, in 2 Chit. Prac. 33, that in cases of mistake, even upon a point of practice, and in cases of negligence, the court will not interfere summarily against an attorney. "But when an attorney has been guilty of a want of integrity, then * * * the court will interfere summarily." The same wholesome doctrine is laid down in 1 Tidd, Prac. 85, where the author quotes from Lord Mansfield.

We shall now consider and determine whether the evidence in the case at bar justifies the conclusion that the respondent, Mr. Duncan, was guilty of gross misconduct, and should therefore be disbarred. The petitioner, Mr. Robinson, charges generally, but only inferentially, that Mr. Duncan was "guilty of deceit, malpractice, and conduct unbecoming a lawyer." But Mr. Robinson specifically charges that when the money was borrowed from M. Frank, and the note and mortgage were executed, Mr. Duncan knew that the mortgagor had no title to the land, and yet he, as the mortgagor's attorney, assured the mortgagee that the title was good. If this were established by the testimony, it would certainly amount to fraudulent and gross misconduct, such as would clearly justify the court in striking his name from the roll. The testimony fell far short of proving this charge. True, the master had found it proved, and had so reported; but the witnesses upon whose testimony he based his findings, namely, Frank, the mortgagee, and Ella Taylor, the mortgagor, so contradicted themselves and each other when examined before this court that this charge—much the most serious charge made—fell to the ground.

The accusation that Mr. Duncan failed to keep his client's money separate from his own in bank, but that he checked it out and used it for his own purposes,—this the respondent admitted to be true, but asserted that he was always ready and able to raise and replace the amount. Such conduct in an attorney may be and is reprehensible for its laxity, but it is not necessarily fraudulent, and it does not furnish ground for disbarment. This has been distinctly held by the English courts in the case of *Gulford v. Sims*, 76 E. C. L. 369.

Great stress was laid by the petitioner on the fact that Mr. Duncan, the respondent, consented to the decretal order confirming and approving the master's report, which, it will be remembered, had, in effect, found, as a matter of fact, that Mr. Duncan had committed fraud and acted deceitfully. The petitioner seemed to interpret the respondent's consent as equivalent to a plea of guilty of fraud and deceit. Mr. Duncan's consent, if nothing else appeared to explain it, would certainly amount to a most damaging ad-

mission. But the record and the testimony abundantly prove that he did not consent until the order was so modified, in his opinion, by erasures, that it did not confirm and approve all the master's findings of fact, but only that finding and conclusion that the respondent should pay Frank the money. The respondent's uncontradicted testimony on this point was not a little corroborated by a statement made by the petitioner, Mr. Robinson, in open court at the hearing. It corroborated Mr. Duncan's testimony that the erasures were made before the report was confirmed. The intention of the respondent in having the erasures made was stated by him in his testimony, and, when we consider the statement made by Mr. Robinson, we see no reason for disbelieving Mr. Duncan's account of the matter. "A consent order is the mere agreement of the parties under the sanction of the court, and is to be interpreted by an agreement." *Allen v. Richardson*, 9 Rich. Eq. 56; *Jones v. Webb*, 8 S. C. 206. And such an agreement is certainly binding in the principal cause, and the consenting parties would be estopped from showing the motive or the intention in that cause. But they would not be estopped in another cause—especially one penal in its nature—from showing the motive and intention of the consent, and thus prevent its being regarded as a conclusive admission of guilt.

We have thus disposed of the three gravest accusations brought by the petitioner against the respondent. Having decided them in favor of the respondent, we see no reason for taking up and considering at length the charges of lesser weight. It is enough to say that, in our opinion, the petitioner failed to make out a case for the order of disbarment prayed for. The testimony signally failed to prove that gross misconduct or want of integrity on the part of Mr. Duncan which should be clearly proved before a court is justified in striking an attorney's name from the roll. And therefore, as already stated, this court immediately after the hearing filed its judgment that the prayer of the petitioner be refused and the petition be dismissed. It is now proper to add that, while pronouncing judgment against the petitioner, we are as far from condemning his action in this matter as we are from commending the conduct of the respondent. We are satisfied that Mr. Robinson brought his petition believing that, as a member of an honorable profession, it was his duty so to do. And we hope that Mr. Duncan's unenviable experience in this proceeding will prove a warning, especially to the young members of the bar, so to acquit themselves as attorneys at law as to avoid even the appearance of evil.

W. C. BENET and J. H. HUDSON sat as associate justices in place of McIVER, C. J., sick, and GARY, A. J., disqualified.

(131 N. C. 14)

CARTER et al. v. WHITE et al.
(Supreme Court of North Carolina. Sept. 16, 1902.)

EJECTMENT—PARTITION—JUDGMENT—AFTER-ACQUIRED TITLE.

1. In an action of ejectment, in which the only title in issue was that of defendant, he not denying that plaintiffs were tenants in common with him, there was judgment that he owned a certain undivided interest, less than claimed by him, and plaintiffs the balance. In subsequent partition proceedings by them against him, his share was allotted to him in severalty. *Held*, that such judgment and decree did not prevent his claiming an undivided interest with them under an after-acquired title from one not a party to the action in ejectment or the partition proceedings.

Appeal from superior court, Currituck county; Geo. A. Jones, Judge.

Action by J. C. Carter and others against L. R. White and others. Judgment for plaintiffs, and defendants appeal. Reversed.

E. F. Aydtlett, for appellants. Pruden & Pruden and Shepherd & Shepherd, for appellees.

COOK, J. In 1895 the plaintiffs brought an action of ejectment against defendant in the superior court of Currituck county, and alleged in their complaint that they were the owners in fee simple of the land in controversy. Defendant, in his answer, denied that his entry and possession were unlawful and wrongful, but averred that he was the owner in fee of seven seventy-second parts of the land. Upon the trial the jury found for their verdict that the "defendant was entitled to one fifty-fourth part of the whole, and the plaintiffs to the balance thereof," and thereupon the court rendered judgment "that the defendant owns in fee simple one undivided one fifty-fourth part of the land and the plaintiffs (trustees) the balance of the same." Thereafter, in 1898, the plaintiffs instituted a special proceeding for partition against defendant, and caused the share of defendant to be assigned and allotted to him in severalty under decree of the court. In February, 1899, defendant purchased the interest of one Thomas S. Land in said tract of land. Said Thomas S. Land was not a party to the action, nor to the special proceeding, and it appears from the pleadings and affidavits in this action that he was the owner of an undivided interest in the land as one of the heirs of Jeremiah Land, one of the original grantees, at the time of and before the institution of said action and special proceeding, which he sold and conveyed to defendant on the 1st day of February, 1899. By virtue of his title thus acquired, defendant claims a tenancy in common with the plaintiffs in the entire tract of land, and has entered upon said land, and insists that he has a right to enter thereon equally with plaintiffs, and that such entry is not a trespass, as alleged. Plaintiffs contend that, notwithstanding said Land was not

a party to the said action and special proceeding, and while he (Land) would not be debarred from entering upon and claiming his right and interest in the tract of land, if he had any, on account of said judgment and decree, yet the defendant, who has purchased Land's interest, is estopped from claiming any interest thereunder by reason of the judgment rendered in said action in 1896 and the decree of partition in 1898, to which defendant was a party. So the plaintiffs' contention is that, by reason of said judgment and decree, defendant is estopped from setting up his interest acquired under the purchase from Land, notwithstanding Land was not a party to the action or special proceeding; wherefore they instituted this action to enjoin and restrain defendant from entering upon the land, etc. His honor held with the plaintiffs, and made an order continuing the restraining order, and defendant appealed.

In so holding his honor was in error. In the action of ejectment the only title in issue was that of defendant. Plaintiffs' title was not in controversy. It was there found and adjudged that defendant was a tenant in common with the plaintiffs. Whether they owned all of the remaining interests, or only a part of them, or any interest at all, was not in issue. It was they alone who denied the title of defendant, and the only title established was that of defendant, who did not deny that plaintiffs were entitled as tenants in common. Nor did the partition proceeding in any wise affect the title either of plaintiffs or defendant. In partition proceedings between tenants in common no title passes; only the unity of possession is dissolved, and title vests in severalty, the common source of title resting undisturbed. *Lindsay v. Beaman*, 128 N. C. 192, 38 S. E. 811. Land's interest never passed to plaintiffs, and was not represented, nor was he a party; therefore he was not bound by the action or special proceeding. As to him, they were void, and he had a right of entry and possession equally with the other tenants in common, whomsoever they might be. By his deed passed all the right of Land to the defendants, who then stood in Land's shoes, and had all the rights and remedies of Land, independent of and notwithstanding the judgment in said action and decree of partition. Had Land been a party, then he and those holding under him would have been estopped by the judgment and decree. *Dixon v. Warters*, 53 N. C. 450; *Bickett v. Nash*, 101 N. C. 579, 8 S. E. 350. But Land was not a party. His title was derived from a common source with that of plaintiffs, and was not an outstanding title, as was the case in *Mills v. Witherington*, 19 N. C. 433. So the question of an outstanding title or incumbrance upon the joint estate is not involved in this action. Defendant, owning Land's interest, has the same rights and remedies under it which Land himself could exercise had he not sold it.

There is error.

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1233.

(131 N. C. 701)

STATE v. TUTEN.

(Supreme Court of North Carolina. Sept. 16, 1902.)

CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY.

1. Remarks of the solicitor in argument to the jury, not interfered with by the court, on prosecution for illegal sale of intoxicating liquors, that this moonshine business must be broken up, "C.'s murder was caused by it," followed, on objection by defendant's counsel, by disclaimer of any intention to accuse defendant with the murder, but a repetition of the remark that C.'s murder was caused by this moonshine business, and it should be broken up, is ground for reversal; there having been no evidence that C.'s death was caused by such business.

Appeal from superior court, Beaufort county; Geo. A. Jones, Judge.

Stephen Tuten was convicted of illegal sale of intoxicating liquors, and appeals. Reversed.

This is a criminal action wherein the defendant has been convicted of selling spirituous liquors by the small measure without license. Upon the trial the defendant testified as a witness in his own behalf. The state offered one John W. Warren to prove the sale. This was the only evidence offered by the state. Upon cross-examination of the defendant, the solicitor asked him whether he had not been charged with the murder of John Cayton. The defendant replied that he had been charged with the said murder, and that he had been committed to jail upon the finding of the coroner's jury; that he had had no opportunity to appear before the inquest, and was not present when it was held; that the grand jury of the county had investigated the charge of murder, and had ignored the bill against him. The said Cayton had been murdered in the county of Beaufort, being shot in his house at night, about the 1st of February, 1902. When the solicitor addressed the jury, among other things he said: "This moonshine business must be broken up. Cayton's murder was caused by the moonshine business, and you should put a stop to it." There was no evidence offered as to the murder of Cayton, except the testimony upon the cross-examination of defendant, above stated, and there was no evidence offered to show by whom Cayton was murdered, or for what cause he was murdered. When the solicitor made to the jury the remarks above quoted, the counsel for the defendant arose and asked the court to stop the solicitor from commenting upon the murder of Cayton and the cause for it; that the remarks were improper, and tended to prejudice a fair trial of the defendant. As soon as this objection was made by counsel for defendant, the solicitor partially turned from the jury and said: "I do not charge Tuten with the murder of Cayton, or say that he was connected with it. I take it all back. But I do say that his murder was caused by this moonshine business, and it should be broken up." Defendant excepted.

When the solicitor made this statement the court did not interpose or make any correction or comment or caution the jury. The defendant was convicted. The defendant moved for a new trial, upon the ground that the remarks of the solicitor were improper and tended to prejudice a fair trial of the case.

Chas. F. Warren, for appellant. The Attorney General, for the State.

DOUGLAS, J. (after stating the facts). The above is the only exception appearing in the record. In our view of the law, it must be sustained upon the principle laid down by this court in *Perry v. Railroad Co.*, 128 N. C. 471, 39 S. E. 27. In this case, as in that, the solicitor stated a fact which there was no evidence tending to prove, and which in its very nature would tend to prejudice the defendant. It is true the solicitor disclaimed any intention of charging the defendant with the murder of Cayton, but he immediately repeated the injurious assertion that "Cayton's murder was caused by this moonshine business, and it should be broken up." It is well known that the term "moonshine business" refers to the unlawful manufacture or sale of spirituous liquors. Like the common-law offense of "owling," applied to the unlawful exportation of wool, it derives its name from the fact that it is carried on principally at night, or at least in secret. This was the offense for which the defendant was being tried, and the jury might have believed that the appeal to them by the solicitor to break up the business was a plea for the conviction of the defendant, who stood charged with a crime that had led to one murder and might lead to others. The motive of the solicitor in making the statement is not as important as its probable effect upon the jury. The best of motives sometimes lead to the most dangerous results; and if in the calmer deliberation of an appellate tribunal we see that the defendant may have been prejudiced by the inadvertent act of court or counsel, and thus deprived of that impartial trial that is guaranteed to him by the law of the land, it is our duty to grant him a new trial.

The state lays great stress upon those cases which say that much must be left to the discretion of the judge below as to when and how he will correct the error, either by stopping the counsel or cautioning the jury; but in the case at bar the court did neither.

It is urged that the jury were too intelligent to be prejudiced by any such remark. This may be true, and yet it does not affect the spirit of the law, which seeks by well-established rules to prevent the possibility of prejudice. An opposite course would do away with the entire law of evidence, and permit the introduction of all testimony of every kind and description, competent or incompetent, relevant or irrelevant, that either side may see fit to offer. In all such cases the intelligence of the jury must be guided by the wisdom and experience of the law.

In conclusion, we may repeat what was said in *Perry v. Railroad Co.*, supra: "If that were all, we would hesitate to interfere; but counsel went far beyond any testimony in the case, and, over the objection of the defendant, related facts within his personal knowledge not of common information, and which were not in evidence. These facts were essentially damaging in their nature, and, coming from so high a source, were capable of producing the most dangerous prejudice. That the counsel intended no impropriety, which we cheerfully admit, does not alter the case. The fact remains that such statements, coming from one of his high character and exalted position in his profession, became only the more dangerous when addressed to jurors whose confidence he justly possessed. Such statements were not in evidence, and were not properly admissible in the argument of counsel. For the failure of his honor to interfere at the request of opposing counsel, a new trial must be ordered."

New trial.

(131 N. C. 705)

STATE v. KNOTTS.

(Supreme Court of North Carolina. Sept. 16, 1902.)

INTOXICATING LIQUORS—PLACE.

1. Laws 1897, c. 411, § 1, declaring it unlawful to sell intoxicating liquors "within certain distances of certain places, as follows: A. county: Within two miles of B. F. Church. B. county: H. Chapel, within one half mile. W. county: Within one mile of L. F. College,"—prohibits sale within a mile of the college, though in an adjoining county.

Appeal from superior court, Halifax county; Winston, Judge.

T. G. Knotts was convicted of an illegal sale of intoxicating liquors, and appeals. Affirmed.

Day & Bell and J. O. L. Harris, for appellant. The Attorney General, for the State.

CLARK, J. The defendant was convicted of selling vinous liquors within one mile of Littleton Female College. The evidence showed that the defendant sold a quart of wine in Halifax county within one mile of said college, which is located in Warren county. The defendant asked the court to charge the jury that the act only applied to Warren, and not to Halifax, and if they believed the evidence to find the defendant not guilty. This instruction was properly refused.

The statute in question (Laws 1897, c. 411), following the customary form in such statutes,

§ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. §§ 138, 173.

gives a list of counties, followed by the names of places in each county, and the distance from each place within which it is prohibited to sell spirituous or vinous liquors, and is as follows:

"Section 1. It shall be unlawful for any person to manufacture, sell or otherwise dispose of, with a view to remuneration, any spirituous, vinous, malt or other intoxicating liquor within certain distances of certain places, as follows: Alamance county: Within two miles of the Big Falls Christian Church. Burke county: Hartland Chapel, within one half mile. * * * Warren county: Within one mile of Littleton Female College: provided, that this act shall not conflict with the Littleton dispensary act."

The legislative power to pass such statutes has always been sustained. *State v. Barringer*, 110 N. C. 525, 14 S. E. 781. It is clear from the express language of the statute that it was intended to prohibit the sale of the kinds of liquor designated within the specified distances of the places named, and the use of the names of the counties was merely to identify the several localities, and not for the purpose of restricting the distances to territory within the county named. *State v. Snow*, 117 N. C. 774, 23 S. E. 322. The town of Littleton lies partly in Halifax and partly in Warren. Littleton Female College is in Warren county, almost on the county line, and it would have been no protection to have restricted the sale of liquor to the Warren side. The language of the prohibition is, "Within one mile of Littleton Female College," and the defendant has sold wine within that limit.

There was not at that time (nor has there been since) any "Littleton dispensary act"; so the language of the proviso fails. There was a dispensary act passed for Warren county in 1899, but we need not consider that act, for (if it could have any application) by its terms it applies only to the territory in Warren county. Nor does the standing provision in our revenue acts that there shall be no tax on the sale of wine by any one "selling wines of his own manufacture at the place of manufacture" apply; for it is each time provided "nothing in this section" shall prohibit such sale, and such exemption from taxation does not repeal the prohibition of sale in any territory for which prohibition has been enacted. Besides, the revenue act has always contained a provision empowering the county commissioners to issue license, "except in territory where the sale of liquor is prohibited by law." Laws 1901, p. 142, lines 20, 21; *State v. Witter*, 107 N. C. 792, 12 S. E. 328.

The other exceptions need no discussion, and, indeed, were not pressed in this court. No error.

(131 N. C. 34)

SMITH v. GARRIS.

(Supreme Court of North Carolina. Sept. 23, 1902.)

LOST PAPERS — SECONDARY EVIDENCE — JUSTICES OF THE PEACE — JURISDICTION — LANDLORD AND TENANT ACT.

1. One pleading an estoppel by a judgment of a justice showed that he did not have the papers in the case, and that the justice was dead, and proved by the clerk of the superior court that he had unavailingly searched his office for the papers. It was not shown that the papers had ever been in the clerk's office, or that the person desiring them had searched for them or inquired of the justice's family for them. *Held*, that the loss of the papers was not sufficiently accounted for to render parol evidence of their contents admissible.

2. The landlord and tenant act gives a justice of the peace no jurisdiction of an action in ejectment by a mortgagee against a mortgagor in possession, involving title to realty, even though it is alleged that the mortgagor is a tenant of the mortgagee.

Appeal from superior court, Pitt county; Winston, Judge.

Action by B. F. Smith against R. H. Garriss. From a judgment for plaintiff, defendant appeals. Affirmed.

F. G. James and Jas. H. Pou, for appellant. Skinner & Whedbee, for appellee.

FURCHES, C. J. The plaintiff was the fee-simple owner of the land in controversy, which he mortgaged to Hardy, and, falling to pay the mortgage debt, the land was sold under the power contained in the mortgage, and the defendant became the purchaser. The plaintiff alleges that the defendant bought the land for him, and was to convey the same to the plaintiff upon the plaintiff's repaying the defendant the purchase money, which he alleges he has paid, and more than paid, in money and in rents and profits, and in money received by the defendant for lumber while he has wrongfully been in possession of said land. The defendant denies that he bought the land for the plaintiff; denies that he agreed to buy it for the plaintiff, and was to reconvey it to the plaintiff upon his repayment of the purchase money; and denies that the plaintiff has ever paid him back the purchase money he paid out for said land. The defendant also pleads an estoppel of record, and says that he brought an action of ejectment before one Asbury, a justice of the peace, recovered judgment therein, and obtained a writ of ouster. Upon the trial the defendant showed that the justice of the peace Asbury was dead. The defendant did not have the papers in the case of himself against the plaintiff before Asbury, nor the docket of the justice of the peace, and, to enable him to introduce parol evidence of the same, he showed by the clerk of Pitt superior court that he had searched his office and no such docket or papers were to be found therein. But he failed to show that said docket and papers had ever been in the clerk's office, and he also failed to show that

he had searched for them, or inquired of the justice's family for them. Upon this evidence, his honor refused to allow this parol evidence, upon the ground that the loss of the papers had not been sufficiently accounted for, and also upon the ground that such a judgment, if shown, would not be an estoppel, as it appeared that the title to the land was involved, and there were equities involved between the parties as to the land, over which a justice of the peace had no jurisdiction. The defendant excepted to the rejection of this parol evidence, and this is the only exception in the case on appeal.

There was but one issue submitted to the jury: "Did the defendant, Garriss, at the sale under the Hardy mortgage, purchase the land in question, in trust for the plaintiff, Smith? Ans. Yes." Upon this finding the court entered judgment that the defendant was the legal owner of the land, but held it in trust for the plaintiff, and ordered a reference to L. I. Moore to take an account. We see no error. A court of a justice of the peace has no jurisdiction, under the landlord and tenant act, to try title to land. And where it appears that title is involved, or that there are equities involved as to the land, a justice of the peace has no jurisdiction. *Parker v. Allen*, 84 N. C. 466. The landlord and tenant act does not apply in cases where the mortgagor is in possession, and no allegation of renting by the mortgagor will be allowed to give the justice of the peace jurisdiction under the landlord and tenant act. *Greer v. Wilbar*, 72 N. C. 592.

We think his honor committed no error in rejecting this evidence for both of the reasons he assigns, and the judgment is affirmed.

(131 N. C. 72)

WHITE v. LOKEY et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

PLEADINGS—TIME OF FILING—DISCRETION OF COURT—REVIEW—EXTENSION OF TIME—DEFAULT JUDGMENT—REFUSAL—PROPRIETY.

1. The discretion granted the judge by Code, § 274, as to allowing an answer or reply to be made, or other act to be done, after the time limited, is not reviewable.

2. At the first term, counsel for both sides of an action of ejectment being absent, and there being no objection, there was a general order continuing cases on the summons docket, with time to file pleadings. On the last day of the second term an answer and defense bond were filed. *Held*, that the effect was the same as if they had been filed at the proper term, and hence the refusal to permit the filing of a default judgment during the second term was proper.

Appeal from superior court, Craven county; Winston, Judge.

Action by Laura A. White against John Lokey and others. From a denial of plaintiff's motion for a default judgment and an

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 3810

order allowing defendants 30 days in which to plead, plaintiff appeals. Affirmed.

W. D. McIver, for appellant. W. W. Clark, for appellees.

CLARK, J. This is an action of ejectment. At the first term there was a general order continuing cases on the summons docket, with time to file pleadings. Counsel on both sides were absent, and there was no objection. On the last day of the second term the plaintiff moved for judgment because no answer had been filed, and no defense bond, as required by section 237 of the Code. The court, in its discretion, granted 30 days in which to file answer and bond, and the plaintiff excepted. In fact, the answer and bond were filed during that same day, and before court adjourned. The extension of time to file answer is within the express terms of the Code (section 274), which makes it a matter of discretion with the judge. Such discretion is not reviewable. Clark's Code (3d Ed.) p. 309, and numerous cases there collected. The same section also confers on the judge the discretion to extend the time for filing the defense bond. *Taylor v. Pope*, 106 N. C. 271, 11 S. E. 257. Indeed, as the bond and answer were in fact filed at the second term, to which time had been extended without exception, the effect was the same as if they had been filed at the proper term; and a judgment by default must have been struck out upon the filing thereof within the term. This case differs from *Cook v. Bank*, 129 N. C. 149, 39 S. E. 746. In that case there was no answer filed, and the plaintiff moved for judgment by default and inquiry upon his verified complaint. The defendant, instead of filing answer then, or getting time to answer (as in this case), opposed judgment. On appeal it was held that judgment on that state of facts was a legal right, and the court held that it was error to refuse it.

No error.

(131 N. C. 36)

LA VALLETTE et al. v. BOOTH et al.
(Supreme Court of North Carolina. Sept. 23, 1902.)

CONTRACT—BREACH—PLAINTIFF FIRST IN FAULT.

1. Where on November 16th plaintiffs contracted to sell and ship to defendants 1,000 gallons of oysters per day until March 15th following, and up to January 25th, when defendants refused to receive further shipments under the contract, the shipments ranged from 10 gallons to about 300 gallons per day, plaintiffs were not entitled to damages for defendants' refusal to continue the contract.

Appeal from superior court, Carteret county; Winston, Judge.

Action by A. T. La Vallette, Jr., and others, against A. Booth & Co. From a judgment for plaintiffs, defendants appeal. Reversed.

D. L. Ward, for appellants. A. D. Ward, for appellees.

CLARK, J. The plaintiffs allege that the defendants contracted to take the output of their oyster factory at a specified price up to March, 1900, but that on January 25 the defendants refused to take more oysters, and plaintiffs sue for the damages sustained by such breach of contract. The written contract was, however, put in evidence, and showed that the agreement dated November 16, 1899, was that the plaintiffs were to furnish 1,000 gallons per day, of standards and selects. There was no evidence of any subsequent change in the terms of this contract. It was in evidence by plaintiffs that the amount sent on ranged from 10 gallons per day to about 300,—on five days only, as much as 500 gallons; the highest being 648 gallons, on January 26, after the order to stop shipping. The letters of plaintiffs were in evidence, to wit, letter 7, January, 1900, in which they acknowledged they had not been able to ship the defendants 1,000 gallons per day, because the oysters had not come, and they could ship only a very few; another letter, dated January 25, the very day of the alleged breach, in which they say, "We cannot expect you to take 1,000 gallons, weather like this, as we could not give them to you when it was cold;" and still another letter, February 3, 1900, in which they say, "I know we did not do as we intended, as it was impossible to come up to our agreement, as we could not get the oysters;" and a letter of February 19, 1900, in which plaintiffs say, "As we failed, on our part, to give you the quantity as stated in the conditions of the order, we could make no complaint, more than to ask you to renew your order." His honor erred in refusing defendants' prayer to instruct the jury that upon the above admissions they should answer the second issue, "No." The uncontradicted evidence shows that the contract was broken by the plaintiffs the very first day, and was not lived up to by them a single day thereafter. Not having furnished the oysters during cold weather, they could not call upon defendants to take the oysters when the weather had become warmer and oysters less salable. The plaintiffs, not having kept the contract themselves in any respect, either as to quantity or quality (for in the letter of February 3d they admit they had shipped defendants some as good and some as bad oysters "as ever did come out of North Carolina"), cannot call upon defendants to observe a contract which they themselves had never kept. The contract of November 16, 1899, was drawn up and sent plaintiffs by defendants, and though the former merely signed, but did not return, it, if this was not an acceptance there was no contract at all.

The third exception is also well taken. There was no evidence to sustain the assessment of damages for breach of contract by

defendants, when the contract had been totally disregarded and broken by the plaintiffs themselves. The plaintiffs were only entitled to pay for the oysters actually shipped to and accepted by defendants, and that has been paid.

Error.

(131 N. C. 54)

JESTER v. BALTIMORE STEAM PACKET CO.

(Supreme Court of North Carolina. Sept. 23, 1902.)

SUMMONS—SERVICE ON FOREIGN CORPORATION—PREMATURE APPEAL.

1. Under Code, § 217, subsec. 1, allowing service of summons on a foreign corporation when it can be made in the state personally on the president thereof, it is immaterial that he is in the state on private business, and is not at the time actually engaged in the service of the corporation.

2. An appeal from an order denying a motion to dismiss the action for want of a valid service of summons is premature.

Cook, J., dissenting.

Appeal from superior court, Hertford county; Brown, Judge.

Action by Ella L. Jester against the Baltimore Steam Packet Company. From an order refusing a motion to dismiss the action, defendant appeals. Affirmed.

George Cowper, for appellant. Winborne & Lawrence, for appellee.

MONTGOMERY, J. Under a special appearance the defendant made a motion to dismiss the action for want of valid service of the summons. His honor found from the evidence that the plaintiff's cause of action arose in another state, that the defendant had no agent in the state of North Carolina, that it was doing no business in the state, and that service of the summons was made on the president of the defendant company in Raleigh by the reading of the summons and delivery of a copy thereof to him. Was the service of the process valid? The courts of this state are open to all suitors, resident and nonresident, whether individuals or corporations. "Civil actions shall be commenced by issuing a summons," and there are no limitations or restrictions as to the residence of a would-be plaintiff. The manner prescribed by the Code for the service of the summons upon corporations (section 217, subsec. 1) is by the delivery of a copy to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides within the state, or when such service can be made within the state personally upon the president, treasurer, or secretary thereof." (Ital-

ics are ours.) The president of the defendant company was found in this state, and the summons was personally served upon him. Our law was complied with. Why is not the service good? The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. The legislative power of the state in which the action is commenced is charged with the duty and responsibility of prescribing the rules governing in such matters, and its action is not reviewable unless it should plainly appear that the notice did not amount to "due process of law." Such a manner of service of summons as our legislative body has provided may not be the best that might have been desired, but it is clear as to its meaning, not unreasonable, and there is nothing for the courts to do but uphold it. It is a most reasonable presumption that the officer served with the process in this case would communicate the notice to the corporation at once. It was his duty to take notice of the commencement of the action, and to give the information to the defendant. We do not see how the fact that the officer who was served with process was in the state on his private business at the time of the service can render the service invalid. Neither can the fact that he was not actually engaged in the service of the corporation at the time have such effect. In the case of service on an officer of a domestic corporation it could not be supposed that it was necessary to serve it on him while he was actually engaged in the corporation's business, or acting officially for it. The just and legal foundation for such service rests in the duty of the officer to report such service, and that the corporation would by that means receive notice. A judgment obtained in an action thus commenced against a foreign corporation would be valid in this state, and enforceable against any property at any time found in this state. What effect it would have in another state we need not discuss. The law of New York upon the question of service of process on foreign corporations is like ours, except that a nonresident, either individual or corporation, cannot bring a suit against a foreign corporation. In that state the question now before us, on a similar state of facts, has been before their court of appeals, and the service was held to be valid. *Pope v. Manufacturing Co.*, 87 N. Y. 137. The court there said: "In order to make such service effective, it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation, or that the corporation should have any property in the state, or that the cause of action should have arisen in the state." The court of errors and appeals of New Jersey, in the case of *Moulin v. Insurance Co.*, 24 N. J. Law, 222,—a case in which a judgment

¶ 1. See Corporations, vol. 12, Cent. Dig. § 2612.

creditor commenced an action in that state upon a judgment obtained in the state of New York,—the defendant having been a foreign corporation, without property in the state, the cause of action not having arisen in the state, the corporation having no business in the state, and the president being accidentally in the state on a visit when the summons was served on him, refused to recognize the validity of the judgment. There was no such statutory law, however, in New Jersey as existed in New York in reference to the service of process on foreign corporations.

But this appeal was premature, and must be dismissed. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731. Appeal dismissed.

COOK, J., dissents.

(181 N. C. 57)

GARRETT-WILLIAMS CO. v. HAMILL
et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

**STATUTE OF FRAUDS—PROMISE TO ANSWER
FOR DEBT OF ANOTHER.**

1. Where defendant's intestate told plaintiff's agent to ship goods to a third person "when-ever he needed them, until I notify you to stop, and I will see you paid." "Collect from him when you come around, and if he fails to pay I will,"—but made no written contract, the undertaking was void, under the statute of frauds.

Appeal from superior court, Halifax county; Winston, Judge.

Action by the Garrett-Williams Company against F. A. Hamill and others. From a judgment for plaintiff, the defendant Ada Hamill, as administratrix of the estate of T. L. Hamill, deceased, appeals. Reversed, and new trial ordered.

Day & Bell, for appellant. E. L. Travis, for appellee.

MONTGOMERY, J. The plaintiff brought this action to recover of the defendants an amount alleged to be due for liquors sold and delivered to the defendants F. A. Hamill and T. L. Hamill, the intestate of the defendant Ada Hamill. The defendant administratrix, in her answer, admits that her intestate did by parol agree to pay to the plaintiff a bill of \$233.83 for liquors to be delivered to the other defendant, F. A. Hamill, but that the same has been paid, and that, if any promise was ever made by her intestate to pay any part of the amount now claimed to be due, it was by parol, and for the sole benefit of F. A. Hamill, and pleads the statute of frauds. The liquors were shipped to F. A. Hamill, at Whitakers, and the liquor

license was in his name. The plaintiff introduced as its witness A. D. Pender, who said: "I sold goods. I am plaintiff's agent. I sold goods on T. L. Hamill's credit. He said he would see it paid." The witness further testified: "T. L. Hamill was in business in Enfield, and was solvent. F. A. Hamill was not solvent. T. L. Hamill told me F. A. Hamill was carrying on business in Whitakers. We went to Whitakers, and T. L. Hamill bought goods, and said, 'Ship goods in the future to F. A. Hamill, whenever he needed them, until he notified us not to ship, and he would see us paid, and to collect from F. A. Hamill when I came around, and, if F. A. Hamill failed to pay, he would. I had no written contract with T. L. Hamill. He asked as to the payments, and never notified us to stop shipping goods to F. A. Hamill. He never countermanded orders or notified us to stop shipping. T. L. Hamill was to pay for the goods, and we sold them on his order, on his credit. F. A. Hamill paid me certain amounts, and I gave him credit for them, all under the verbal order of T. L. Hamill. I saw some of the goods in Hamill's store. T. L. Hamill never instructed me to ship or sell any specific goods to F. A. Hamill after the first order. I don't know when T. L. Hamill died. I was in Enfield a day or two before he died. I did not instruct the house to make out account against T. L. Hamill and F. A. Hamill. The goods were all shipped to F. A. Hamill, but T. L. Hamill was responsible for them. The account was entered on the books, 'F. A. Hamill; T. L. Hamill responsible.' I don't know how they were entered, and never saw the book." The other evidence in the case threw no light on the contract, and was of no benefit to the plaintiff. The defendant asked the court to instruct the jury that there was no evidence to go to the jury as to the liability of the defendant A. R. Hamill, administratrix of T. L. Hamill, and the request was refused. We think it ought to have been given. If there was any conflict in the testimony of Pender, it was only an apparent conflict, not a real one. It is true, the witness said, "T. L. Hamill was to pay for the goods, and we sold them on his orders,—on his credit." But that was explained by his saying: "I sold the goods on T. L. Hamill's credit. He said he would see it paid. We went to Whitakers, and T. L. Hamill bought goods, and said, 'Ship goods in the future to F. A. Hamill' whenever he needed them, until he notified us to stop, and he would see us paid, and to collect from F. A. Hamill when I came around, and, if F. A. Hamill failed to pay, he would. I had no written contract with T. L. Hamill."

New trial.

(115 Ga. 968)

McCANDLESS et al. v. INLAND ACID CO.

(Supreme Court of Georgia. July 22, 1902.)

CORPORATIONS—DEED TO PROSPECTIVE INCORPORATORS—SUBSEQUENT INCORPORATION—EQUITABLE TITLE OF COMPANY—ACTION TO RECOVER PROPERTY—HOLDER OF LEGAL TITLE—NECESSITY OF JOINDER—ALLEGATION OF LEGAL OWNERSHIP—EQUITABLE OWNERSHIP—AMENDMENT—PRIORITY—CORPORATE CHARTER—WANT OF LOCAL PROPERTY—VALIDITY—ORGANIZATION OF COMPANY—PAYMENT OF CAPITAL STOCK—CONFORMITY OF VERDICT TO PLEADINGS.

1. Under the allegations of the amendment to the plaintiff's petition, the plaintiff had such a perfect equity in the property in controversy as to authorize a recovery of the same from the defendants, and it was not essential to the maintenance of this cause of action that the holders of the legal title to the property should be made parties to the case.

2. In an action brought by a plaintiff to recover possession of land, the petition alleged that the plaintiff was the owner of the land under written evidence of title. An amendment was offered setting up that the plaintiff at the commencement of the action was the equitable owner of the land, and, as such, entitled to the possession of the same. *Held*, that the amendment did not set forth a new and distinct cause of action.

3. A charter granted by a superior court upon a petition alleging that the principal office of the company is to be located in the county in which the petition is filed is a valid charter, notwithstanding the corporation owns no property in that county, and the work in which the corporation is to be engaged is to be carried on in another county.

4. While a corporation chartered by a superior court cannot transact the business for which it is organized until at least 10 per cent. of the capital stock has been actually paid in, such corporation may be organized immediately upon the granting of the charter, take steps to secure subscriptions to the capital stock, and collect the same either in money or in property; and, as soon as 10 per cent. of the capital stock is so paid in, the corporation may exercise all the corporate powers granted in the charter.

5. The evidence demanded a verdict in favor of the plaintiff, and the court did not err in directing the jury so to find.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by the Inland Acid Company against J. M. McCandless and others. From a judgment for plaintiff on a directed verdict, defendants bring error. Affirmed.

King & Spalding and Edwards & Ault, for plaintiffs in error. E. S. Griffith, A. T. London, John D. Little, and W. F. Turner, for defendant in error.

COBB, J. The Inland Acid Company brought suit in the superior court of Haralson county against McCandless and others for the recovery of a lot of land and the mineral interest in three other lots, for injunction, the cancellation of certain deeds, and other relief. The petition alleged that the plaintiff claimed title to the property sued for, under a deed conveying the same to the plaintiff from a named person and on a given date. The defendants in their answer disclaimed title to the lot first indicated above, and at the January

42 S.E.—29

term, 1899, the court directed a verdict in favor of the plaintiff. The case came to the March term, 1899, of this court, and the judgment directing a verdict was reversed upon the ground that the court erred in holding that a sheriff's deed was not within the operation of the registry laws of this state. 108 Ga. 618, 34 S. E. 142. A second trial was had at the July term, 1900, of the superior court of Haralson county, and that trial resulted again in the court directing a verdict for the plaintiff. The case came to this court at the October term, 1900, and the judgment was again reversed; this court holding that the direction of a verdict was improper, for the reason that the evidence did not show that the plaintiff had title to the property in controversy; the ruling being contained in the first headnote, which is in the following language: "A deed to designated persons 'as incorporators' of a named 'company,' which had not in fact been incorporated, did not, upon the granting by a superior court of a charter to a company of like name, and composed of these same persons, ipso facto operate to pass to such company the legal title to the property in the deed described." 112 Ga. 291, 87 S. E. 419. At the January term, 1901, of the superior court, the plaintiff offered an amendment to its petition, in which it alleged that it claimed "equitable title to all the property" described in the petition, and then alleged that the corporators of the plaintiff, prior to its incorporation, with the expectation, purpose, and agreement of procuring a charter and organizing the corporation afterwards formed as the Inland Acid Company, upon negotiations through Singleton, one of the corporators above referred to, who acted by agreement for all the corporators, purchased the mineral interest in the three lots above referred to, for a valuable consideration; Singleton taking the deed in his own name, by agreement, for the use and benefit of the corporators, until the company was chartered and organized. Each of the corporators contributed to the payment of the purchase money, and they took possession of the property under the deed, and mined and operated the property until the corporation was organized, when they turned over the possession of the property to the corporation. The corporators filed a petition to the superior court, praying that they might be incorporated as the Inland Acid Company, and, after proper notice had been given, an order granting a charter was obtained. The corporators met and organized, subscribing for all of the capital stock, electing officers, and tendering to the company the property they acquired from Singleton in full payment of their subscriptions, and the property was so accepted by the company, and the subscribers released from further liability on account of such subscriptions; the reasonable cash value of the property being sufficient to discharge in full such liability. The corporation then went into possession and mined and operated the property, laying out large sums of money and

continuing in adverse, public, uninterrupted, and peaceable possession of the property under the deed to the corporators until forcibly ousted by the defendants. Since the filing of the petition the corporators, recognizing that they were holding the legal title for the benefit merely of the corporation, have executed deeds to the corporation to the mineral interest in the three lots referred to in the petition. The plaintiff averred that, upon the facts above alleged, it was at the time of filing the petition the equitable owner of the property, and, as such, entitled to recover the same. This amendment was allowed and filed, and at the same term a motion was made to strike the amendment upon the grounds that it set forth no cause of action, and that, even if a cause of action was set forth therein, it was a new and distinct cause of action, in that in the original petition the plaintiff relied for a recovery on a strict legal title to the property sued for, and the amendment was a departure from this claim, being founded upon an equitable title which was not referred to in the original petition, nor there relied upon as a ground of recovery, and on the further ground that the amendment was defective for the reason that there was a non-joinder of parties defendant. The court overruled the motion to strike the amendment, and the defendants filed their exceptions *pendente lite*, which were duly certified and entered of record. The defendants answered the petition as amended, denying that the plaintiff had either a legal or equitable title to the property in controversy, and also denying all the material averments in the petition in reference to the manner in which the plaintiff claimed to be the equitable owner of the property. They further denied that the plaintiff was a corporation under the laws of this state, it being averred that the alleged charter of the company was granted by a superior court of a county which had no jurisdiction to grant the same, and that, even if the court had jurisdiction to grant the charter, the corporation had no right to exercise corporate powers and privileges until 10 per cent. of the capital stock had been paid in, and that this had never been done as required by law. Upon the pleadings as amended the case went to trial for the third time, and the judge again directed a verdict in favor of the plaintiff. The case is here upon a bill of exceptions assigning error upon the refusal to strike the amendment to the plaintiff's petition, and upon various rulings made at the trial.

1. Were the allegations of the amendment to the petition sufficient to authorize a recovery by the plaintiff as the equitable owner of the property in controversy? While under the deed to M. T. Singleton he acquired the legal title to the property conveyed, he, in equity, held the same for the benefit of himself and associates, to be used in the mining enterprise which was to be carried on by them through the instrumentality of the corporation thereafter to be organized. Al-

though the deed from M. T. Singleton to himself and his associates passed the legal title to the grantees, still they held the same, in equity, subject to the agreement above referred to; that is, that the property should be used for the benefit of them all in the mining enterprise which was to be carried on by the corporation to be formed. Under the allegations of the amendment, any one of the grantees in this deed, after the creation of the corporation, could, in equity, compel the other grantees to convey the property to the corporation in execution of the trust which arose by virtue of the agreement between the parties. The grantees did not stand seised of the property as tenants in common, each owning an absolute interest in the property, but, in equity, each was seised of his interest in the property for the benefit of all in the mining enterprise which was thereafter to be conducted by a corporation chartered under the laws of this state. As soon as the corporation was created, and became capable, under the law, of acquiring title to property, it became the equitable owner of the property. The transaction between Singleton and his associates was, in effect, an agreement between them to hold the title to the property until the corporation should come into existence, and then convey the same to it. It was similar to a conveyance to a person in trust until another person should come into being. Under such circumstances, as soon as the person for whose benefit the trust is created comes into being, and becomes capable of holding property, the trust becomes executed; and, notwithstanding the trustee still holds the legal title, equity considers the person for whose benefit the trust was created as the owner of the property for all purposes. So in this case the moment the corporation was created, and became authorized, under the law, to acquire property, it could have compelled Singleton and his associates to convey the property to it; and, if they failed or refused to do this, equity, considering that done which ought to have been done, would treat the corporation as the owner of the property, notwithstanding the naked legal title was still outstanding in Singleton and his associates. The petition alleged that the corporation was duly chartered and legally organized. Under these averments the corporation became, in equity, the owner of the property, and, as such, could maintain an action to recover possession of the same against one who had wrongfully dispossessed it, or could recover upon its prior possession against one who was a mere wrongdoer. See *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405, and *Van Epps' Annotations* in reprint edition. It is said, however, that the doctrine that a perfect equity is equivalent to the legal title is restricted to the relation of vendor and purchaser (see *Howell v. Ellsberry*, 79 Ga. 480, 5 S. E. 98, and cases cited), and that in the present case M. T. Singleton and his associates and the Inland Acid Com-

pany, as a corporation, did not sustain to each other this relation. It is true that the consideration upon which Singleton and his associates agreed to convey the property to the Inland Acid Company when it should be organized as a corporation did not move from the corporation, for the reason that at the time the agreement was entered into the corporation was not in existence. When the legal title to the property was in M. T. Singleton alone, under the allegations of the amendment, the agreement between him and his associates was that he was to convey the property to himself and associates, to be held by them for the benefit of another person that was to come into existence (that is, the corporation), and in the meantime to hold and use the property for the purposes which were to be afterwards carried out through the instrumentality of the corporation, and that the full purchase price was paid to M. T. Singleton. The relation of vendor and purchaser existed between M. T. Singleton and the grantees in the deed from him, and his grantees were to hold the property in trust for the benefit of another person thereafter to come into existence; and as soon as that person came into existence, and was authorized, under the law, to acquire property, it occupied the status of a purchaser from M. T. Singleton. While a deed from the grantees of M. T. Singleton was necessary to clothe this purchaser with the legal title to the property, it was, in equity, a purchaser from M. T. Singleton. Though a stranger to the consideration, it is no less a purchaser. It is said, however, that the amendment should not have been allowed, because, even if, under the facts alleged, the plaintiff was the equitable owner of the property, it was necessary, in order to obtain a decree to this effect, that M. T. Singleton and his associates should have been made parties to the case. When a plaintiff seeking to recover possession of real property is not the holder of the legal title, but relies upon a perfect equity, it is not absolutely essential that the person in whom the legal title to the property is vested should be made a party to the suit. It is necessary, of course, that the allegations should be such as to show that the equity set up by the plaintiff is superior to the outstanding legal title, and a judgment in the case would not conclude the holder of the legal title, if he was not a party to the case. In the present case, under the facts alleged, it not only appears that the plaintiff has a perfect equity to the property in controversy, but it also appears that the holders of the legal title which was outstanding at the time the suit was brought have conveyed to the plaintiff all of their interest in the property. The court did not err in overruling the motion to strike the amendment, so far as it raised the questions that there was no cause of action set forth therein, and that there was a want of proper parties.

2. It is said, though, that, even if the

amendment set forth a cause of action, it should have been stricken, for the reason that it set forth a new and distinct cause of action. To determine this question, it is necessary to ascertain what was the cause of action set forth in the original petition. If the right to recover the property in controversy upon the legal title was the cause of action originally set forth, then it would seem that the amendment did contain a new cause of action, for it was based upon an alleged right to recover the property upon an equitable title. It needs no argument to show that an equitable title is entirely separate and distinct from a legal title. To say, however, that the cause of action set forth in the original petition was the right to recover upon a legal title, is giving the term "cause of action" too restricted a meaning. The cause of action in such a case consists not only of the right of the plaintiff, but of the wrong of the defendant. The right of the plaintiff consists in being entitled to the possession of the property which is owned by him, and the wrong of the defendant consists in his withholding from the plaintiff that which is rightfully his. Under this view of the matter, the cause of action set forth in the original petition was based upon two facts,—ownership of the property by the plaintiff, and the wrongful withholding of possession by the defendants. The purpose of the suit was to recover of the defendants that which they were wrongfully withholding from the plaintiff; that is, the possession of the property. If this be a correct analysis of the petition, then any fact which would tend to establish that the plaintiff was the owner of the property, and entitled to the possession thereof as against the defendants, would be germane to the cause of action set forth in the petition. If the plaintiff's cause of action was based upon ownership, then anything which tended to show ownership would be part and parcel of the cause of action. Ownership of land may be shown by evidence of written title, or by facts from which a jury could find that the plaintiff had a perfect equity in the property. The plaintiff seeks to recover the land because it is the owner of the same. It is true that in the original petition it is alleged that the plaintiff is the owner because it has written evidence of title. In the amendment it still maintains that it is the owner, and does not depart from this claim, but says its ownership is derived, not from written evidence of title, but from a state of facts which gives it such an equity in the property as to entitle it to maintain its action. Under this view of the case, the amendment did not set forth a new and distinct cause of action, and the motion to strike the same was properly overruled. See, generally, on the subject of cause of action, 1 Enc. Pl. & Prac. 116 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 776; 1 Rap. & L. Law Dict. tit. "Cause of Action"; 1 Cycl. Law & Proc. 634 et seq.; Bliss,

Code Pl. (3d Ed.) § 126; Andrews, Steph. Pl. (2d Ed.) § 244; Veeder v. Baker, 83 N. Y. 160; Sibley, Action, § 26 et seq. There is nothing in the case of White v. Moss, 67 Ga. 89, which conflicts with the ruling now made. While in that case Mr. Justice Crawford said that an amendment in an action of ejectment setting up an equitable title in the plaintiff added a new cause of action, still the case was really decided upon the point that the amendment was properly disallowed because, under the law as it then stood in this state, new parties could not be made at law by amendment, and it was necessary to the maintenance of the cause of action set forth in the amendment that other parties should be brought into the litigation. Neither is there anything in this ruling which conflicts with the numerous rulings of this court to the effect that where a suit is brought, seeking to enforce a common-law liability, an amendment seeking to enforce a statutory liability adds a new cause of action. One test as to whether the amendment adds a new cause of action is whether the judgment in the case as it originally stood would bar a suit upon the cause of action alleged in the amendment. Under this test, in a case of the character of those last referred to, the amendment would add a new cause of action, for the simple reason that one who seeks to enforce a common-law liability and fails will not be precluded from enforcing a statutory liability against the same parties, growing out of the same state of facts. If we have correctly analyzed the petition in the present case as one in which a recovery is sought because the plaintiff is the owner of the property, then all rights of ownership are thus directly involved in the litigation, and a finding in favor of the defendants would have forever precluded the plaintiff from bringing another suit against the defendants to recover the property upon the facts alleged in the amendment.

3. The defendants filed a plea setting up that the Inland Acid Company is not a corporation under the laws of this state, for the reason that its alleged charter was granted by the superior court of Polk county, and that the business intended to be carried on was that of mining ore in the county of Haralson; that it does not appear that the plaintiff owned any property in Polk county, or intended to transact any business in connection with the mining of ore in that county. It appears from the evidence that M. T. Singleton and his associates filed a petition, addressed to the superior court of Polk county, praying that they might be incorporated under the name of the Inland Acid Company; reciting in their petition that the office and place of business of the corporation was to be at Cedartown, in that county, and that an order was passed by the judge of the superior court incorporating the Inland Acid Company, as prayed for in the petition. It also appears from the evidence that the property in controversy is located in the county of Haralson,

and that the mining operations of the corporation were conducted wholly in that county. The superior courts of this state have the power to create corporations of the character of that sought to be created by the petition of M. T. Singleton and his associates. The jurisdiction of the superior court of a particular county to grant a charter to a corporation depends upon the allegations in the petition; the law declaring that "persons desiring the charter shall file in the office of the clerk of the superior court of the county in which they desire to transact business" a petition setting forth the object of the association, etc., and that this petition shall be published "in the nearest public gazette to the point where such business is located." Civ. Code, § 2350. If the petition shows upon its face that the corporation is to transact business in the county in which the petition is filed, the superior court of that county has jurisdiction to grant an order creating the corporation. A corporation transacts its business at the place where its members are required, under the charter, to meet for the purpose of attending to the affairs of the corporation; that is, at the place where its principal office is located. A corporation may transact its corporate business in one place, and the work necessary to effectuate the purposes of the corporation may be carried on in an entirely different place. That is to say, the principal office of a corporation need not be at the place where the work of the corporation is being carried on. It is not absolutely essential that the corporation should own property at the place where its principal office is located. The requirement in the Code that the petition shall be filed in the county in which the corporation desires to transact business refers to the transaction of corporate business, such as the meeting of the members of the corporation for the purpose of organizing and attending to the corporate affairs of the company; that is, the statute refers to the county in which the principal office of the corporation is located; and the requirement that the petition shall be published in the nearest public gazette to the point where such business is located refers to the business of the corporation usually transacted at its principal office. The petition for incorporation in the present case alleged that the principal office of the corporation was to be at Cedartown, which is in the county of Polk, and the superior court of that county had jurisdiction to pass an order granting the application for a charter. See, in this connection, Jossey v. Railway Co., 102 Ga. 706, 28 S. E. 273.

4. It is said the court erred in directing a verdict in favor of the plaintiff, for the reason that it did not appear that 10 per cent. of the stock of the Inland Acid Company had been paid in, and that until this was done it had no right to exercise corporate powers. The petition for incorporation recited that 10 per cent. of the capital stock had been actually paid in. It is not necessary, however, to determine in the present case whether this

recital in the petition is conclusive evidence of this fact, as against one who is a mere trespasser upon property claimed by the corporation. As soon as a corporation is organized, it certainly has a right to collect in subscriptions to its capital stock; and, as soon as 10 per cent. of the subscriptions is actually paid in, it may begin to transact the business for which it was created. Subscriptions for stock may be collected either in cash or in property, and, if collected in property, certainly a third person who is not a creditor would not have the right to raise the question that the property was not of sufficient value to discharge the amount due on the subscriptions, or that the title to the property acquired was for any reason defective. The failure of a corporation to have collected 10 per cent. of the subscriptions to its capital stock would certainly be no bar to a suit which was instituted for the very purpose of complying with this requirement of the law. *Branch v. Glass Works*, 95 Ga. 573, 23 S. E. 128. In addition to this, it is no concern of a debtor of a corporation, or of a person who is wrongfully withholding property belonging to it, that it has not complied with the conditions precedent in its charter, or has laid its charter subject to forfeiture by a nonuser or misuser of corporate powers. 1 *Mor. Priv. Corp.* §§ 31, 1015; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106. The undisputed evidence is that the members of this corporation agreed at a meeting held for the purpose of organizing the corporation that the property described in the deed from Singleton to himself and his associates should be taken by the company in full satisfaction of the subscriptions to stock which had been made by them, and that, acting upon this, the corporation went into possession of the property. It is true that the corporation did not, under this arrangement, acquire the legal title to the property; but it became, as has been heretofore shown, the equitable owner thereof, and could assert its ownership, not only against the holders of the legal title, but against any one who claimed adversely to it. This was done before the mining operations by the corporation, as such, began; and as the agreed value of the property was more than sufficient not only to pay 10 per cent. of the amount subscribed for stock, but the entire amount of such stock, the corporation, by virtue of this arrangement, became authorized to exercise all the corporate powers that the laws of Georgia bestowed upon it.

5. The foregoing discussion deals with all of the points which were insisted on in the brief of counsel for the plaintiffs in error, except that which complains that the judge erred in directing a verdict in favor of the plaintiff, for the reason that the evidence did not demand a finding in its favor. After a careful examination of the pleadings and the evidence, we are satisfied that no other verdict than the one directed could have been legally rendered in this case. Counsel for

the plaintiffs in error in their briefs insist that there was evidence which would have authorized the jury to find that the defendant McCandless had title to at least a one-tenth undivided interest in the property in controversy. We do not think that, under the pleadings in this case, there was any other issue raised than one involving entire ownership of the property in controversy. The plaintiff relied upon an equitable title to the entire interest in the property, and the defendants McCandless and Smith claimed in their answer to be the owners of the entire interest. According to the pleadings, the issue was clear-cut. It was entire ownership of the property in the plaintiff, opposed to entire ownership in the defendants. The petition alleged in the eighth paragraph that "J. M. McCandless claims right and title to minerals, mining interests, and privileges" in and to the property in controversy under a deed from Redwine, who derived his title through a sheriff's sale. It was alleged in the thirteenth paragraph that the deed from the sheriff to Redwine and from him to McCandless constituted a cloud upon the title of the plaintiff. The answer to the eighth paragraph is in these words: "This paragraph is true." The answer to the thirteenth paragraph is in these words: "Plaintiff has no title as against the conveyances herein described." While in the original answer and in the different amendments to the answer there may be found general denials of those paragraphs of the petition which allege title in the plaintiff, it is apparent from the answer as a whole that the defendants relied, so far as their pleadings are concerned, entirely upon the title derived through the sheriff's deed. There is not a hint or suggestion in any portion of the answer that McCandless relied upon any other title, or that he claimed in this case any other interest in the property than that which would have resulted from the deeds referred to in the answer if they had been valid conveyances of the property. It is true that there appears in the brief of evidence a statement that there was offered in evidence an agreement "by which M. T. Singleton sells and conveys to John M. McCandless a one-tenth interest" in the property in controversy, and that this agreement was dated October 16, 1895. But nowhere in the answer does the defendant McCandless plead the title apparently derived from this agreement as a defense to the plaintiff's action. If the defendants had rested their defense solely upon a denial of the plaintiff's title, and the evidence introduced had shown that McCandless, under the agreement referred to, really had title to an undivided one-tenth interest in the property, it is possible that the direction of a verdict against him for the entire interest in the property would have been erroneous; but when in his answer he does not rest his defense entirely upon a denial of the plaintiff's title, but admits the allegation of the petition which, in

effect, charges that his only claim to the property is under deeds of a certain date and character, and fails to prove that he does hold title under the deeds referred to in the petition, no other termination of the case could be properly had than one directing that in the issue thus made the plaintiff has prevailed, when the evidence supports the allegations of the plaintiff as to its title. The brief of evidence does not disclose the contents of the agreement under which the defendant McCandless claims to own a one-tenth interest in the property. All that appears in the record as to the character of the conveyance is in the quotation above made, which was merely a conclusion of counsel who drew the bill of exceptions as to the legal effect of the paper. But even treating the agreement as vesting title in McCandless to an undivided one-tenth interest in the property at the date of the agreement, under the pleadings this title is not relied on as a defense in this case. It may be then asked, for what purpose was it introduced in evidence? Even if not relied upon as a muniment of title, it may have been admissible to show that at the date of the agreement M. T. Singleton was dealing with the property as his own, and apparently at that time not recognizing the trust which he afterwards set up in the property for the benefit of himself and his associates. But be this as it may, the mere fact that it was introduced in evidence will not give the defendant the right to rely upon it as evidence of title, as, under the pleadings in the case, there is nothing to show that this title was relied upon in any way.

Judgment affirmed. All the justices concurring, except LITTLE, J., disqualified, and LEWIS, J., absent on account of sickness.

(131 N. C. 60)

AYERS et al. v. MAKELY.

(Supreme Court of North Carolina. Sept. 23, 1902.)

VENDORS AND VENDEES—EXECUTORY CONTRACT—ASSUMPTION OF INCUMBRANCE—ORDER—DISCRETION—PRESUMPTION—APPEAL.

1. The presumption that the court refused leave to amend an answer as a mere matter of discretion, when the order is silent as to the ground of refusal, is rebutted when in making up the case on appeal the judge states that he did not refuse as a matter of discretion, but on the ground that the offered amendment was insufficient.

2. Where, under an executory contract for the purchase of land which was incumbered by a mortgage, it was agreed that the installments of the purchase price as they matured should be applied on the mortgage until it was reduced to a specified sum, the vendee did not thereby assume the payment of the mortgage debt.

3. An appeal from an order denying a motion to amend an answer is premature. Exception should be entered, and case proceeded with.

¶ 3. See Appeal and Error, vol. 2, Cent. Dig. §§ 270, 706.

Appeal from superior court, Hyde county; Jones, Judge.

Action by S. B. Ayers and others against M. Makely to recover money paid on a judgment recovered against plaintiffs on a bond in an ejectment suit, on the ground that defendant had agreed to hold them harmless from liability on such bond. From an order denying defendant's motion to amend the answer and set up a counterclaim, he appeals. Appeal dismissed.

In July, 1893, H. W. Wahab and George Credle, being then the owners of a certain tract of land in Hyde county, known as the "Donnell Farm," entered into a written contract and agreement to sell and convey the same to Stephen B. Ayers for the price of \$40,000. Five thousand dollars of the purchase money was to be paid in November, 1894, and \$5,000 on the 1st of November in each subsequent year, with interest on all unpaid sums, payable annually, until the whole purchase money should be paid. Makely, the defendant in this action, was a party to the contract. At the time of its execution he held a mortgage on the tract of land, and agreed to purchase another incumbrance on the same, held by James A. Bryan, trustee of Miss Donnell, both incumbrances aggregating about \$25,000. It was further agreed in the contract that the payments to be made by Ayers were to be applied to the payments of the incumbrances until the principal of the incumbrances and interest thereon should be reduced to \$10,000. When that should be done, then Wahab and Credle and their respective wives were to execute and deliver to Ayers a good deed in fee to the land, and Ayers at the same time was to execute and deliver his notes to Makely, secured by a mortgage upon the premises for the \$10,000 in two payments of \$5,000 each, to be a first lien on the land. Ayers was also to execute his notes to Wahab and Credle for the balance of the purchase money, to be secured by a mortgage on the premises. It was also agreed that in case of default in any of the payments, then, at the option of Ayers and Credle and Makely, the contract should be null and void, and the total amounts unpaid should be considered due and payable at once. Also Ayers was to furnish to Makely at the time of the execution and delivery of the contract a bond satisfactory to Makely in the sum of \$10,000 guarantying the first two payments provided for by this contract. Under the said contract Ayers went into possession and control of the land on the 1st day of November, 1893, the rents and profits for that year, however, to belong to Wahab and Credle. Differences and controversies having arisen between Ayers and Wahab and Credle, the last two, with Makely, instituted an action of ejectment in the superior court of Hyde county against Ayers, and demanded possession of the land. Ayers filed his answer in tha;

suit, and gave the bond as required by law in the sum of \$200, with sureties. Under an order of the superior court, made in the cause, Ayers was required to give an additional bond in the sum of \$5,000 to secure the rents, costs, and damages that might be sustained by the plaintiff. The bond was given with sureties. While the action of ejectment was pending against Ayers, the plaintiffs in the action, Makely, Wahab, and Credle, entered into an agreement among themselves whereby Makely instituted an independent action against Wahab and Credle in the superior court of Hyde county for the foreclosure of the mortgage held by Makely upon the land and the part of the notes or bonds owned by Makely and secured by the deed of trust to James A. Bryan. Ayers was not a party to the agreement, and was not a party to the action of foreclosure. By the terms of the agreement between Makely on the one part and Wahab and Credle on the other, it was stipulated and provided that at any sale under the foreclosure decree in the cause, Ayers would bid for the land, or cause to be bid therefor, such sum as would discharge the indebtedness due him as aforesaid by Wahab and Credle; or, if he failed to do so, and bought the land himself at any less price, that he would cancel and satisfy the balance of his judgment upon his debts aforesaid. Under his contract and agreement with Wahab and Credle, as aforesaid, the land was sold by Makely, through a commissioner appointed by the court, on the 11th day of May, 1896, and was purchased by him for \$15,500; and the residue of said judgment due Makely, after crediting the amount brought by the sale of the land, was canceled by him under his agreement aforesaid. Ayers, notwithstanding the foreclosure and sale, continued to remain in possession of the premises. Pending the said action of ejectment, Henry W. Wahab died intestate, and his personal representative and heirs at law were made parties plaintiff with Makely and Credle therein. A judgment was recovered in said action of ejectment against Ayers and his sureties and in favor of Geo. Credle, as surviving partner of Wahab & Credle, "or the penal sums of the aforesaid bonds to be discharged upon the payment of \$3,200, with interest thereon from January 1, 1896, being for the rents and profits of said land for the year 1895, and for the further sum of \$464.63 costs. A large amount has been paid by some of the sureties of Ayers on the judgment recovered against them in the suit of ejectment. The defendant appealed from the judgment rendered.

Rodman & Rodman and Geo. W. Ward, for appellant. Chas. F. Warren, for appellees.

MONTGOMERY, J. (after stating the facts). The plaintiffs in this action are Ayers and the sureties on his bond in the ejectment suit. In the complaint they allege that dur-

ing the pendency of the action of ejectment Ayers was not ejected by process of law, but that he voluntarily surrendered possession of the premises to Makely on Makely's express promise to Ayers and his sureties that they should not be held responsible for the rents and profits growing out of the land while Ayers was in the possession thereof, and that he would hold Ayers and his sureties harmless against any demand that might be made on them for the rents and profits by Wahab and Credle. And this action is brought to recover from Makely the amount which the sureties have had to pay, and will have to pay, because of the recovery against them on the bonds in the ejectment suit. The defendant, in his answer, denied the cause of action alleged in the complaint. At the fall term, 1901, of Hyde superior court, he moved to amend his answer, and to plead counterclaims and set-off. The counterclaim which the defendant desired to plead was, in substance, that Ayers was the principal in the bonds filed in the ejectment suit, and that the other plaintiffs were sureties, and that Ayers owed him \$5,359.44,—that amount being the difference between the amount of Makely's incumbrance on the land and the amount at which he bought the land at the commissioner's sale,—and that Ayers had assumed the payment of the incumbrances. The motion to amend the answer and set up the counterclaim was denied, the order being silent as to the ground of refusal. The plaintiff contends that there can be no appeal at any time from the refusal to allow the answer to be filed, for the reason that such matter was entirely discretionary with the court, and, the order being silent as to the ground of refusal, the conclusion is that it was denied as a matter of discretion. But in making up the case on appeal his honor stated that he did not refuse to allow the amendment as a matter of discretion, but on the ground that the offered counterclaim did not amount to a counterclaim in law. The presumption in law that the order was made in the discretion of the court was rebutted by the statement of his honor to the contrary in the case made up for this court. The appeal was premature, but, as the whole matter in dispute came out on the argument here, it may be best for all (the court included) to pass upon the ruling made by his honor that the claim of the defendant did not amount to a counterclaim in law. We see no error in the ruling. It was argued here by the counsel of the defendant that the legal effect of the contract of sale was to make Ayers the principal debtor, as between himself and Wahab and Credle, as to the debts due by Wahab and Credle to Makely, and that that position was brought about by the assumption by Ayers to pay those debts for Wahab and Credle. On that proposition it was insisted that the release of Wahab and Credle from their indebtedness to Makely was only a release of the sureties, and not a release of Ayers, the prin-

cial. But from our reading of the contract we do not find that there was any assumption on the part of Ayers of the debts of Wahab and Credle to Makely. The relations of the parties to that contract were not changed by its execution. The most that could be said is that Ayers bound himself to see that particular payments on the purchase money should be applied to the claims of Makely. The language of that part of the contract is as follows: "It is understood by and between the parties hereto that the payments above mentioned to be made by said third party [Ayers] shall be applied to the payment of those incumbrances held by said second party [Makely] until the principal of said incumbrances and interest thereon has been reduced to the sum of ten thousand dollars." We are of the opinion, therefore, that when, at the time of his purchase of the land at the commissioner's sale, Makely released and discharged Wahab and Credle, the principal debtors, from the payment of the incumbrances, Ayers was also released. The appeal, however, was erroneously granted, because it was premature. Exception should have been noted, and the case proceeded with. *Milling Co. v. Finlay*, 110 N. C. 411, 15 S. E. 4; *Walker v. Scott*, 104 N. C. 481, 10 S. E. 523. Appeal dismissed.

(131 N. C. 70)

BEST v. BRITISH & AMERICAN MORTG. CO., Limited.

(Supreme Court of North Carolina. Sept. 23, 1902.)

ANSWER AFTER TIME—DISCRETION—VERIFICATION BY CORPORATION—REHEARING.

1. Under Code, § 274, providing that the judge may, in his discretion, allow an answer after the time limited, exercise of the discretion is not reviewable.

2. The managing director of a foreign corporation is an officer, within Code, § 258, providing that, when a corporation is a party, verification of a pleading may be by an officer thereof.

3. A rehearing cannot be had of a question decided on a former appeal by counsel discussing in his brief on a second appeal the former decision, and suggesting that the court, *ex mero motu*, review that question.

Appeal from superior court, Greene county; Allen, Judge.

Action by W. E. Best, administrator, against the British & American Mortgage Company, Limited. From an order denying a motion, plaintiff appeals. Affirmed.

Geo. M. Lindsay, for appellant. L. V. Morrill and Battle & Mordecai, for appellee.

MONTGOMERY, J. The defendant in this action, a nonresident corporation, was brought into court by publication. A special appearance was entered on its behalf, and a motion to dismiss the action and vacate the

attachment was granted. Upon the appeal of the plaintiff, that ruling was declared to be erroneous by a decision of this court. 123 N. C. 351, 38 S. E. 923. The plaintiff in due time moved in the court below for judgment on his verified complaint, no answer having been filed. The court refused the motion, and the defendant was allowed to file an answer, and the plaintiff appealed.

It does not appear from the record that the defendant got leave to file an answer under section 220 of the Code, and we must presume, therefore, that the order was made under section 274 of the Code. The matter was entirely in the discretion of the court, and cannot be reviewed on appeal. *Gilchrist v. Kitchen*, 86 N. C. 20; *Woodcock v. Merriam*, 122 N. C. 731, 30 S. E. 321. In *Mallard v. Patterson*, 108 N. C. 255, 13 S. E. 93, the defendant filed an unverified answer, the complaint in the action having been verified; and the defendant, after a lapse of five years, asked to be allowed to file a new answer, properly verified, and the court allowed him the leave, though he was not entitled to it as a matter of right. This court approved of the order, and declared that the exercise of the discretion by his honor was not reviewable.

After the answer was filed in the case now before us, the plaintiff moved for judgment on the ground that the answer was not properly verified; the alleged insufficiency being that the verification had been made by L. H. Graham, a managing director of the defendant corporation. The motion was disallowed, and properly so. When a corporation is a party, the verification may be made by any officer thereof. Code, § 258. Certainly the managing director of a foreign corporation is such an officer as would meet the requirements of the Code in the matter of the verification of pleadings.

The counsel of the plaintiff, in his brief, discusses at some length the decision of this court in the former appeal of this case on the question of the discontinuance of the action on the part of the plaintiff, and suggests that the court will, *ex mero motu*, review that question. But rehearings are not allowed in such a manner.

No error.

(131 N. C. 65)

DAWSON v. BAXTER et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

LIBEL PER SE—BREACH OF DUTY TO INDIVIDUALS.

1. A publication that the chief of police and mayor, on being invited and urged to co-operate with a "citizen committee," instead of doing so, at all times seriously handicapped their efforts by their actions and manner of treatment, and that "we could have accomplished better results, and saved much time and labor, had the chief of police and the mayor recognized that they were public officers, paid as public servants, and discharged their duty in

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3810.

accordance with those facts," was not libelous per se, as it did not charge a breach of official duty as to the public, but only as to the committee, a mere voluntary organization.

Appeal from superior court, Pasquotank county; Jones, Judge.

Action by W. O. Dawson against W. M. Baxter and others for libel. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Geo. W. Ward and P. W. McMullen, for appellant. E. F. Aydlott, for appellees.

COOK, J. The demurrer to the complaint was properly sustained by his honor. No special damage is alleged to have resulted from the publication, but it is contended to be libelous per se. The publication of which plaintiff complains is as follows, to wit: "Recognizing the fact that in this matter all agencies should work together for the accomplishment of the end in view, we immediately proposed that we should communicate with Mr. Dawson, the chief of police, and secure the benefit of his services and ability. Mr. Dawson was waited on by several members of the committee at different times, and invited and urged to co-operate with us. He positively refused to do so, and from the date of our appointment until this hour he has not—neither has the mayor of this city—done one single thing to assist us, but have at all times seriously handicapped our efforts by their actions and manner of treatment. For this reason we were badly thwarted in our efforts at the very outset." And again: "We could have accomplished better results, and saved much time and labor, had the chief of police and the mayor recognized that they were public officers, paid as public servants, and discharged their duty in accordance with those facts." It was made by the defendants and one H. T. Greenleaf, who were appointed a committee of five for certain ends and purposes foreign to this complaint, and that said committee was styled and known as the "Citizens' Committee." The publication shows that plaintiff is charged with a breach of his official duty with respect to the defendants in the execution of the ends and purposes for which they were appointed, and not with respect to the public. Then what official duty did plaintiff owe to them? None is alleged in the complaint, nor does any appear upon the face of the publication. The "committee" appears to have been a volunteer organization and self-appointed. It nowhere appears that it had any legal existence, or that it owed any duty or service to the public, or that the public, through its officers, owed it any duty or service; and the court cannot assume such to be the fact. "Quod non apparet non est." We must construe the language of the publication as a whole in its ordinary and popular sense with reference to what the persons to whom it was published would reasonably suppose to have been in-

tended (Jaggard on Torts), and not what defendants intended to charge, or what plaintiff understood. Plaintiff insists that he is charged with misfeasance and nonfeasance in office. Defendants contend that the breach of duty charged has reference solely to his hindrance and refusal to assist them in their undertaking as a "committee," and not to his official duties with reference to the public. To arrive at a proper construction of the publication, we must construe the doubtful part by comparing it with those parts which are clear and certain, and so find out its sense from the words and obvious intent of the others, as in the case where the meaning of a word is doubtful its meaning must be ascertained from its associates. "*Noscitur a sociis.*" So coupling the words of the last sentence of the publication with those of the preceding, we can ascertain the sense in which they should be understood. "*Copulatio verborum indicat acceptationem in eodem sensu.*" Thus construing them, we find the charge of misfeasance to be that he, as an officer, hindered, handicapped, and badly thwarted their efforts in carrying out their undisclosed purpose; and that of nonfeasance to be that he did not recognize that he was a public officer, and did not discharge his duty in accordance with the fact, in that he would not render any official service in aid of their purposes. With this understanding of the meaning of the publication taken from its face and context,—and they must have been so understood by the readers,—we are unable to discern any meaning or intentment which would bring the plaintiff into disrepute, or which imputed to him an unfitness, either in respect of morals, inability, or want of integrity, for the discharge of the duties of his office; and we cannot go beyond, and enter into the region of conjecture, but must confine ourselves to the allegations contained in the complaint. From this publication it nowhere appears that plaintiff was charged with having violated or failed to perform any duty imposed upon him by his office. As a public officer and public servant, he was obliged to obey and execute the prescribed and established laws of the land, and not to serve and co-operate with any body or bodies of men having neither legal existence nor legal authority to make, execute, or enforce law, or to preserve the peace. As their ends and purposes were foreign to the matters of the complaint, and no legal authority is shown for their appointment, it must be assumed, even if not engaged in an unlawful purpose, that their undertaking was not within the pale and protection of the law, or that they were undertaking to usurp the functions of officers of the law, and by reason of their incompetency or inexperience the plaintiff officer did not deign to dignify them with his official recognition. And as the plaintiff and mayor, of whom they also complain, did not take steps to suppress their efforts, we must assume that the purpose

they had in view was not of a criminal character.

Defendants, in their publication, do not state such facts as to show that they were engaged in an undertaking which would entitle them to invoke the aid of legal authority. They do not claim that plaintiff officer failed to discharge any duty further than to fail to assist them in their own peculiar undertaking. To refuse them his services and ability in that behalf, he had a right to do, and "he positively refused to do so"; and he at all times seriously handicapped their efforts by his actions and manner of treatment. Should he have done otherwise? So far as the record shows, the duties of his office did not require it. In thwarting their efforts, and preventing them from accomplishing better results, and saving them much time and labor, by not recognizing the fact that he was a public officer, and not discharging his duty in accordance with those facts, it seems that he regarded the matter they had in view as being of such a character as would appeal to his discretion, rather than a demand as of legal right. The inference is strong that they were endeavoring to manage matters which pertained to the duties of the chief of police and mayor, who deemed their uninvited efforts officious and unnecessary, and kept aloof from them. If that be so, then the officers would owe them no duty; and to charge them with a failure of duty with respect of them would not injure the plaintiff's reputation, or expose him in his private or official character to public scandal, hatred, ridicule, or contempt.

As there is no special damage alleged to have resulted from the publication, it must appear that the words of the publication were such as to impute to the plaintiff an unfitness to perform the duties of his office, or a want of integrity in the discharge of such; and this the words do not show.

There is no error.

(131 N. C. 29)

BULLUCK et al. v. BULLUCK et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

ADVERSE POSSESSION—TENANCY—PRESUMPTION—EVIDENCE.

1. Code, § 147, provides that, whenever the relation of landlord and tenant shall have existed, the possession of the tenant shall be deemed the possession of the landlord, until 20 years from the last payment of rent, notwithstanding the tenant may have claimed to hold adversely to his landlord. *Held*, that where, in partition, defendant claimed by adverse possession, it was error to exclude a question as to whether defendant entered as a tenant; the intent being to show tenancy and payment of rent for more than 30 years.

Appeal from superior court, Edgecombe county; Bryan, Judge.

Action by F. B. Bulluck and others against W. O. Bulluck and others. From a judg-

ment for defendants, plaintiffs appeal. Reversed.

G. M. T. Fountain, for appellants.

CLARK, J. This action began as a petition for partition. The defendants pleaded sole seisin and the statute of limitations under adverse possession up to known and visible boundaries for more than 20 years. Thereupon the action was transferred to court at term for the trial of the issue of title as in an action of ejectment. The plaintiff asked a witness, "Did the defendant W. O. Bulluck enter possession of the Minnis place in 1874 as the tenant of Jesse Bulluck, your father?" This question, counsel stated, was asked for the purpose of showing that the defendant entered into possession as the tenant of Jesse Bulluck, and has so remained, paying rent, for more than 30 years. The evidence was excluded, as were three other questions, somewhat different in form, but all asked for the same purpose, and the plaintiff excepted. There was error. Code, § 147; *Mobley v. Griffin*, 104 N. C., at page 115, 10 S. E. 142. In *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757, the point is so clearly treated and disposed of by the present learned Chief Justice that further discussion is unnecessary. That case is cited. *Shannon v. Lamb*, 126 N. C. 47, 35 S. E. 232; *Hatcher v. Hatcher*, 127 N. C. 201, 37 S. E. 207.

Error.

(131 N. C. 42)

SWIFT et al. v. DIXON et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

LEASE—LAND INCLUDED—EVIDENCE—MORTGAGE FORECLOSURE—PARTIES—ADVERSE POSSESSION—LIMITATIONS—MARRIED WOMEN.

1. A mortgaged her lands, known as the "S. Farm," reserving her homestead rights therein. After her homestead was laid off, there was a foreclosure, and deed was given reserving such homestead rights, and defendant got from the purchaser a deed for the tract outside the homestead boundary. After being in possession of the land conveyed to him a number of years, treating it as his own, taking the rents and profits, and paying none to any one, he took a lease from A. of "all her land and interest in the land that she formerly resided on * * * known as the 'S. Farm,'" whereupon he went into possession of the land in the homestead boundary, and paid her rent therefor. *Held*, that these facts authorized a finding that the lease did not cover the whole tract mortgaged, thus estopping defendant to deny A.'s title to the whole tract, but covered only the homestead allotment.

2. A. and her husband, R., gave a trust deed on her lands. Action to foreclose was begun by issuance of summons against them, returnable to fall term, 1878, which was served on her, but not on him, and was not returned. Thereafter another action was begun by issuance of summons against them returnable to spring term, 1879, which was served on him alone, and at this term, complaint having been filed, default judgment was taken against them, under which there was a sale. There was no

order for an alias or to consolidate the actions. *Held*, that A. was not a party to the action in which judgment of foreclosure and sale was had.

3. Where one was in actual adverse possession, under color of title, of land of a married woman, for seven years before the death of her husband, and she failed to bring her action therefor within the three years after his death allowed by Code, § 143, her heirs are barred by adverse possession and limitations from recovering it.

Appeal from superior court, Greene county; Moore, Judge.

Action by W. O. Swift and others against R. D. S. Dixon and others. Judgment for defendants, and plaintiffs appeal. Modified.

Geo. M. Lindsay and Jarvis & Blow, for appellants. L. V. Morrill and Connor & Son, for appellees.

FURCHES, C. J. In 1877 Anna S. Rawls was the owner of the land in controversy, and her husband, Isalah Rawls, was indebted to William Devries & Co. and to Devries, Young & Co., and to secure this indebtedness the said Anna S. Rawls and her husband, Isalah Rawls, made and executed a deed in trust to W. T. Dortch on said land. This indebtedness not being fully paid, said Dortch, trustee, on the 1st day of September, 1878, commenced an action by the issuance of a summons against the said Isalah Rawls and wife, Anna S. Rawls, for the purpose of foreclosing said trust, returnable to fall term of Greene superior court. Service of this summons was acknowledged by Anna S. Rawls, but no service was made upon her husband, Isalah Rawls. But this summons was not returned to said fall term, or, if it was, it was not put upon the docket of said court. And on the 2d day of March, 1879, the plaintiff, Dortch, commenced another action by issuing another summons against said Rawls and wife, which was served on the husband alone; and at said spring term of said court the plaintiff filed his complaint, and took judgment for want of an answer, no appearance ever having been made by either of the defendants named in the summons. Under this judgment Isaac F. Dortch, the commissioner named in the judgment, sold said land on Saturday, the 17th day of January, 1880, when William R. Devries became the purchaser at the price of \$1,500, which sale was reported to spring term of said court and confirmed. It appears that said deed from Isaac F. Dortch to Devries, the purchaser, was executed before the sale was reported and confirmed. It also appears from the decree of the court confirming said sale that the purchaser was one of the plaintiffs in the action under which the land was sold. It also appears from the mortgage itself that, while it conveyed a large boundary of land,—being the entire tract on which the mortgagors resided,—it contained the following: "The said Anna S. Rawls reserving, however, her homestead right under the constitution and laws of the state in the said

land." This homestead had been laid off and located by metes and bounds before the sale by the said commissioner, and he sold and conveyed to Devries under the same terms of reservation as those contained in the mortgage, and all the mesne conveyances from Devries contain the same reservations as to the homestead of Mrs. Rawls down to the last, which is a deed from Jones to the defendant Dixon, which deed only conveyed that part of the tract outside of the homestead boundary. But after the death of Mrs. Rawls the defendant bought and took a deed from Jones for that part of the land covered by the homestead. After the death of Isalah Rawls, and on the 22d of November, 1890, the defendant Dixon leased from Mrs. Rawls "all her land and interest in the land that she formerly resided on in Greene county, and known as the 'Dr. Swift Farm,' for the year 1891, and as long thereafter as the party of the second part wishes this lease to be in force," for the price of \$150 or 1,700 pounds of lint cotton per year. Isalah Rawls died on the 18th day of May, 1893, and Anna S. Rawls died in February, 1900, and the plaintiffs are the children and heirs at law of the said Anna S. Rawls, and this action is brought to recover said land. A jury trial was waived, and the whole case was submitted to his honor to find the facts and declare the law, which he proceeded to do, and the same are set out and sent up as a part of the case on appeal, with the plaintiff's exceptions thereto. These findings are very lengthy, covering 13 pages of printed matter, and we will not, therefore, set them out in full, but will state such as we think have any bearing in the case, and we have already stated the most of those we think of any importance to its consideration.

It was contended by the plaintiffs that the lease from Mrs. Rawls to the defendant, made in October, 1890, covers the whole tract of land mortgaged to Dortch, and was an estoppel on the defendant to deny the title of Mrs. Rawls to the whole tract; while the defendant contended that it only extended to that part of the tract covered by the homestead allotment. And his honor sustained the defendant's contention, and found as a fact that it only covered the homestead. This is final, and not reviewable by this court, if there is any evidence to sustain such finding. This is admitted by the plaintiffs, but they say there is no such evidence; but it seems to us there was such evidence as authorized the finding. There was the fact that the defendant had bought the land outside of the homestead boundary from Jones, was in possession of it before the date of this lease, and had been for a number of years treating it as his own, taking the rents and profits, and paying none to any one. He paid no rent to Mrs. Rawls until after this lease was made, when he went into possession of the homestead boundary, and paid her rent for the same. This evidence, we think, authorized the court to make this finding, as it is unrea-

sonable to suppose he would have leased his own land from Mrs. Rawls.

The court finds that the summons issued to fall term, 1878, was never placed on the docket until he ordered it to be done at this trial, and finds there was no order for an alias, nor to consolidate the two actions. Upon the facts found the court held as a matter of law that Anna S. Rawls was a party to and bound by the judgment taken at spring term, 1879. In this there is error. It is manifest that the complaint was filed at spring term, 1879, upon the summons returnable to that term of court. It is true that there is not a mark on the complaint to show when it was filed; not even on the verification. But how could it have been filed before then, when there was no such case on the docket? Where the plaintiff in an action is the purchaser of land, the burden is upon him and those claiming under him to show that everything necessary to sustain the judgment has been done. *Lyerly v. Wheeler*, 83 N. C. 288, 53 Am. Dec. 414, approved in *Lee v. Eure*, 82 N. C. 431, and many other cases.

We see no connection between the summons returnable to fall term, 1878, and the action in which the judgment was taken. There is nothing on the docket to show any connection between the summonses, and, if there was, it devolved upon the plaintiff in the action under which the land was sold and those claiming under him to show it (if it could be shown outside the records themselves). This being so, the said Anna S. was never a party to the action in which the judgment of foreclosure and sale was had. The defendant cites *Harrison v. Hargrove*, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781, as sustaining his contention, upon the ground that, although Anna S. was not in fact served, the clerk inadvertently entered upon the docket that she had been served. Whether this (if the plaintiff had not been the purchaser) would have availed the defendant or not, as the record proper showed that she had not been served, it is not necessary for us to say. But as one of the plaintiffs was the purchaser at the commissioner's sale, it was his duty to know whether she had been served, and, if she had not been, he got no title. *Lyerly v. Wheeler*, *supra*. The case of *Harrison v. Hargrove* is distinctly put upon the ground that he was not a party, and was an innocent purchaser, without notice, and is therefore distinguished from *Chambers v. Brigman*, 75 N. C. 487, where it was held the purchaser got no title. If *Hargrove* had been a party to the action under which he bought, he would have gotten no title, and the plaintiffs in that case would have recovered. Then William R. Devries got no title by this sale, and the purchaser from him got nothing but a color of title. But the deed from Devries to Jones and Beaman is dated the 6th of October, 1880, and they immediately entered into possession of all the land outside the homestead boundary, and they and those claiming under them, down to

and including the defendant, have been in the actual adverse possession of said land ever since, except the land covered by the homestead, and that remained in possession of Mrs. Rawls, by herself and her tenants, down to and at the time of her death; that is, from 1880 to 1900.

As defendant and those under whom he claimed have held possession under color of title seven years, this would have been sufficient to ripen the title, if there had been no exception to the general rule. But as Mrs. Rawls was a married woman, time was not counted against her until her husband died, on the 18th of May, 1893, provided she availed herself of the statutory time to bring her action after his death, which was three years. Section 148, Code. That time expired on the 18th of May, 1896, and this action was not commenced until the 28th day of April, 1900. The plaintiffs, therefore, are barred by the lapse of time, actual adverse possession, and the statute of limitations from recovering that part of the land sued for outside of the homestead boundary. But they are not barred by the statute, are the owners of and entitled to recover that part of the land sued for embraced within the homestead boundary.

There is error, and the judgment of the court below will be modified in accordance with this opinion. Error.

(231 N. C. 31)

DUFFY v. E. H. & J. A. MEADOWS CO.
(Supreme Court of North Carolina. Sept. 23, 1902.)

**NUISANCE—UNPLEASANT AND OFFENSIVE
ODOR—APPEAL—DENIAL OF MOTION.**

1. A guano manufactory, though it may largely use undeodorized decayed fish in its processes, is not a nuisance per se, unless it is so situated as to affect the health or comfort of the community by means of its odors.

2. The fact that odors carried a great distance by the wind are "unpleasant and objectionable" is not sufficient ground for interference by the court with the establishment from which they arise.

3. The denial of a motion for judgment upon the complaint and answer, with damages to be thereafter determined by the jury, is not an appealable matter, the proper practice being to note an exception to the refusal, so as to have it considered on appeal from the final judgment.

Appeal from superior court, Craven county; Winston, Judge.

Action to abate a nuisance, brought by Francis Duffy against the E. H. & J. A. Meadows Company. From an order denying his motions for judgment and for injunction upon the complaint and answer, plaintiff appeals. Affirmed.

W. D. McIver and A. D. Ward, for appellant. M. De W. Stevenson and W. W. Clark, for appellee.

MONTGOMERY, J. The plaintiff commenced this action to have abated an alleged nuisance, to wit, a manufactory of guano,

on the premises of the defendant. The plaintiff, in his complaint, alleged that the manufactory was both a public and a private nuisance. The complaint is that the odors arising from certain of the materials used in the manufacture of the guano gives out an unpleasant and objectionable odor, amounting to an offensive stench; that the odors are so noisome and offensive that they "pollute and permeate the atmosphere to such an extent as to render the buildings of the plaintiff almost unfit for habitation, and render the life of plaintiff and his tenants uncomfortable," and that they are deleterious to health as well; that, as plaintiff is informed and believes, by reason of the foul and offensive odors and stench arising from the operation of said factory in the city of New Bern, the same is a public nuisance, noisome, offensive, and hurtful to the inhabitants of the city generally, and especially to those in the vicinity of said factory. The allegation as to the establishment being a public nuisance is as follows: The defendant, in its answer, denies all such allegations, except the thirteenth and fifteenth. The thirteenth is in these words: "That the said material gives off odors which may be smelled at great distances in the direction of the wind." The fifteenth allegation is as follows: "That the said odor arising from the said material is an unpleasant and objectionable one." The plaintiff moved for judgment upon the complaint and answer, the damage to be determined by inquiry thereafter to be submitted to the jury. He made a further motion "that upon the complaint and answer the defendant be enjoined from using, bringing upon, or storing on the premises of defendant described in the pleadings any of the said materials as described in the complaint, and referred to in allegation 13 of the complaint, which gives off odors that may be smelled at great distances in the direction of the wind, * * * and which said odor arising from the said material is an unpleasant and objectionable one, as described in allegation 15 of the complaint." Both motions were denied, and the plaintiff appealed.

The first motion could have been sustained only upon the ground that the material used in manufacturing the guano constituted either a nuisance per se or that the answer admitted the allegations of the complaint to such an extent as to show that the manner in which the business was conducted and the material used caused a nuisance. This court would be slow to declare any lawful business a nuisance per se. A slaughterhouse located in a thickly populated town or city, or a manufactory of guano similarly situated, in which the chief material used was decayed fish, not having gone through a process of deodorization, would be nuisances per se; and there may be others. But if a slaughterhouse was situated in a place remote from residences and public highways, it would not be a nuisance, unless it was shown that the

business was conducted in an improper manner,—as by allowing or permitting the escape of gases, stench, or vapors, thereby producing serious and substantial discomfort and annoyance to those residing in the neighborhood, from a want of proper care in the removal or burning of the offal from the premises. Such a guano manufactory as we have mentioned, so remotely situated from residences and highways as not to affect the health or comfort of the community by means of odors, would not be a nuisance. The denial of the first motion, however, was not an appealable matter. The correct practice would have been to note an exception to the refusal, so as to have it considered on appeal from the final judgment. *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364; *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731; *Cameron v. Bennett*, 110 N. C. 277, 14 S. E. 779. A refusal to grant the injunction is the question, then, for consideration in the case. Each and every allegation of the complaint in which there is a charge of facts concerning the alleged nuisance is denied in the defendant's answer,—the answer being a verified one,—except the thirteenth and fifteenth, which we have set out already in this opinion. The admission of these allegations is harmless to the defendant. The fact that odors are "unpleasant and objectionable" is no ground for invoking the aid of the court, in interfering with a business or other establishment from which such odors arise. That they are unpleasant will not be sufficient. They must work some substantial annoyance, some material physical discomfort, to those who live in the neighborhood, or injury to their health or property. 21 Am. & Eng. Enc. Law, 692, and the numerous cases there cited.

No error.

(131 N. C. 39)

HARRINGTON et al. v. RAWLS et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

MORTGAGES — FORECLOSURE — INJUNCTION — DISSOLUTION — PARTITION — QUITCLAIM DEED — HUSBAND AND WIFE.

1. Where, in an action to restrain the foreclosure of a mortgage alleged to be on a wife's land, to secure her husband's debt, which had been extended without her consent, a restraining order was issued, such order should not be dissolved on the coming in of an answer alleging that the debt was the joint debt of the husband and wife, and denying that there was extension without her consent.

2. Where, for the purpose of partitioning land which two sisters had inherited, each with her husband executed a quitclaim deed to her sister and husband to a certain part of the land, and they afterwards exchanged their lands by similar deeds, the husbands did not acquire any title.

Appeal from superior court, Pitt county; Winston, Judge.

Action by W. H. Harrington and others against M. O. Rawls and others to restrain the foreclosure of a mortgage. From an order

dissolving a temporary restraining order, plaintiffs appeal. Reversed.

Skinner & Whedbee, for appellees.

CLARK, J. Jesse Harris died seised in fee of a tract of 188 acres, which descended to his two daughters, Elsie and Susan, who respectively married J. A. Briley and B. F. Jolly. They made partition, by mutual deeds, of the land, allotting 84 acres to Mrs. Jolly and 104 acres to Mrs. Briley. In 1874 the parties exchanged lands, B. F. Jolly and wife executing a quitclaim deed to J. A. Briley and wife for the 84 acres, and they in turn executing a quitclaim to Jolly and wife for the 104-acre tract. In 1889 Briley and wife executed a mortgage to the defendant Rawls upon the 84-acre tract, who subsequently assigned the bond to the defendant Flanagan, and Briley has sold the land to defendant Tyson, who is in possession. The land has been advertised for sale under the mortgage. Elsie is dead, and the plaintiffs are her heirs at law. The complaint alleges that the mortgage was executed to secure a debt from J. A. Briley; that the joinder in the mortgage by his wife made her merely surety to that extent; and that she has been released by extension of time granted for a consideration to said Briley, without the assent of the wife (*Smith v. Association*, 119 N. C. 257, 26 S. E. 40), and further that the debt is barred by the lapse of more than three years since the maturity of the bond (but see *Hedrick v. Byerly*, 119 N. C. 420, 25 S. E. 1020), and asked for a restraining order, which was granted, and an injunction till the hearing. The defendants answered, alleging that the debt was the joint debt of Mrs. Briley and her husband, and denying that any extension had been granted without her consent, and denying also that the debt is barred by the statute of limitations. His honor dissolved the restraining order upon the coming in of the answer.

These pleadings raised a serious contention, and if nothing more appeared the injunction should have been continued to the hearing. *Raleigh & A. Air-Line R. Co. v. Aberdeen & W. E. R. Co.*, 125 N. C. 96, 34 S. E. 197; *Whitaker v. Hill*, 96 N. C. 2, 1 S. E. 639. But the defendants further aver that the mutual deeds of partition being made to Briley and wife, and especially the subsequent deed of exchange being so worded, this put the title in him and his wife by entirety, and she being now dead, J. A. Briley holds by survivorship, and these plaintiffs, claiming as heirs of his wife, have no cause of action. But a deed of partition conveys no title. It is simply a severance of the unity of possession. Elsie Briley took no new title by purchase, but held by descent from her father, and the insertion of her husband's name in the mutual deeds of quitclaim and release conveyed nothing to him. *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57; *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4. In par-

tion, no title passed; only unity of possession is dissolved. *Lindsay v. Beaman*, 128 N. C. 192, 38 S. E. 811. The subsequent deeds of exchange were merely a new reallocation or readjustment, and had no more effect than the first partition. Besides, the deed on its face is a quitclaim merely to J. A. Briley and his wife, and could not have the effect to convey to him any property which till then belonged to his wife. The claim that J. A. Briley is sole seised by right of survivorship cannot be sustained, and the injunction to the hearing should have been granted, that the other issues raised by the pleadings may be determined. As an appeal from a dissolution of an injunction does not keep it in force (*Reyburn v. Sawyer*, 128 N. C. 8, 37 S. E. 954), it may be that the sale has taken place, but that is not made to appear to us.

In dissolving the restraining order there was error.

(131 N. C. 48)

WOOD v. ATLANTIC & N. C. R. CO.

(Supreme Court of North Carolina. Sept. 23, 1902.)

MECHANICS' LIENS — SUBCONTRACTOR — PAYMENT TO CONTRACTOR — NOTICE — STATUTES — TRIAL — SETTING ASIDE VERDICT.

1. While, when a verdict is set aside or a setting aside is refused on the ground that it is against the weight of the evidence or excessive, or for other matters resting in irrevocable discretion, no appeal lies, yet when a verdict is set aside, as a matter of law, because the judge holds that he erroneously refused a prayer asked by the losing party, an appeal lies.

2. Code, § 1801, provides that all subcontractors on a building shall have a lien when notice of the claim is given to the owner, provided that the sum total shall not exceed the sum due the original contractor at the time of the notice. In a suit to enforce a subcontractor's lien, the uncontroverted evidence showed that at the time the subcontractor gave notice of his claim to the owner the contractor had been paid all that was due him under the contract. *Held*, that it was error to refuse to charge that, if the jury believed the evidence, defendant was not indebted to plaintiff.

3. A subcontractor on a building notified the owner of a sum due him from the contractor, and requested that the same be withheld on settlement, but was told by the owner that when the contractor called for the money it would have to be paid to him. *Held*, that the owner's reply was not an assumption of the contractor's debt.

4. If the reply had been an assumption of the debt, it would have been invalid, as not in writing and without consideration.

Appeal from superior court, Craven county; McNeill, Judge.

Action by J. W. Wood against the Atlantic & North Carolina Railroad Company. From an order setting aside a verdict for plaintiff and granting a new trial, plaintiff appeals. Affirmed.

Plaintiff filed a lien upon defendant's warehouse for a claim amounting to \$35.19, and brought action before a justice of the peace to enforce a subcontractor's lien against the defendant's property. Defendant appealed to the superior court, where the case was

tried before McNeill, J. The issue was found in favor of plaintiff to the amount of \$35.19, without interest. Plaintiff introduced the book of liens from the clerk's office, and then testified that he did work for R. S. Neal upon the warehouse of defendant, and was paid all except the above balance due. He went to the president of the road, and told him that Neal owed him \$35.19 for work on the warehouse of his company, and wanted him to hold that much from Neal's money when he settled with him, but he was told that this could not be done when Neal called for his money, but "I will have to pay it to him." On cross-examination witness stated that this was about three weeks before Neal's failure. Redirect: "Mr. Bryan, president of the road, had seen me at work on the building." Mr. Bryan, president of the road, was introduced by defendant, and stated that he remembered when plaintiff came to him about the Neal debt, but did not remember what was told him. "People frequently came and asked about what we owed others, and, as I think it is none of their business, I make it a rule never to give them any satisfaction about it. Shortly after the conversation I learned that we had paid Neal more than we owed him, and that he had been fully paid by the early part of July for all the work afterward done by him." To this, plaintiff excepted. On cross-examination he stated that Neal was a contractor doing general warehouse and bridge work for the road. Question by plaintiff: "Was not Neal reputed to be a man of means? A. I never heard that he was. Q. Are you not president of the National Bank of Newbern, and did he not borrow large sums of money from your bank up to the time of his failure? A. We only loaned him money on good collaterals. Q. At the time of his failure for \$4,000, did he not owe your bank more than \$5,000? A. Yes, but we had collaterals. Q. If you did not owe Neal, why did you tell Wood that you would have to pay Neal his money if he called for it? A. We had had no settlement, and did not know that he was overpaid until about a week afterwards. Q. Did you then inform Wood of your mistake, so as to give him an opportunity to push Neal while his credit was good? A. I did not. I did not think it was any of my business. It was a small matter, and I did not bother about it one way or another. Q. Do you know of your own knowledge that Neal had been paid in full for his contract? How much money did you know he was paid? A. I saw him paid money twice that I can recall, but I cannot say how much was paid in at either time. I had no notice before the conversation with Wood that Neal owed him anything. Neal was originally to build a warehouse for \$9,775, but he brought in extras to the amount of \$711, making in all \$10,486. It turned out that we had overpaid him. I know that Neal got the checks and that we cashed the checks. I know Neal's handwriting, and have seen

the checks with Neal's name on the back of them." Plaintiff here moved to strike out this witness' former statement that Neal had been paid in full, but the motion was denied. Defendant introduced M. Manly, who testified that he was treasurer of defendant company; that the amount of Neal's contract for the warehouse was \$10,486. "I paid to Neal, by cash and an acceptance for \$600 made June 9 and paid July 9, 1900, \$10,532.52. The last payment besides the acceptance was made June 30th, and the acceptance was paid July 9th. All was paid for the warehouse in question, and Neal was overpaid by July 9, 1900." The issue, "Is defendant indebted to plaintiff, and, if so, in what amount?" was found in favor of the plaintiff, to the amount of \$31.19, with interest. Defendant filed written requests, which appear in the record and which were refused by the court, and defendant excepted. Defendant objected to the submission of any issue to the jury, and moved that plaintiff be nonsuited. Refused. The court instructed the jury that if they found from the evidence, and by its greater weight, that, at the time plaintiff notified the president of the road about Neal's owing him on the contract, the defendant had paid Neal in full, then defendant would not be liable to plaintiff at all, but, if they found that there was still money due Neal from the company at that time, the company would be liable for such amount as was due plaintiff, not exceeding the amount due by defendant to Neal. "There was some dispute between counsel as to what some of the witnesses testified. You heard all the evidence, and you are the final judges of the facts, and it is left to you for your decision, and you will take the case and say how the matter stands." The jury responded as above set forth. Defendant moved to set aside the verdict, as against the weight of the evidence. Motion refused. Defendant then moved to set aside the verdict and for a new trial, for that the court erred in refusing the instructions prayed for. This motion was allowed, and the verdict set aside and a new trial ordered, and plaintiff excepted and appealed.

W. D. McIver, for appellant. Simmons & Ward, for appellee.

CLARK, J. When the trial judge sets aside or refuses to set aside a verdict on the ground that it is against the weight of evidence or excessive, or for other matter resting in his irreviewable discretion, no appeal lies. Clark's Code (3d Ed.) pp. 736, 746. But when the verdict is set aside as a matter of law, as here, because the judge held that he had erroneously refused a prayer asked by the losing party, an appeal lies. Bryan v. Heck, 67 N. C. 322; Gay v. Nash, 84 N. C. 333; Thomas v. Myers, 87 N. C. 31. An appeal lay at once, because a verdict is a substantial right, and the appellant should not be put to the trouble and expense of another

trial if this verdict was erroneously set aside. The plaintiff testified that, having done some work for R. S. Neal upon a warehouse which Neal had built for the defendant company, he called upon the president of the company, James A. Bryan, notified him of the amount, and asked him to retain said sum for him in the settlement with Neal, and that this was about three weeks before Neal failed, which occurred in September, 1900. The president refused to do so, saying that when Neal called for his money he would have to pay it to him. President Bryan and the treasurer, Matt Manly, both testified that, on making up a statement of Neal's account, it appeared that by July 9, 1900, the defendant company had overpaid Neal for the warehouse. This evidence was uncontradicted, and the defendant requested the court to instruct the jury, if they believed the evidence, to find on the issue submitted that the defendant was not indebted to the plaintiff. This instruction the court refused, but, on the motion for a new trial made on the ground that he had committed an error in refusing the instruction, he properly so held, and set aside the verdict. The defendant could not be liable to the plaintiff unless at the time of his notification to President Bryan of his claim the defendant was then or thereafter indebted to Neal on account of said work (Code, § 1801), and the uncontradicted evidence is that before that time Neal had been more than settled with in full for said warehouse. The reply of President Bryan was not an assumption of Neal's debt to plaintiff, and, if it had been, it was without consideration and not in writing. It did not mislead the plaintiff, even, because the president expressly refused to assume any responsibility.

In setting aside the verdict there was no error.

(131 N. C. 50)

TAYLOR v. NORFOLK & C. R. CO.

(Supreme Court of North Carolina. Sept. 23, 1902.)

LOGGING—LOG JAM—NEGLIGENCE—COMPLAINT—ISSUES—PERIL TO BRIDGE—BREAKING JAM—INSTRUCTIONS.

1. A raft of logs was broken loose from its moorings by a freshet, and driven against the defendant's railroad bridge across the river, lying broadside against the piling which supported the bridge, and endangering the bridge. The defendant, through its agents and employes, broke up the raft, by means of which the logs passed under the bridge, and many of them were lost. In an action by the owner of the raft, the complaint alleged that the defendant company, by its agents and employes, wantonly, etc., broke the raft in pieces, threw the rafting gear into the river, and turned the said logs adrift in the current; that the logs floated down the river and were lost; and that, by the wanton negligence on the part of defendant, gear and logs were lost. *Held*, that under the complaint the only issue that should have been submitted to the jury was whether the property was destroyed as alleged, and not as to whether defendant was negligent in not

saving the logs after they had floated into the stream.

2. It was error to charge that if the defendant could save any of the logs, by exercising due care, with the means which it then actually had at its command, it was its duty to do so, without further instructing that that would not have been the defendant's duty if the means at hand were not sufficient to save both the bridge and the logs.

3. The defendant was not required by law to anticipate that a raft would break loose and come against its bridge, and it was not required to have on hand boats sufficient to save the logs.

4. A son of plaintiff testified that defendant made no effort to save any of the logs, though there were 30 or 40 men at hand, and that the foreman, when asked to wait the arrival of a tug, said, "D— the logs." Several witnesses testified that the logs could have been saved if there had been boats to stop them, but there was no evidence that defendant had boats or facilities on hand. *Held*, that there was no evidence of negligence in failing to save the logs to go to the jury.

Appeal from superior court, Hertford county; Brown, Judge.

Action by W. P. Taylor against the Norfolk & Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

George Cowper, for appellant. L. L. Smith, for appellee.

MONTGOMERY, J. A large raft of logs was broken loose from its moorings by a high freshet in Chowan river, and was driven down against the defendant's railroad bridge across the river, lying broadside against the piling which supported the bridge. The defendant, through its agents and employes, broke up the raft, by means of which the logs passed under the bridge, and many of them were lost. It was admitted and proved, also, that the safety of the bridge was imperiled and endangered by the lodgment of the raft. This action was brought to recover of the defendant damages for the loss of the logs and the gear which held together the raft. The allegation of the complaint on that point was "that the defendant company, by its agents and employes, willfully, negligently, wantonly, and wrongfully broke the said raft in pieces, and threw the rafting gear into the river, and turned the said logs adrift in the current, and the said gear sunk to the bottom of the river, and the said logs floated down the river and were lost." The plaintiff also alleged that, "if it was safe and prudent on the part of the defendant's employes to remove the raft, it was not necessary, in order to save the bridge, to throw the gear to the bottom of the river, or to turn the logs adrift in the current"; and the fourth allegation is in these words: "That by the said willful, wanton, and wrongful negligence on the part of the defendant's agents and employes, the said gear and logs, to the value of \$250, were lost, to the plaintiff's damage." In passing,

It is curious to observe that the plaintiff got a verdict for 13 cents less than the amount demanded in the complaint, and we have searched in vain for any evidence upon which the deduction was made. The plain meaning and intent of the complaint are that the plaintiff's damages arose from the destruction of the raft, and that that act itself, although done to save the defendant's bridge, as it was shown to have been, was wanton and willful and negligent. There is no charge in the complaint that the defendant was negligent in not saving the logs after they were broken loose from the raft and turned adrift. The plaintiff's loss was declared to have been brought about by the "said willful, wanton negligence on the part of the defendant's agents"; and the "said willful, wanton, and wrongful negligence" mentioned in the complaint was the breaking the raft into pieces. The case seems not to have been tried altogether upon the theory of the plaintiff as set out in his complaint. It seems to us that the only issue that ought to have been submitted, on the complaint and answer, was, "Did the defendant's agents negligently and wantonly and wrongfully destroy the plaintiff's property, as alleged in the complaint?" And in looking into the case we find that his honor took that view of the matter, and submitted one issue only, and that in the very language of the above. In the course of the trial, however, it having been admitted and proved that it was necessary, for the safety of the bridge, to break up the raft, and that that act was not wanton or willful or negligent, the question arose as to the duty of the defendant in connection with the logs after they floated under the bridge and into the stream below. If that had been an issue, the greater part of his honor's charge on that subject was correct; but we think he was wrong when he said to the jury, "If the defendant could save any of the logs, by exercising due care, with the means which it then actually had at its command, it was its duty to do so," without further instructing them that that would not have been the defendant's duty if the means at hand were not sufficient to save both the bridge and the logs. Certainly the first duty of the defendant was to use all available means to secure the bridge, for the benefit of the traveling public and the protection of its own property. But in any view of the case, we think there was no sufficient evidence to be submitted to the jury on the question of the defendant's conduct in reference to the logs after the raft was broken up. The only scintilla, if that, came from the son of the plaintiff, who said: "Defendant made no effort to save any of the logs or gear. Plenty of men to do it there. There were between 30 and 40 men." That was only an opinion, for he mentioned no appliances or other

means which could be put to use by the men in an attempt to save the logs. This witness says that the boss, while engaged in breaking up the raft (on a Sunday), in a high freshet of rolling waters, and getting higher, in peril of his life, and fighting to save a valuable railroad bridge, when told by the witness not to break up his raft,—that his father would be there soon with a tug,—exclaimed, "Damn the logs;" and that was argued to be evidence of willful and wanton destruction of the property. We hardly think so. The wonder is, he had not said more. W. H. Pyland, Jr., a witness for the plaintiff, said: "The defendant's agents made no effort to save the logs. They could have done so if they had had boats below to catch the logs as they cut them loose." Pyland, another witness for the plaintiff, said: "The raft was lengthwise against the bridge, and greatly endangered it. If the railroad people had had boats enough ready prepared, they might have saved some of the logs. They had two skiffs, but I did not see any other boats there." And another witness (Stain) for the plaintiff said that "more logs could have been saved by taking two boats on the lower side of the bridge, taking the logs up separately as fast as they came through." His honor properly told the jury that the defendant was not required by law to anticipate that a raft would break loose and come against its bridge, and it was not required to have on hand boats sufficient to save the logs. Now, in connection with that part of the charge where the plaintiff's evidence is carefully examined, it will be seen to afford no grounds upon which to impute negligence to the defendant in respect to its duty to save the logs, or any part of them. Plaintiff's evidence does not tend to show that there was a boat or any other appliance available with which to make an attempt to save the logs. There was, however, on the part of the defendant, ample evidence going to prove that there were no facilities or appliances at hand, and which could be used to save the logs. N. Y. Robinson said: "The logs doubled and piled on each other, and, reaching down near the bottom row, were pressing against the bridge with such strength and dangerous force as to require immediate relief. We had only two boats, and it was impossible for our men to save the logs, and at the same time bestow reasonable attention upon the safety of the bridge." And Culpepper testified that the only means of saving the logs after they had passed through the bridge was by boats, and these the railroad company did not have. What we have said does not apply to the gear, for it seems there was some evidence tending to show that it was wantonly and negligently destroyed in breaking up the raft.

New trial.

(116 Ga. 313)

NORRELL v. AUGUSTA RY. & ELECTRIC CO.**(Supreme Court of Georgia. Aug. 9, 1902.)**
PRESCRIPTION—LANDS HELD BY MUNICIPALITY—POSSESSION OF STREET.

1. Prescription does not run against a municipal corporation in regard to land held for the benefit of the public.

2. Accordingly, where a certain strip of land is conveyed to a municipal corporation for use as a public street, and the authorities accept the deed, but open and use but one half, longitudinally, of the land, adverse possession of the remainder by a private individual cannot ripen into a prescriptive title, although such possession is under a deed from the dedicant subsequent to the deed to the municipality.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by H. D. Norrell against the Augusta Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Callaway, for plaintiff in error.
Boykin Wright, for defendant in error.

SIMMONS, C. J. Suit was brought by Norrell against the Augusta Railway & Electric Company. The defendant demurred to the petition, and the court sustained the demurrer. The plaintiff excepted. From the petition it appeared that in 1840 Edward Thomas owned certain land immediately north of the right of way of the Georgia railroad, this land being then beyond the limits of the city of Augusta, but since 1870 within the limits. Thomas by deed conveyed to the county authorities having charge of the county roads a strip of land 70 feet in width off of the south of his land, this strip lying between the railroad right of way and the remaining lands of Thomas, and extending for some 160 feet east and west. This strip was definitely and fully described in the deed, which expressed as its consideration the benefits the grantor and his heirs and assigns expected to derive from the opening of a road thereon. The deed stated that the grantor conveyed this land "on which to locate and open a public road from the city of Augusta to the Turknott Springs road." The county authorities accepted this deed, and immediately proceeded to locate a road upon the strip conveyed. This road was opened only 35 feet wide, occupying the half of the strip which was next to the remaining lands of the grantor. The road so opened was known as "Railroad Avenue." The unused strip 35 feet wide lay next to the railroad right of way the entire length of the strip. The possession of this portion, unused by the county authorities, was retained by Thomas, who, in 1845, made a deed of his lands to Hight, and included therein "all right, title, and interest of the [grantor] to a narrow strip of land between said rail-

road and said railroad avenue or public road, so far as said narrow strip of land fronts the land herein conveyed only." Hight went into possession under this deed, and retained possession until 1861, when he conveyed to plaintiff's father all of the land conveyed to him by Thomas, including the strip between the railroad and the public road. By subsequent instruments, this property was conveyed to the plaintiff. The possession of the plaintiff and his predecessors in title was continuous from the time of Edward Thomas to the year 1900. During part of this time, plaintiff used the land between the railroad and the public road as a woodyard, and one of his tenants erected a shanty on it. During all of this time the public road was never widened. In 1900, the city council of Augusta authorized the defendant to lay a spur track across Railroad avenue from an adjoining cross street. The defendant laid the track upon a portion of the strip which was in the possession of the plaintiff, took possession of the entire unused strip, and used part of it for piling and storing iron rails. This was done over the remonstrance of the plaintiff, who thereupon filed this petition. The petition alleged that the land in dispute was worth \$1,000, and prayed, as actual and vindictive damages, for the defendant's trespass, \$2,000.

1, 2. That prescription does not in any case run against the state itself is no longer open to question. *Glaze v. Railroad Co.*, 67 Ga. 761; *Kirschner v. Same*, *Id.* 760. There is also no doubt that, when the city limits of Augusta were extended so as to include this land, the road became a city street, and the city succeeded to the rights and jurisdiction of the county over it. We are also clear that by the acceptance of the deed the authorities accepted the entire tract conveyed by Thomas, and there can arise in this case no question as to an acceptance of only such part of the land as was actually used. The entire tract was accepted by the acceptance of the deed, and the failure to use all of it immediately was not such an act as could be construed as an abandonment of the unused portion. Nor does the petition present a case in which the doctrine of estoppel could be invoked, and the city estopped to set up its title. We are therefore squarely confronted with the question whether prescription will run against a municipal corporation so that adverse possession of a part of a street may bar the city of the right to recover it. This question has many times been passed upon by various courts, but has never been expressly decided by this court. Though this court did, in *City Council of Augusta v. Burum*, 93 Ga. 68, 73, 19 S. E. 820, 822, 26 L. R. A. 340, in an action against a municipal corporation, say: "Although . . . in Georgia the maxim, 'Nullum tempus occurrit regi,' had been abrogated, we are quite certain that no statute of limitations or prescription of any kind could so operate as to

§ 2. See Adverse Possession, vol. 1, Cent. Dig. § 45.

abridge in any manner the exercise of the legitimate legislative powers of the state, conferred by the people for the common welfare of all. In this sense, at least, the kindred maxim, 'Nullum tempus occurrit reipublicae,' is still of force, and it is applicable to a city council, so far as its legislative powers conferred upon it by statute are concerned, as well as to the state itself; the city government being, in this respect, a part of the lawmaking power of the commonwealth." After a careful consideration of the question, we are of opinion that the better view is that prescription does not run against a municipal corporation in regard to land held by it for the benefit of the whole public. While it may be entirely proper to apply the doctrine of adverse possession and prescription to a city in matters in which it is concerned in a capacity which is private rather than governmental in its nature, we think that adverse possession by an individual of property held by a city for the benefit and use of the whole public should not be allowed to ripen into a prescriptive title. The city is in some respects not a division of the state, but it is at least an agent of the state, exercising, within certain limits, governmental functions and powers. If prescription does not run against the state, it should not run against a city in respect to rights which are intrusted to the city for the benefit of the public generally, and as to which it exercises governmental powers. A municipal corporation is intrusted with the care and control of its streets for the use and benefit, not of its own inhabitants merely, but of the whole public, and prescription, which does not run against the state, should not run against its trustee. Every unauthorized encroachment upon a street, by which its use is in danger of impairment, is a public nuisance, and cannot be justified or sanctified by the lapse of time, however great. See *Tied. Mun. Corp.* § 312. The doctrine of prescription is based on a presumption, after long-continued adverse possession, that the possession is under a grant. Where the land so held is part of a city's streets, and the city has no power to make a grant, it would seem that this presumption should not arise. Courts will not presume a grant where no grant is possible. For these reasons, we believe that the better doctrine is as above stated, though there are not a few very respectable authorities to the contrary. For summaries of the decisions on this question and some of its immediate branches, see *Dill. Mun. Corp.* (4th Ed.) §§ 673-675; 1 *Am. & Eng. Enc. Law* (2d Ed.) 878 et seq.; notes to *Meyer v. Graham* (Neb.) 18 L. R. A. 146 (s. c. 50 N. W. 763, 29 Am. St. Rep. 500).

It follows that the city of Augusta had title to the land in dispute in the present case, and that the plaintiff was himself a trespasser, and had no title. The defendant went into possession under authority from

the owner, and the plaintiff certainly cannot recover damages for the defendant's use of the land in so far as the same was authorized, and a proper use of a highway. It was contended, however, that piling up and storing iron rails is not a proper use of a street, and that the defendant is at least liable for maintaining such a nuisance. The facts alleged in the petition show that this alleged nuisance is maintained directly in front of plaintiff's residence, and immediately across the opened street therefrom, and that it is unsightly; but it does not appear that it interferes with his ingress or egress, or that he suffers any other special injury. Be that as it may, the petition seeks damages for a trespass upon land belonging to the plaintiff, and under such a petition the plaintiff cannot recover damages as for the maintenance of a nuisance in a public highway. The court below was, therefore, right in sustaining the demurrer to the petition.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 320)

SAVANNAH ELECTRIC CO. v. PEDRICK.
(Supreme Court of Georgia. Aug. 9, 1902.)

INJUNCTION—OBSTRUCTING STREET.

1. Under the facts appearing in the present case, there was no error in refusing to grant an injunction.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Action by Savannah Electric Company against P. S. Pedrick. Judgment for defendant, and plaintiff brings error. Affirmed.

Osborne & Lawrence, for plaintiff in error.
R. R. Richards, for defendant in error.

COBB, J. This was an application by a street railway company to enjoin Mrs. Pedrick from erecting a building near its track in the town of Warsaw. The ground upon which the injunction was sought was that the street railway company had been for a number of years, with the knowledge and consent of Mrs. Pedrick and her predecessors in title, operating its line of railway near her property, and that the building she was erecting to replace a building which had been burned was nearer the track of the railway than the destroyed building was; that a portion of the building now being erected was within the limits of a street of the town; that it was so near the railway as to render it a menace to persons traveling upon the railway; that it was an obstruction to the public, and should be enjoined. The defendant maintained in her answer that the building being erected by her was not as near the track of the railway company as the old building which had been destroyed; that she and her predecessors in title had been in adverse possession of the land upon which the building was being erected for

more than seven years, under written evidence of title; and that no part of the building was in a public street of the town. The judge refused to grant the injunction, and the plaintiff excepted. While the evidence was conflicting upon some of the material points in the case, there was evidence from which the judge could find that the building being erected was not as near the track of the railway company as the one which was destroyed, and that no part of the land covered by the building had ever been a portion of a public street in the town of Warsaw. If this was true, no injunction should have been granted, and, as the judge was authorized to find from the evidence that this was the case, his judgment refusing the injunction will not be disturbed. Under this view of the case, the question whether prescription will run against a municipal corporation is not involved; but see, in this connection, *Norrell v. Electric Co.* (Ga.) 42 S. E. 466.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 272)

MALONE v. STATE.

(Supreme Court of Georgia. Aug. 9, 1902.)

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—AFFIDAVIT—DILIGENCE—PROOF OF VENUE—ASSAULT WITH INTENT TO KILL—VERDICT.

1. The discretion of the judge in overruling a motion for a new trial in a criminal case, based on alleged newly discovered evidence, will not be controlled when the movant fails to make affidavit that he did not before the trial know of the facts upon which the motion is based, and could not, by the exercise of proper diligence, have discovered them. And this is true though his counsel may make affidavit, evidently based on information received from others, to the effect that at the time when the alleged offense was committed the accused was in such a condition that he could not have known of the existence of the evidence upon which the motion is based, and though the counsel also deposes that the failure to discover the evidence before the trial was not due to any lack of diligence on his part.

2. Testimony of a witness that the offense was committed "in this county" is sufficient proof of the venue, when it appears from the record that the trial was had in the county in which the offense was alleged to have been committed.

3. When, in the trial of one charged with the offense of assault with intent to murder, the evidence demands a finding that the accused is guilty of the offense charged, and the statement of the accused admits that he was at the scene of the crime, and was drinking, and that if he shot the person alleged to have been assaulted he did not know anything about it, a verdict finding the accused guilty of shooting at another furnishes the accused no ground of complaint. This case is distinguished from the case of *Kendrick v. State*, 113 Ga. 759, 39 S. E. 286, by the fact that in that case the statement of the accused, if true, established an alibi.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. §§ 2396, 2397, 2399.

4. There was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; *Z. A. Littlejohn*, Judge.

John Malone was convicted of crime, and brings error. Affirmed.

J. R. Williams and Allen Fort, Jr., for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 351)

MACON CONSOL. ST. R. CO. v. JONES.

(Supreme Court of Georgia. Aug. 9, 1902.)

NEW TRIAL—REVIEW OF FIRST GRANT—QUESTION OF LAW.

1. Unless the verdict rendered was absolutely demanded by the evidence (which does not appear in this case), this court will not undertake to decide whether or not the trial judge abused his discretion in granting a first new trial, even though the grant thereof was based solely upon a single question of law, in the determination of which it was unnecessary to consider the evidence in the case. *Weinkle v. Railroad Co.*, 33 S. E. 471, 107 Ga. 367; *Watson v. Mortgage Co.*, 37 S. E. 363, 112 Ga. 253; *Harvey v. Bowles*, 37 S. E. 363, 112 Ga. 363; *McCain v. College Park*, 37 S. E. 971, 112 Ga. 701; *Carter v. Dunson*, 38 S. E. 830, 113 Ga. 374; *Thornton v. Insurance Co.*, 42 S. E. 287, 116 Ga. —.

(Syllabus by the Court.)

Error from city court of Macon; *W. D. Nottingham*, Judge.

Action by *W. J. Jones* against the *Macon Consolidated Street Railroad Company*. Judgment for plaintiff, and defendant brings error. Affirmed.

Bacon, Miller & Brunson and *W. C. Nottingham*, for plaintiff in error. *M. Felton Hatcher* and *T. J. Cochran*, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 235)

MCCALL v. HERRING.

(Supreme Court of Georgia. Aug. 8, 1902.)

BILL OF EXCEPTIONS—PLEADINGS—TRANSCRIPT OF RECORD—ENFORCEMENT OF LIEN—BANKRUPTCY AS DEFENSE—USURY.

1. When a plea to an action has been duly and regularly filed, or an amendment thereto allowed and filed, such plea or amendment becomes a part of the record of the case, and, although afterwards a demurrer to the plea as amended is sustained, and the same stricken, if it be sought to review the ruling striking the same it is not necessary that such plea be set out in the bill of exceptions. It can properly be incorporated as a part of the record in the transcript which is made and certified by the clerk. The motion to dismiss is overruled.

2. In an action in which only the establish-

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. §§ 808, 812.

ment of a special lien on specific property is sought, and no judgment in personam is prayed against the defendant, a plea to the effect that the defendant has been adjudicated a bankrupt presents no defense to the action.

3. The taking of interest at the highest legal rate, in advance, by way of discount on short loans, in the ordinary course of business, is not usurious; but a reservation of interest in advance, in an ordinary transaction of lending and borrowing money, for a period of five years, is usurious when the amount reserved and the amount contracted to be paid aggregate a sum which is in excess of the highest legal rate for the term of the loan.

4. The statements of fact made in the plea, which by the demurrer are admitted to be true, are sufficient to make a good plea of usury. The trial judge, therefore, erred in sustaining a demurrer to this part of the plea, and in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by E. S. Herring against J. K. McCall. Judgment for plaintiff, and defendant brings error. Reversed.

O. E. & M. C. Horton, for plaintiff in error.
John M. Graham and E. M. & G. F. Mitchell, for defendant in error.

LITTLE, J. Elizabeth S. Herring instituted an action in the city court of Atlanta against J. K. McCall. Originally she sought both to recover a judgment on a promissory note, and also to establish a lien in her favor against certain land which she alleged had been conveyed to her, at the time of the execution of the note, to secure its payment. By amendment, the plaintiff alleged that the defendant had filed a petition in the district court of the United States for the Northern district of Georgia, to be adjudicated a bankrupt, and thereafter prayed said court to enjoin the plaintiff from prosecuting her suit; that such application for injunction resulted in an order allowing the plaintiff to prosecute her suit for the purpose of obtaining a special judgment, and having her lien fixed against the property described in the deed, but staying the suit in so far as it sought to obtain a general judgment against the defendant. The plaintiff then struck her prayer for a general judgment, and prayed only for a special judgment fixing her lien for the amounts alleged to be due. The defendant answered, admitting the execution of the deed, but alleging that the same was void because the note which it was given to secure was infected with usury. He also averred that he had filed his petition in bankruptcy and been adjudicated a bankrupt; that the property described in the deed had been scheduled in his petition in bankruptcy; and that the plaintiff's debt was one against which a discharge in bankruptcy would be good; and he set up the bankruptcy proceedings as a defense against the debt. The averments of the plea in relation to the defense of usury set out in detail the facts on which the defendant relied to show that the debt was infected with usury, which will hereafter be specifically referred to. The

plaintiff demurred to the answer and plea on a number of grounds, among others, that it set forth no legal defense, and failed to show usury; that it does not appear by the answer that the lender retained or received or shared in the \$80 retained as commissions; and that those parts of the answer which set up the bankruptcy of the defendant were insufficient as a defense to the action, and irrelevant. A hearing was had on the demurrer, and the answer of the defendant was stricken, and by direction of the court the jury returned a verdict setting up and establishing a lien in favor of the plaintiff, on the land described in the petition, for the amount claimed thereon, together with attorney's fees and interest. The defendant excepted to the ruling of the court in sustaining the demurrer and striking his answer, and also in directing the verdict which was rendered.

1. When the case was called in this court, a motion was filed to dismiss the writ of error on two grounds: First, that the plea, having been stricken from the files, is not properly a part of the record, and should therefore have been incorporated in the bill of exceptions, and not sent up by the clerk as a part of the transcript of the record; second, that there was no sufficient assignment of error, that the assignments in relation to striking the plea could not be understood without the plea, and the other assignments were not specific, and do not point out the errors complained of. It is sufficient to say, in regard to the second of these grounds of the motion to dismiss, that it is without merit. The trial judge directed a verdict, and the bill of exceptions alleges that the court erred in so doing. This was a sufficient assignment of error to call in question the correctness of such direction, and, as we shall presently see that the stricken plea was a part of the record, there is no merit in the complaint that there was no sufficient assignment of error.

We are well aware that it has been ruled in several other states that when a plea or answer has been stricken the effect is to take such plea or answer out of the record; that, in order to be considered by a reviewing court, it must come up in the bill of exceptions; and that sending it up as a part of the record, by the clerk of the trial court, does not make it such. See 2 Cyc. Law & Proc. 1069; Halpern v. Spencer (Ark.) 47 S. W. 637; Pelham v. Page, 6 Ark. 535; Harness v. Ross, 13 Ind. App. 575, 41 N. E. 1065; Fry v. Leslie, 87 Va. 269, 12 S. E. 671; and cases cited in 3 Cent. Dig. 107, § 2352, under title "Appeal and Error." On the other hand, it was ruled in the case of Whiting v. Fuller, 22 Ill. 33, that "an affidavit of merits to a plea is a part of the plea, and is preserved in the record without a bill of exceptions. This is the case, also, where a plea is stricken from the files." In the case of Abbott v. Douglass, 28 Cal. 295, it was ruled that "an answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment roll." In Davis v. Water Co. (Cal.) 33 Pac. 270, it was

also ruled that "a demurrer, though stricken out, constitutes a part of the judgment roll." If the effect of dismissing a plea on demurrer is to take it out of the record, the same result would follow in case the petition was dismissed on demurrer; and while, perhaps, there is no adjudicated case in which this court has been called on to rule the question directly, it has not infrequently recognized a petition dismissed on demurrer as a part of the record; thus tacitly, at least, indorsing the view taken in the Illinois and California cases cited *supra*. It seems that the rulings of those courts are founded on the better reasoning. In the case of *Sibley v. Association*, 87 Ga. 738, 13 S. E. 838, it was ruled that "an amendment to the declaration, which was offered at the time of hearing a demurrer to the declaration, and disallowed by the court, is no part of the record, and can only come to the supreme court by being set out in the bill of exceptions, or annexed to the same as an exhibit duly authenticated." As the reason for this ruling, Chief Justice Bleckley said, in the course of his opinion delivered in that case, that the "amendment did not become a part of the record so as to be authenticated by the clerk's certificate, and its contents are not set out in the bill of exceptions, nor in any copy of it annexed to the bill as an exhibit, or otherwise duly authenticated by the presiding judge. For this reason, although the record as sent up by the clerk is accompanied by what purports to be an amendment without any mark of filing upon it, we do not consider it as properly before us." This ruling is not only sound, but certainly the principle on which it is based does not conflict with that on which the California and Illinois cases were ruled. The amendment in the *Sibley* Case, just cited, never became a part of the record of the case; it was offered, but not allowed, by the judgment of the court; had it been, it would have become a part of the record. Having become such, it is difficult for us to perceive how a subsequent ruling that such plea or amendment sets up no defense to the action has the effect of divesting it of its character as a plea of record. It is, under such circumstances, not physically taken from the files, nor separated from the other pleadings in the case. Having been allowed and filed, the question whether it contains matter good in defense cannot divorce it from the record. The motion to dismiss the writ of error must therefore be denied on each of the grounds on which it was predicated.

2. The trial judge did not err in striking, on demurrer, so much of the plea as set up the facts that the defendant had been adjudicated a bankrupt, that the debt sued on was one provable in bankruptcy, and that the property described in the deed, which the plaintiff held as security for her debt, had been placed in his schedule of assets on file in the bankrupt court. These facts did not bar the right of the plaintiff to assert her lien against the land which she held as se-

curity for her debt. The plaintiff sought no judgment in personam against the defendant, but only attempted to assert the lien which she had. This she could lawfully have done, even if the defendant had received his discharge in bankruptcy. See *Smith v. Zachry*, 115 Ga. 722, 42 S. E. 102; *Evans v. Rounsaville*, 115 Ga. 684, 42 S. E. 100. Nor was there any error in striking that part of the answer which set up that it was unlawful to enforce the lien as to attorney's fees. Under the contract, they became a part of the debt if the note was placed in the hands of an attorney for collection; and the deed (unless it was usurious) vested the title in the plaintiff to secure this sum as well as the other sums contracted for. We know of no reason why the amount of attorney's fees could not properly be included in the amount for which the special lien was sought to be set up, since it appears that the plaintiff complied with all the requirements of the act approved December 12, 1900, and the defendant did not pay the debt before the return day of the court to which the suit was brought. *McCall v. Walter*, 71 Ga. 287.

3, 4. Devested of a great deal of surplusage, so much of the plea as alleges that the security deed was void because the debt it was made to secure was infected with usury substantially avers the facts to be that the loan was made through the agent and attorney at law of the plaintiff, who negotiated the loan; that while the defendant contracted to borrow \$1,600, and executed a promissory note for that sum, and agreed to pay interest at the rate of 7 per cent. per annum on \$1,600, yet he in fact only received from the plaintiff, as lender, the sum of \$1,520; that plaintiff's agent and attorney, with the knowledge and consent of the plaintiff, retained \$80 from the principal sum as commissions for negotiating the loan; that the amount of the commission, when added to the interest contracted to be paid, exceeds the highest rate of interest allowed by law; that by retaining the sum of \$80 from the principal agreed to be loaned, the lender avoided the necessity of paying commissions to her agent for making the loan, and in this way she was benefited and shared in the commission. The demurrer directed to this part of the answer denies that the \$80, together with the interest contracted to be paid, makes an amount greater than the lawful interest, and that the payment of an eighth of the interest in advance would render the transaction usurious. Further, that it does not appear that the plaintiff retained, received, or shared in said sum of \$80, but that this sum was paid to an attorney for his services in connection with making the loan; and that, contracted in this manner, the loan is not rendered usurious by the fact that the borrower pays or is required by the lender to pay attorney's fees for the examination of title, preparation of papers, and for other services; and that it does not appear that the

services in this instance were not of this character. In support of the demurrer, it is urged by counsel for the defendant in error that, under repeated rulings of this court, a contract providing for the payment of the highest lawful rate of interest in advance is not usurious, and that it has been held that such payment in advance on short loans did not render a transaction usurious; and it is argued that there is no difference in principle between taking interest in advance on short loans, and taking it in advance on a loan made for a number of years.

The contentions raised by the demurrer, and insisted on as reasons sufficient to justify the court in striking the plea, necessarily lead to the determination of the question whether the averments of the plea, when taken to be true, characterize the transaction as a usurious one. If they do, the court erred in striking the plea, because the deed relied on by the plaintiff as the basis of the establishment of her lien would be void. If they do not, the court committed no error, and the validity of the security deed is unaffected. In the case of *Clarke v. Havard*, 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499, Presiding Justice Lumpkin, in the course of a very able opinion which he delivered in that case, and in which he considered the rulings made by this court in a number of cases preceding it, said: "A money lender cannot, in this state, lawfully contract for or reserve any greater rate of interest than 8 per cent. per annum, and the prohibition is just as strong against doing so indirectly as it is against doing so openly and without pretense. It is now too well settled to admit of doubt that, if the agent of a money lender, with his knowledge, charges the borrower a commission, it is the same thing in law as if the lender charged it himself. This is so because he gets a benefit from the agent's services, and because in such cases there is, as to this matter, no separation of principal and agent. The payment of a commission to the lender's agent, being a part of what the borrower expends for the use of the amount he actually receives, is in effect a payment to the principal, if he gives countenance to the exaction of such commission, and is in the nature of interest on the loan. If, then, the commission so paid, and the stipulated interest, together, exceed the lawful interest, the transaction is usurious. These are familiar principles, and should be readily accepted as sound." The principles which this able judge declares to be sound are clearly ruled in the headnotes which precede his opinion, and such ruling obviates the necessity of a review on our part, here, of the various cases which may be found in almost every one of the later volumes which contain the decisions of this court. The rulings made in the *Clarke Case* stand on an entirely different principle from other rulings made where it appeared that

the person negotiating the loan was the agent of the borrower, and not of the lender. Accepting the rulings made in that case as being sound, our next inquiry, in order to fully meet the demurrer, is whether, when the \$80 retained by the agent of the lender is added to the interest contracted to be paid, it appears that the aggregate of these sums is greater than the highest rate of interest allowed by law to be charged. The borrower gave his note for \$1,600, and agreed to pay interest thereon at the rate of 7 per cent. per annum,—\$112. The commission retained amounted to \$80. The borrower, according to his plea, received \$1,520. Interest upon this sum at the rate of 8 per cent. per annum, the highest allowed by law in this state, is \$121.60. This would make the amount of interest to maturity,—five years,—\$608. Any greater sum than \$608 received as interest for this time on this amount would be usury. But, according to the averments of the plea, the interest contracted to be paid,—seven per cent. on \$1,600 for five years,—was \$560, which, added to the \$80 retained as commissions, aggregates \$640 (not including in this calculation any interest on the \$80), as interest on the \$1,520 received by the borrower. Thus it is clear that the borrower would pay and be liable to pay \$32 more than the highest legal rate during the period of the loan for the sum borrowed. And the result is the same if we treat as chargeable to the borrower the \$16 which, in one part of his amended plea, he admitted the plaintiff was entitled to receive from him for preparation of abstract, etc. These figures are conclusive to our minds that, when the principles ruled in the *Clarke Case*, *supra*, are applied to the facts set out in the plea and by demurrer admitted to be true, the transaction represented by the promissory note, which is the foundation of the action in the present case, was usurious. Council, however, contend that, if the \$80 paid by the borrower as commissions is to be treated as interest reserved, then the transaction would not be usurious, for the reason that this amount which was deducted from the face of the note must be treated as the payment of interest pro tanto in advance; that \$80 represents 1 per cent. on the amount contracted to be loaned for the full term, five years; and that, as the balance of the interest contracted to be paid amounts to 7 per cent., the whole rate of interest, when so treated, aggregates 8 per cent., and is within the lawful limit; and that the payment of 1 per cent. of interest in advance under these circumstances does not render the transaction usurious. An examination discloses that the adjudicated cases are somewhat in conflict on the question whether a reservation of the highest legal rate of interest in advance renders a loan transaction usurious, but a majority of those which we have had opportunity to consult draw a distinction, in this respect,

between what is termed a long and a short loan. Counsel for defendant in error argues that on principle no such distinction exists, and we agree with him. We are unable to see any reason why on principle the reservation of the highest rate of interest in advance on short-term loans does not render the contract usurious. It is perfectly clear that in pure discount, or the absolute purchase, by one, of the promissory note of another, the laws relating to usury ought not to apply, for the reason that one may give such a price in the purchase of a promissory note of an individual as he may see fit, just as he may for a horse or other article of personal property. In that case, the note put on the market by the maker represents property which the maker wishes to sell; and if one choose in open market to buy it the price concerns no one except the owner and the purchaser. Such a transaction is not, however, the loan of money. But the authorities have gone further, in the declaration that certain transactions which they call "discount" do not render a certain species of loan usurious.

Mr. Webb, in his treatise on Usury (section 111) declares, on the authority of a large number of adjudicated cases cited in note 3, p. 126: "That it is not usury to discount commercial paper in the ordinary course of business is absolutely settled. This rule of law arose out of custom, and does not depend upon statute." Mr. Tyler, in his work on Usury (page 298), declares that "the courts uniformly hold, at the present day, that the interest for ordinary paper having the usual time to run, such as is the practice by banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury. It is obvious, however, that the length of time the paper has to run must have a controlling effect upon this question. If the note has a short time to run the interest may be taken in advance, whereas the time may be so lengthened out as to make the taking of the interest, in advance, palpably usurious." Whether, then, there is, in principle, any difference in such transactions in taking the highest legal rate on short and long time loans, is not now a question with which we are materially concerned; for undoubtedly, according to the authorities generally, the proposition that taking the highest rate of interest in advance does not render the transaction usurious may be considered settled on short loans. Indeed this court, in the case of *Mackenzie v. Flannery*, 90 Ga. 590, 18 S. E. 710, ruled that "to take eight per cent. interest in advance by way of discount on short loans, in the usual and ordinary course of business, is not usurious." And in the case of *Trust Co. v. Dottenheim*, 107 Ga. 614, 34 S. E. 221, Mr. Justice Cobb said: "It is also well settled that a contract providing for the payment of the highest lawful rate of interest in advance is not usurious, though many of the courts which

recognize this as an established rule express doubts as to whether upon principle such practice should be allowed to prevail."

Just where the line is to be drawn so as to determine what is a short, and what a long, term loan, does not seem to have been settled. The period of one year seems to have been fixed in the case of *Tallman v. Truesdell*, 3 Wis. 443. But the rule that interest at the highest legal rate may be taken in advance on long loans without rendering the contract usurious is not established by the authorities generally. There are a number of cases so ruling, in many of which the rulings are made on statutes. Certainly, there are no decisions of this court which so declare, and we are not aware of any authority which binds us so to rule. While we accept the doctrine almost universally applied to short loans, in the absence of controlling authority we decline to extend that rule in the case of long loans. On principle it cannot be done, nor ought it to be, for the reasons which are tersely stated by Mr. Webb in this work cited supra (section 113), in the following language: "Interest is compensation for the use of money. If the amount of the interest is deducted in advance, it is plain that the borrower never uses the interest so paid. He does not receive the full amount of his loan. He cannot use that which he was to receive unless it is paid to him. He cannot employ money kept out of his possession. It renders the borrower no service, performs no purpose, pays no debts, buys no property, satisfies no wants, and accomplishes nothing, as far as the borrower is concerned, for which he should be compelled to pay interest." While the language of Mr. Justice Cobb in the *Dottenheim Case*, cited above, is very broad, it was not, as we understand it, meant to include interest on long-time loans, but evidently referred to the rule which seems so generally to prevail, that the highest rate of interest may lawfully be taken in advance on short loans. If it be contended that this language referred to long as well as short loans, it may be replied that that question was not one which was passed on by the court in that case. If the contention of the defendant in error is sound, then it would lead to this result: If a loan of \$500 were made for a term of five years at the rate of 8 per cent. per annum, then at the time of making the loan the lender could reserve the interest for the whole period, and give to the borrower only \$300 in satisfaction of his contract; if such a loan were made for 10 years, the law would be fully met by the lender handing to the borrower \$100, and accepting his obligation to pay him \$500 at the end of the period; if it were made for 15 years, instead of the borrower receiving anything from the lender, the former would not only get nothing, but would pay the lender \$100 for the privilege of executing to him his promissory note. The argument would not be dignified

by pursuing the subject further. It is all sufficient to say that such absurd results cannot be accomplished consistently with law or reason; and to state such conclusions as the legitimate outgrowth of a principle is to stamp the principle as unsound. In our opinion, the answer in the present case averred facts which, when taken as true, rendered the transaction between the parties a usurious one, and the court erred in sustaining the demurrer to that part of the answer setting forth these facts.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 62)

BROOKS et al. v. THRASHER.

(Supreme Court of Georgia. July 24, 1902.)

ACTION ON NOTE—PETITION—AMENDMENT—DISMISSAL.

1. While a petition in an action against A. and B., upon a promissory note purporting to be an instrument which they had executed at the same time,—A. by signing the paper on its face, and B. by writing his name on the back thereof,—may be amended by striking the name of A. as a defendant, such petition cannot properly be so amended as to make the same allege that when the note was originally executed it was signed by A. alone, B. not then being a party to it; that subsequently the contract between A. and the payee, evidenced by the note, was rescinded, and A. released from all liability thereon, and that thereupon B. wrote his name on the back of the note, thereby intending to make an entirely new note, evidencing his sole and individual promise to the payee. An amendment of this kind would set forth a new cause of action, for its effect would be to convert a suit upon an undertaking entered into by two persons at one time into a suit upon another and entirely distinct undertaking, entered into by one of these persons at a different time.

2. It was, however, in such a case, erroneous to dismiss the plaintiffs' petition, upon the ground that B. appeared from the petition to be a surety upon the note, and the suit could not proceed against the surety after the same had been discontinued as to the principal; the note being in form a joint and several undertaking.

3. It results from the foregoing that the court erred in dismissing the plaintiffs' petition as amended.

(Syllabus by the Court.)

Error from superior court, Hart county; H. M. Holden, Judge.

Action by Brooks & Tabor against M. C. Thrasher. Judgment for defendant. Plaintiffs bring error. Reversed.

W. L. Hodges, J. N. Worley, and A. A. McCurry, for plaintiffs in error. J. H. Skelton and O. C. Brown, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 181)

WELDON et al. v. AYERS.

(Supreme Court of Georgia. July 22, 1902.)

SURETY ON NOTE—RELEASE—USURY—PLEADING—CERTIORARI TO JUSTICE.

1. A surety upon a promissory note, who signs the same in ignorance of the fact that the contract between the payee and the maker is one providing for the payment of usury, is not, because this fact is concealed from him, discharged altogether from liability on the note. By a proper plea of usury, the surety may prevent a recovery against him of a sum greater than the principal of the debt and legal interest thereon.

2. In the absence of a proper plea of usury, setting forth the facts necessary to determine the exact amount of usury contracted to be paid, so that the same may be set off against the amount sued for, a judgment in favor of the plaintiff for the latter amount is not contrary to law.

3. The verdict rendered in favor of the plaintiff in the justice's court was, under the facts appearing at the trial, the only proper verdict that could have been rendered; and the court did not err in overruling the certiorari, which complained merely that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Hart county; H. M. Holden, Judge.

Action by L. J. Ayers against W. S. Weldon and others. From a judgment of the district court refusing the certiorari to review a judgment for plaintiff in a justice court, defendants bring error. Affirmed.

O. C. Brown, for plaintiffs in error. J. H. Skelton, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 63)

INMAN et al. v. CRAWFORD et al.

(Supreme Court of Georgia. July 24, 1902.)

BREACH OF CONTRACT—EVIDENCE—AUTHORITY OF AGENT—LIABILITY OF PRINCIPAL—INSTRUCTION.

1. On the trial of an action for breach of contract, it is erroneous to allow in evidence another contract, relating to an entirely distinct transaction, having no connection with the contract alleged to have been broken.

2. When the authority of a special agent is limited to soliciting and procuring written proposals for the sale and delivery of cotton, to be binding when the same are agreed to in writing by his principal, the latter is not bound by a secret stipulation or agreement between such agent and the party who submits the written proposal, which is not contained in the writing. The law in such a case is well established that those who deal with a special agent are bound at their peril to take notice of the extent of his authority.

3. It was, under the evidence in the present case, erroneous to give to the jury an instruction based on the law of general agency; there being no evidence to warrant a finding that such agency existed at the time of the execution of the contract which was the subject-matter of the suit. On the contrary, the evidence demanded a finding that the authority of the agent in this case was special and limited.

4. The issues between the parties and the merits of the case as presented by the evidence

12 See Bills and Notes, vol. 7, Cent. Dig. § 1971.

are substantially controlled by the rulings above announced. The points insisted on in the motion for a new trial, not embraced in the rulings above made, do not show any error which would authorize a reversal of the judgment.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; H. M. Holden, Judge.

Action between Inman & Co. and Crawford & Maxwell. From a judgment, Inman & Co. bring error. Reversed.

Saml. H. Sibley, for plaintiff in error. Wm. M. Howard, E. P. Shull, and Strickland & Green, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 53)

MORRIS v. CONTINENTAL INS. CO.

(Supreme Court of Georgia. July 24, 1902.)

TENDER—BOND FOR TITLE—SUFFICIENCY.

1. Since a tender by the obligee in a bond for title to the obligor of the amount due upon a promissory note described in the bond is not in law good if coupled with a condition that the obligor shall execute and deliver to the obligee the conveyance which he, upon paying the note, is entitled to receive, it follows that equity will not, at the instance of the maker of the note, enjoin an action thereon by the payee, on the ground that the latter, upon being tendered, with such condition, the amount due on the note, failed or refused to execute and deliver such conveyance as that called for in the bond for title. *De Graffenreid v. Menard*, 30 S. E. 560, 103 Ga. 651; *Elder v. Johnson*, 42 S. E. 51, 115 Ga. 691.

2. Applying what is announced above to the facts of the case in hand, there was no error in denying the interlocutory injunction.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. W. Bennet, Judge.

Action by A. E. Morris, executor, against the Continental Insurance Company. From the judgment, Morris brings error. Affirmed.

Courtland Symmes and Atkinson & Dunwoody, for plaintiff in error. Brandon & Arkwright, W. B. Stovall, and Walter T. Colquitt, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 219)

COMMERCIAL BANK OF JACKSONVILLE, FLA., v. FLOWERS.

(Supreme Court of Georgia. Aug. 8, 1902.)

PLEDGE—VALIDITY.

1. In order to constitute a valid pledge of property to secure a debt, there must be a delivery, either actual or constructive, of the property to the intended pledgee. Consequently, the delivery, as collateral security to a promissory note, of a paper purporting to be a wharfinger's receipt for property therein described, conveys to the intended pledgee no

interest whatever in such property, when the same is not in the possession of the wharfinger or the party who undertakes to pledge it.

(Syllabus by the Court.)

Error from city court of Brunswick; J. D. Sparks, Judge.

Action by A. A. Flowers against Des Rochers & Phinney Co. Judgment for plaintiff on levy of execution. The Commercial Bank of Jacksonville, Fla., filed claim. Judgment for Flowers, and the bank brings error. Affirmed.

R. H. Liggett, A. L. Franklin, and D. W. Krauss, for plaintiff in error. W. E. Kay, for defendant in error.

FISH, J. In the view which we take of this case, it is controlled by the principle laid down in the above headnote, and it is, therefore, unnecessary to consider any of the questions made except the one therein indicated, which can be reached and determined without passing upon any of the others. Certain described lumber, while in the possession of Hopkins & Co., wharfingers, and lying upon their dock in the city of Brunswick, was levied upon under an attachment for purchase money in favor of Flowers, and against Des Rochers & Phinney Co., and was claimed by the Commercial Bank of Jacksonville, Fla. Upon the trial of the claim case, the claimant relied for title upon a wharfinger's receipt issued by Hopkins & Co. to Des Rochers & Phinney Co., and by the latter attached to and pledged as collateral for a note for \$1,000, given by such company to the National Bank of Brunswick, Ga., which bank regularly transferred the note and the accompanying collateral, for value, to the claimant. It clearly appears from the evidence that at the time that this receipt was issued, and at the time that it was transferred to the Brunswick bank, neither Hopkins & Co. nor Des Rochers & Phinney Co. had possession of the lumber in controversy, and that the latter did not then even have any title thereto. This particular lumber then belonged to, and was in the possession of, Flowers, the plaintiff, at his sawmill in Sumner, Worth county, Ga. He had contracted to sell to Des Rochers & Phinney Co. a certain amount of lumber of this description, and several days subsequently to the issuing of the wharfinger's receipt to that company by Hopkins & Co. and to its transfer to the Brunswick bank, he did ship the lumber by rail to Des Rochers & Phinney Co., at Brunswick, where it was received for that company by Hopkins & Co., the wharfingers, and deposited upon their dock. The sale by Flowers to Des Rochers & Phinney Co. was a cash transaction, and he accordingly drew a draft on them for the purchase money, which not being paid, he sued out an attachment for the purchase money, and had the lumber levied on thereunder. The transaction between Des Rochers & Phinney Co. and the Bruns-

wick bank, relative to this lumber, was an effort on the part of the former to pledge or pawn the lumber to the latter to secure a debt. We say it was an effort to do so, because we shall now endeavor to demonstrate that the lumber was not pledged, and that, therefore, the intended pledgee acquired no interest in it. "A pledge, or pawn, is property deposited with another as security for the payment of a debt. Delivery of the property is essential to this bailment, but * * * warehouse receipts, elevator receipts, bills of lading, or other commercial paper symbolical of the property, may be delivered in pledge." Civ. Code, § 2958. As above indicated, the very essence of a pledge or pawn is deposit. The property must be deposited, either actually or constructively, with the pledgee. Where there is no delivery, either actual or constructive, there is no pledge. *Bank v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400. See, also, *National Exch. Bank v. Graniteville Mfg. Co.*, 79 Ga. 25, 3 S. E. 411. At the time of the transaction between Des Rochers & Phinney Co. and the Brunswick bank, whereby the former undertook to pledge this lumber to the latter, Des Rochers & Phinney Co. could not pledge this particular property, for the simple and sufficient reason that such company did not then have possession of it, and hence could not deliver possession to another. It was then the property of Flowers, and was in his possession, at his sawmill in Worth county. A warehouseman's or a wharfinger's receipt for particular property may be used, in commercial transactions, as the representative of and a substitute for property which has been deposited with him, and the delivery of the property described in such receipt may be effected by the delivery of the receipt; but the delivery of a so-called receipt issued by a warehouseman or wharfinger, which represents nothing in his possession, is not a symbolic delivery of anything. Before there can be a substitute, there must be an original. Here, the receipt issued by Hopkins & Co. to Des Rochers & Phinney Co. could not represent the lumber in controversy, for this lumber was not then in the possession of these wharfingers, nor, as we have seen, was it then even in possession of Des Rochers & Phinney Co.; nor was this lumber in the possession of either of these parties at the time that this receipt was transferred by Des Rochers & Phinney Co. to the Brunswick bank. There can be no symbolical delivery of property which is not, either actually or constructively, in the possession of the party undertaking to deliver it. It is very clear that, so far as this lumber is concerned, the Brunswick bank took a paper which represented and was symbolic of nothing. Therefore no property was constructively delivered to this bank as a pledge when this so-called receipt was delivered. The lumber in controversy not having been pledged to the Brunswick

bank as collateral security to the note which it took from Des Rochers & Phinney Co., that bank acquired no lien on or interest in it, and was, therefore, powerless to transfer any to the Jacksonville bank to which it transferred the note and the receipt.

It follows that the claimant had no title to or interest in the property levied upon, and the judgment of the court below must be affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 45)

HILL v. ARNOLD et al.

(Supreme Court of Georgia. July 23, 1902.)

GARNISHMENT—WAGES OF LABORER—PAYMENT.

1. When money due a laborer is exempt from seizure by the process of garnishment, it is protected whether in the hands of the employer or a third person, and cannot be reached by a garnishment until it has passed, either actually or in legal contemplation, through the hands of the laborer.

2. A deposit by a debtor in a bank to the account of his creditor of a sum of money due the latter will not constitute payment to the creditor, unless he consents to the deposit. When such a deposit is made without the creditor's consent, the bank is merely the agent of the debtor to pay the money to the creditor.

3. The judge erred in rendering a judgment finding the fund in dispute subject to the garnishment process.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by Arnold & Co. against J. B. Hill and others. From a judgment, J. B. Hill brings error. Reversed.

C. P. Harris, for plaintiff in error. Jos. N. Worley, for defendants in error.

COBB, J. Arnold & Co. sued Hill on a promissory note, in the city court of Elberton, and caused summons of garnishment, returnable to that court, to be served upon the Bank of Elberton. The garnishee answered that the sum of \$127.38 had been "deposited in the Bank of Elberton to the credit of" Hill, and that this fund was subject to the order of the court. Hill filed a paper in which he set up that the sum mentioned in the answer of the garnishee was deposited in the bank by Mrs. R. C. Mattox, at the request of S. P. Mattox, and that he (Hill) did not request or consent "that said money should be deposited in bank to his credit"; that \$100 of the money was earned by Hill as a laborer employed by S. P. Mattox to work on his farm; that this sum was for this reason claimed to be exempt from process of garnishment; but that no claim of exemption was made as to the \$27.38, that not having been earned by Hill as a daily laborer. The case was submitted to the judge of the city court, presiding without a jury, upon the issue thus made, and he rendered a judgment finding the entire sum

in the garnishee's hands subject to the garnishment. Hill filed a motion for a new trial upon the ground that this judgment was contrary to law and the evidence, and, this motion having been overruled, he excepted.

We are of opinion that the evidence demanded a finding in favor of Hill, and that, therefore, the judge erred in overruling his motion for a new trial. It appears from the evidence that S. P. Mattox was due Hill \$127.38, \$100 of which was earned by him while working as a farm laborer for Mattox. When demand was made upon Mattox for the amount due, he gave Hill an order on Arnold & Co., the defendants in error, and when this order was presented to them they refused to pay it on the ground that Hill was indebted to them in a sum greater than the amount of the order. When this was reported to Mattox, he gave Hill another order on his mother for the sum in question. When this order was presented to Mrs. Mattox, she stated that she did not have the money at home, but would have to go to the bank and get it. She and Hill thereupon went to the bank, but found it closed, the day in question being a holiday, which fact neither of them had previously known. Mrs. Mattox then told Hill to come back the next day, and she would pay him; that she might go to Atlanta, but, if so, she would arrange with the cashier of the bank for Hill to get the money there. Mrs. Mattox testified: "I don't know that anything was said about depositing the money in the bank to Mr. Hill's credit. I just told Mr. Hill that if I should go to Atlanta I would make arrangements with Mr. Heard for him to get his money at the bank." It appears that in the afternoon of the day upon which this conversation took place the cashier of the bank drove over to the home of Mrs. Mattox; that she gave him the money due Hill, and he gave her a receipt for it. When Hill went back to see Mrs. Mattox the next day she told him that the money was in the bank for him, and when he made application to the bank for the money he was told that the bank had been garnished, and could not pay it. Hill testifies in positive terms that he did not "agree that Mrs. Mattox should deposit the money in the bank to [his] credit."

It is not contended that the wages of Hill as a farm laborer were not exempt from garnishment, but it is insisted that the judge could have found from the evidence that the money was deposited in the bank to the credit of Hill with his consent, and that, this being so, it became mingled with the general funds of the bank, and stood in the position of an ordinary debt due by the bank to Hill. In other words, it is claimed that the transaction which took place between all these parties was equivalent to a payment of the money to Hill, and a deposit of it by him in the bank to his credit. We do not think this conclusion is fairly warranted by the

evidence. The real meaning of the transaction was that S. P. Mattox constituted his mother his agent to pay Hill the money, and that Mrs. Mattox constituted the cashier of the bank her agent to do this; and the evidence probably warranted the inference that Hill consented that the cashier should so act. There was never any payment of the money to Hill, and we do not think the evidence authorized a finding that he so regarded the transaction. The Code provides that the wages of certain classes of laborers, "whether in the hands of their employers or others," shall be exempt from garnishment. Civ. Code, § 4732. This being so, the money in the hands of the Bank of Elberton was not subject to garnishment unless it had first passed, either actually or in legal contemplation, through Hill's hands. The judge erred in rendering judgment in favor of Arnold & Co. for the entire sum in the hands of the garnishee.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(118 Ga. 22)

ANDREWS v. STATE.

(Supreme Court of Georgia. Aug. 7, 1902.)

BURGLARY—EVIDENCE.

1. The evidence, being entirely circumstantial, and not sufficient to exclude every reasonable hypothesis except the guilt of the accused, was insufficient to authorize a conviction, and a new trial should have been granted. (Syllabus by the Court.)

Error from superior court, Wilcox county; D. M. Roberts, Judge.

Peter Andrews was convicted of burglary, and brings error. Reversed.

Martin Cameron, for plaintiff in error. John F. De Lacy, Sol. Gen., for the State.

LITTLE, J. Andrews was indicted for the offense of burglary. The bill of indictment charged that he broke and entered the storehouse of R. B. Bowen with intent to commit a larceny therein. He was tried, convicted, and, upon his motion for a new trial being overruled, sued out a bill of exceptions, alleging as error the overruling of his motion for a new trial, the grounds of which were that the verdict was contrary to law, contrary to the evidence, and without evidence to support it. We are of the opinion that the court erred in overruling the motion. It was clearly shown by the evidence that the storehouse of Bowen was burned, and the evidence justified a strong inference that the fire was of incendiary origin. The evidence that there was a breaking rests in this case upon rather a slender foundation. It was shown that on the evening prior to the fire, which occurred at night, the storehouse had been securely closed, and

§ 1. See Criminal Law, vol. 14, Cent. Dig. § 1261, 1262.

one of the witnesses, Roberts, testified that he was awakened about 2 o'clock in the morning, and told that Bowen's store was on fire; that he got up, and went to the burning house, which was near by, and, when he got there, was unable to tell where the fire originated; that the lower part of the house was burning at the time, and the end door was open, and one end of a gang plank 18 feet long, 12 inches wide, and 2 or 3 inches thick was lying in the door; and that it would require two or three men to carry this plank from the depot to the storehouse. He saw no signs on the door, but could just see that it was open. Certainly this evidence was sufficient to show that the door of the house was open, and inferentially that it had been opened by more than one person using a large plank for that purpose. It was possible, of course, that the storehouse might have been entered by burglars before the fire, and equally as possible that the door might have been broken in by other persons after the fire had been discovered. In the absence of any evidence in relation thereto, it is hardly sufficient to make the first inference conclusive, and say that this evidence established beyond a reasonable doubt that the store was broken and entered prior to the fire. But, treating the evidence as sufficient to establish this fact, we are still of the opinion that it was not sufficient to show, with that clearness necessary to support a conviction, that the plaintiff in error was present, or was one of the persons who broke and entered the house. Under the evidence which was introduced, the jury were fully justified in arriving at the conclusion that the accused had, within a very short period of time, been near the storehouse, and that he had gone from there to his own house, a mile or more distant, because it was shown that tracks made by a particularly described pair of shoes led from near the storehouse to the house of the accused. Another circumstance adds some weight to this proof. That was that a bloodhound was placed on a track near the store house, and followed it to the house of the accused. Indeed, on his trial the accused did not contest the fact that he had been at the store a very short time previous to the fire, and had gone from there to his own house. It seems that the burned storehouse was located at a place known as "Lulaville." One of the witnesses for the state testified that, on the day before the night in which the house was burned, he saw the accused, and went with him through Lulaville to his house between 3 and 4 o'clock in the afternoon before the fire. The owner of the dog which tracked the accused testified that he could tell from the conduct of the dog that the track was a little old; that he had known the dog to run a track which had been made 24 hours before. So neither the evidence of the tracks from the store to the house of the accused, nor the fact that they were trailed between

these two points, was sufficient to identify him as the burglar, even had the corpus delicti been sufficiently proved. Two other items of circumstantial evidence, in addition to these, were relied on as making the case against the accused complete. It seems that the accused and one Merritt Dennis occupied different parts of the same house, and that a shoe box which had been in the store on the night of the fire, and certain towels which had been taken from the store, were found in the house occupied by the accused and Dennis. These facts were of course sufficient to create a suspicion that the articles were taken from the storehouse by such occupants, but they were not in law sufficient to fix their guilt. See *Hall v. State*, 65 Ga. 36. The towels were found in the part of the house occupied by Dennis, where an attempt had been made to conceal them, and not in the part occupied by the accused. The box was found in the room of the accused, but it appears that it was not found until about three months after the fire.

The probative value of this evidence must rest on the principle that the recent possession of stolen goods, unexplained, is evidence sufficient to authorize a conviction, of the person in whose possession they are found, of the offense of larceny; and where the charge is burglary, and it is clearly shown that a burglary has been committed; that certain goods were in the house at the time of the burglary; that they were taken therefrom by burglars,—then the recent possession of the goods so taken, unexplained, may authorize the conclusion that the possessor of the goods committed the burglary. See *Lester v. State*, 106 Ga. 371, 32 S. E. 335. In the case of *Turner v. State*, 114 Ga. 45, 39 S. E. 863, it was ruled that: "While proof that an accused was found recently after a larceny in the possession of stolen goods is a circumstance from which the presumption of guilt may arise, sufficiently strong to authorize a conviction, yet where the evidence shows such possession not to have been recent, and the articles stolen of such a nature that they could readily have passed from hand to hand, a presumption of guilt still arises, but it is not, without other evidence, sufficient to sustain a conviction." It was nearly three months after the accused had been arrested and committed to jail before the shoe box was found at his house. This fact, without more, gives to such finding but little weight as indicating the accused as the thief, for the reason that the house was occupied by others. Then an ordinary shoe box is readily transmissible by hand from one to the other, and, had it been at the house immediately after the burglary, it would probably have been at that time discovered. It suffices to say, however, that, whatever probative value this circumstance may have had, it was not sufficient to authorize a conclusion, even when taken with the other circumstances above named, that

the accused was the burglar. He may have been. The circumstances create the suspicion that he was, but this suspicion will not authorize a conviction, nor will any amount of circumstantial evidence support a conviction which does not exclude every other reasonable hypothesis than that the accused was guilty. Every circumstance relied on to convict in this case may be admitted to be absolutely true, and at the same time be consistent with the innocence of the accused. This being true, the conviction cannot stand, and a new trial should have been granted.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness. .

(116 Ga. 50)

WIMBERLY et al. v. TWIGGS COUNTY et al.

(Supreme Court of Georgia. July 24, 1902.)

COUNTY BONDS—ISSUANCE—VALIDITY.

1. The record discloses that all the requirements of the statute in relation to notice, and providing for an election by the qualified voters of Twiggs county to determine the question whether bonds to build a court house and jail for said county should be issued, were either literally or substantially complied with. On the hearing no error was committed by the trial judge, and no legal reason has been made to appear why the judgment validating such bonds is erroneous.

(Syllabus by the Court.)

Error from superior court, Twiggs county; D. M. Roberts, Judge.

Petition by the solicitor general validating certain bonds issued by the county of Twiggs, J. L. Wimberly and others intervening. Judgment validating the bonds, and the interveners bring error. Affirmed.

Henry Bunn Wimberly, for plaintiffs in error. J. F. De Lacy, Sol. Gen., L. D. Shannon, and Hall & Wimberly, for defendants in error.

LITTLE, J. A hearing was had before the judge of the Oconee circuit, on the petition of the solicitor general of that circuit, to validate certain bonds which were proposed to be issued by the county of Twiggs. The petition was brought, and proceedings therefor had, under authority of the act approved December 6, 1897 (Acts 1897, p. 82). In accordance with the terms of that act, J. L. Wimberly and other citizens of Twiggs county intervened, and sought to prevent their validation. At the hearing, the judge passed an order validating the bonds, and to this order the interveners excepted. After due consideration, we are of the opinion that all the requirements of the act of 1897 were either literally or substantially complied with. Certainly the superior court of Twiggs county was the only court which had jurisdiction to validate the bonds, and the fact that the hearing was had before the judge on a day other than that named in the published notice does not render the judgment illegal, when it further appears that the case was regularly continued

by the court from the day named in the publication to the day on which the hearing was had. The object of the publication is to inform citizens whose interests are to be affected of the time when the case is set to be heard. When, on the day so fixed, any good reason appears therefor, such a case, like others, is subject to a postponement or continuance, of which no one but the parties present on that day can justly complain.

It is contended by the interveners that the notice calling the election is illegal, void, indefinite, vague, and uncertain, for a number of reasons; among others, because it does not state with sufficient definiteness what date the bonds are to bear, nor when they will fall due, nor when the last bond will mature; nor does it show that the bonds will be paid off within 30 years; nor does it state that any provision has been made to pay off the bonds when they become due; no price is given at which the bonds are to be sold; no order or authority is given for publishing the notice; the notice does not state what amount of principal and interest is to be paid each year, and what time of the year each is to be paid; and no date appears to the notice. After a careful consideration of the questions presented, we are of opinion that there is no merit in any of them. The notice distinctly stated that the election would be held on March 6, 1902, to determine the question whether the bonds should be issued. The purpose expressed was the building and furnishing of a court house and jail for Twiggs county. It appeared in evidence that this notice had been published in the manner, and for the time prior to the election, which the act prescribed. The notice declares that the amount of the bonds shall be \$25,000; that they shall bear interest at the rate of 4½ per cent., and be of the denomination of \$1,000 each. It is then distinctly stated: "One of said bonds to become due and payable, both principal and interest, at the expiration of twelve months from date of issue; one of said bonds, both principal and interest, to become due and payable each successive 12 months as per number, which shall be from 1 to 25, both inclusive; and the interest on the whole to be paid annually." Here the rate of interest is given, the amount of the principal set forth, and the notice clearly contemplates that the entire issue shall be paid off in 25 years; for there are to be 25 bonds, numbered from 1 to 25, and one of these, with interest, together with the interest due on the "whole issue," is to be paid 12 months after the date of issue, and one with such interest each succeeding 12 months thereafter. It is further stated that \$19,500 of the amount derived from the sale of the bonds is to be applied to the building and furnishing of a courthouse, \$5,500 to the building and furnishing of a jail. Evidently it is contemplated that the issue shall be sold at par; otherwise, the \$25,000 provided in the notice would not be raised. We think the notice sufficiently states that the entire issue

shall be paid within 30 years. It is true that the notice does not state the date the bonds are to bear, and from the nature of the case this could not be expected, because the bonds were not then issued. They were to be thereafter issued, and the exact date of the issue was subject to such contingencies as that it would have been impossible to fix such date beforehand. The contemplation of the law undoubtedly is that the county, city, or town which has been authorized to issue bonds will in good faith proceed within a reasonable time to exercise the privilege which the voters have granted for the public purpose intended to be accomplished. Nor does the statute require that provision shall be made for raising a revenue, by taxation, to pay off the principal and interest of the bonds as they become due, until the date of the issue of such bonds. We know of no requirement of law which rendered the notice invalid because the price at which the bonds will be sold is not stated therein. The notice is signed by the persons who are the commissioners of roads and revenues of Twiggs county, which we think is sufficient. The fact that such notice bears no date, when it appears that it was made and published prior to the election, for the time required by the statute, does not affect its validity. Nor do we find any error in the rulings of the court on any of the other questions made by the interveners. The issuance of bonds by a county or city is an important matter, and the legality of such issue must depend on the wishes of the qualified voters of such county or city desiring to make the issue. In the present case, as far as the matter of the issuance of the bonds by Twiggs county has progressed, it seems that the statute has been substantially complied with in all respects. We have not given an extended notice in detail to all the points made by the interveners, but have given them careful consideration, and find that no error of such materiality as affects the order of validation appears in the record and judgment of the court below.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 53)

SOUTHERN RY. CO. v. DE SAUSSURE.
(Supreme Court of Georgia. July 24, 1902.)
CARRIERS—SALE OF COMMUTATION TICKET—
RIGHTS OF PURCHASER.

1. When one has purchased from a railway company a commutation ticket at a price below the regular fare charged, by which the purchaser is entitled to a given number of trips between places named in such ticket, on conditions that no rebate on account of the nonuse of the ticket from any cause will be allowed, and that the ticket shall be presented to the conductor on each trip, the presentation of the ticket is a condition precedent to the right of the purchaser to be transported on it; and in case of its loss, so that it cannot be pre-

sented, there is no obligation on the part of the company to transport the purchaser except upon the payment of the regular fare; and such purchaser is not entitled, because of the terms of the contract, either to have refunded to him the amount so paid for transportation, or to recover damages against the company for a failure to transport him without paying fare, during the time limit of the lost ticket, the number of trips called for thereby, or for a refusal to issue him a duplicate ticket.

2. The trial judge erred in remanding the case to the justice's court, and in not rendering a final judgment therein in favor of the plaintiff in certiorari.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by John B. De Saussure against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming and G. M. Beasley, for plaintiff in error. F. W. Capers, for defendant in error.

LITTLE, J. John B. De Saussure purchased from the Southern Railway Company a commutation ticket in the following form: "Southern Railway Company. Fifty four trips commutation ticket. When properly stamped, this ticket will entitle J. B. De Saussure to fifty four continuous trips in either direction between Augusta and Alken, if presented on or before 14th July 1901, inclusive, 30 days limit. [Signed] W. A. Smith, Gen. Passenger Agent,"—subject to conditions printed on back of ticket, which must be signed by purchaser before using. This ticket was properly stamped, and on the back thereof was printed what was termed a "contract," which read as follows: "In consideration of the reduced rate at which this ticket is sold, I agree that its use shall be subject to the following conditions." Among those enumerated only the seventh and eighth are important in this connection, which are as follows: "(7) That I have no claim for rebate on account of the nonuse of this ticket from any cause. (8) It is to be presented to the conductor each trip, [who] will cancel one of the marginal numbers, and is to be surrendered on the last trip taken, during the period for which it is issued." De Saussure lost this ticket, and was unable to find it. He communicated these facts to the railroad company, and requested its agent to issue him a duplicate, or in some way to give him a right of passage between Augusta and Alken in accordance with the terms of its contract with him. The company refused to do so, and also refused to allow him to deposit with it the value of the ticket as an indemnity and pass him over the road the number of consecutive trips represented by the ticket at the time of its loss, unless he would produce the ticket. He then instituted an action in a justice's court, alleging that the railway company had caused a breach of the con-

§ 1. See Carriers, vol. 2, Cent. Dig. §§ 1027, 1031.

tract which they had entered into; and sought a recovery of damages, in consequence of such breach, in the sum of \$6.50. He also averred that the company had caused him unnecessary trouble in compelling him to institute the suit to recover what he should have had without suit, and unnecessary expense in being compelled to employ counsel to bring the action, and claimed that the damages in this regard was \$25. Defendant denied liability, and the case was tried before a jury in the justice's court, which returned a verdict for the plaintiff "for full amount" sued for. The railway company then applied to the judge of the superior court for a writ of certiorari, which was ordered to issue; the petition for which writ recited, as the evidence had on the trial in the justice's court, substantially the following: Plaintiff paid \$7.50 for the ticket, a correct copy of which was attached to the petition. He had ridden several times on it between Augusta and Aiken, and, after having done so, had lost it. There were 11 or 13 "punches" unused at the time of the loss. He had searched for the ticket, and was unable to find it. He then notified the company's agent of the loss, and desired to have a duplicate issued. This was declined. He then applied to the passenger agent of the road for such duplicate, without success. He then asked for some papers which would entitle him to continue his trips, but was refused. He then offered to deposit with the company the amount of the ticket, and, if anybody used it, to forfeit the amount so deposited. This proposition was also declined. He then employed an attorney, whose fee was \$25, to institute an action against the company to recover his damages. The "punches" unused on the ticket amounted to \$6.50. He did not sign the contract on the ticket, and was not asked to do so. He did not read the conditions on the ticket when he purchased it, and not until he had taken the first ride. He then read them, and continued to ride on it. He subsequently purchased a second ticket, which he did sign. The price which was paid for the ticket was considerably less than the straight fare. The conductor of the defendant testified that, to the best of his knowledge, the ticket in question was signed; that he allowed plaintiff to ride three times after he had lost his ticket; that commutation tickets were sold at largely reduced rates. The lost ticket had never been presented. The company put up a bulletin to look out for the ticket, etc. The answer of the magistrate was, in effect, that the evidence set out in the petition was substantially correct. The errors assigned in the petition for certiorari were that the verdict rendered in the justice's court was contrary to the evidence, and contrary to law. At the hearing, the judge of the superior court passed an order that the case be sent back to the justice's court for a rehearing. To this judgment the railway company ex-

cepted, and specifically assigned, as error, that the judgment was erroneous, because, under the undisputed evidence, any finding against the company was erroneous, and because the only question involved was one of law, and therefore the judge should have made a final disposition of the case in favor of the petitioner in certiorari. It may be well to remark, at the outset, that each of the parties is to be governed by the terms of the contract into which they entered, and that it is the duty of the courts to enforce the terms of contracts which parties have made, and neither to enlarge nor restrict such terms beyond or below the intention of the parties as therein expressed. The plaintiff testified that he did not sign the contract. If he did not, then he was not entitled to be transported on the ticket at all; for on the face of his ticket, which was confessedly sold at a greatly reduced rate, is the statement that the transportation of the purchaser is subject to the conditions printed on its back, which must be signed before using the same. However, this is not material in the consideration of the questions involved, for the reason that the conductor of the defendant's train testified that it was signed; and, even if De Saussure had not signed it, he used it after he had knowledge of its conditions, and he was, of course, thereafter bound by such conditions.

1. The first question which arises in the consideration of this case is whether the plaintiff in the court below had the legal right, after having lost his ticket, to have the company issue him a duplicate ticket, or in some way give him the right of continuous passage between Augusta and Aiken for the trips remaining unpunched thereon, under the terms of the contract which the company had made with him at the time he purchased his ticket. If he had this right, it was denied to him by the railway company, and he was entitled to recover the damages which he sustained by reason of that denial. If he had no such right, then he was entitled to no damages. This question is to be determined by the contract between the parties. By reference thereto, it will be seen that it was stipulated that the plaintiff should have no claim for rebate on account of the nonuse of the ticket from any cause. The legal effect of this condition in a commutation ticket was passed on by the Interstate Commerce Commission in the case of *Sidman v. Railroad Co.*, 3 Interst. Com. R. 512, where passage on a commutation ticket was subject to a condition in the exact terms of the one just referred to,—that is, that the purchaser should have no claim for rebate on account of nonuse of the ticket from any cause. It was there ruled by the commission that, under that condition, it was not an unlawful discrimination to refuse to refund to the purchaser, who held such ticket, but had forgotten to take it on a certain trip, the amount which he had paid as his fare. It is, however, claimed by coun-

sel for defendant in error that the performance of an impossible condition is not required; and that inasmuch as the ticket had been permanently lost, and could not be presented, the condition requiring its presentation on each trip was impossible of performance, and therefore he would be entitled to be refunded by the company the value of so much of the ticket as remained unused at the time of its loss. This contention is not a sound one. It has been repeatedly ruled that regulations such as are expressed in these conditions are not unreasonable. In the case of *Railroad Co. v. Fleming*, 14 Lea, 128, it was ruled that a regulation which provided that passengers should, on demand, exhibit their tickets on entering the train, and should afterwards, on like demand, surrender the same, or pay fare, under penalty, in case of refusal, of removal from the cars, was a reasonable one; and that there is no distinction, so far as the relative rights of the parties are concerned, whether the ticket be lost or mislaid before or after going on the train. But whether such stipulation would be reasonable or not as one of the regulations of the company is not the question here, because the contract between the parties expressly provides the stipulation referred to as a part of the contract, and as a part of the contract it was binding on each of the parties. In his *Commentaries on the Law of Negligence* (volume 3, § 2625), Judge Thompson says: "Passengers riding upon commutation tickets are bound strictly by the terms of the contract embodied in such tickets."

We are therefore very clear in our opinion that, under the conditions attached to the issuance of the lost ticket, the plaintiff was not entitled to have refunded to him any sum for the unused parts of the ticket, nor any sum which he may have paid out for transportation during the time covered by the ticket. The stipulation that the ticket was to be presented to the conductor on each trip was equally binding as a part of the contract; and if the plaintiff was not entitled to be transported until, as a condition precedent, he had exhibited his ticket, then whether such failure was attributable to the fact that the ticket had been lost, or to other cause, is in no sense material; for by his own agreement he was only excused from paying his fare when he exhibited a ticket showing his right to be transported without such payment. In the case of *Ripley v. Transportation Co.*, 31 N. J. Law, 388, it appeared that plaintiff had purchased a commutation ticket from defendant, to be good from January 1, 1865, to January 1, 1866, at a reduced price. In a receipt given for the money, this note appeared: "The commutation ticket is to be shown to the conductors and ferry masters each trip, whenever required. * * * No repayment in consequence of any inability to use the privilege. No duplicate ticket will be issued." This ticket was stolen from the plaintiff, and, because he could not show his ticket, the rail-

road company refused him the privilege of a free pass; and he thereupon brought his suit for damages. In discussing the question presented, *Vredenburg, J.*, said: "This is not a question of the reasonableness of the rules of the company, or whether plaintiff complied with such rules, * * * but simply whether it was lawful for the parties so to contract, and whether they did so contract. It is argued that, the ticket being lost, the plaintiff should be permitted to prove its contents, as in the case of other lost instruments. But nobody objects to that; that is not the difficulty. The difficulty is that upon proving the contract it appears that, by the terms of the instrument, the plaintiff has lost the privilege of a free pass. The right to a free pass depended, by the terms of his contract, upon his showing the conductors his ticket; and this he could not do, for he had lost it. It has been argued that the plaintiff had paid his fare, and that he ought not to lose his right because he has lost the evidence of the payment. If there had been no special contract, or if the plaintiff had paid all the fare that the law allowed the defendants to charge, that would have been another question. But he paid here a special fare under a special contract. The defendants agreed that the plaintiff might travel for a fare which is not alleged to be the full fare the law allowed, and the defendants had a right to impose such conditions as they saw fit; and they saw fit to prescribe, as a condition, that the plaintiff should show his ticket, and this he agreed to. He thus became his own insurer that he would not lose his ticket. If he did not like that contract, he should not have entered into it. But, having entered into it, he is bound by it as much so as the company are to carry him if he does show his ticket." Not only the ruling, but also the reasoning, in this case seems to be conclusive against the right of the plaintiff to recover damages from the railway company for refusing to issue him another ticket, or in refusing to pass him over its road without the presentation of it. The company never agreed to substitute another ticket if the one he purchased was lost. While the plaintiff in this case did contract and pay for a given number of trips, which was evidenced by his ticket, his right to make those trips was by agreement based on the condition that the ticket which was sold should be presented each trip. It may be, if the plaintiff had contracted for and paid in advance the usual fare for each of the trips, that his right to be transported would have been absolute. But when it appears, as in this case, that he purchased the ticket for a given number of trips for a sum largely below the regular fare, the better doctrine is that he is not entitled to be transported unless the conditions of the contract which form a part of such ticket are fully complied with. In the case of *Bennett v. Railroad Co.*, in the court of common pleas of Philadelphia, 7 Phila. 11, it was ruled that "a railroad com-

pany has the right to require commuters to show their tickets, and, in default, to exact the fare without liability to repay it." To the same effect, see the citation from Thompson on Negligence, *supra*. Inasmuch, then, as by the contract of the parties the plaintiff was not entitled to be transported over defendant's railroad without the payment of the regular fare, unless he exhibited his ticket, he would not be entitled to have from the defendant any amount paid for such transportation when he failed, for any cause, to present his ticket. Nor, after its loss, would he be entitled to be transported free without the production of the ticket. Nor could he lawfully demand of the company another ticket, or papers entitling him to any number of trips under the terms of his original contract, because that very contract provided that he was not so entitled unless his ticket was presented. Its loss was his misfortune. His right to transportation depended on the production of his ticket. This right was only a right on conditions. These conditions the company could lawfully impose, because the right was given for a largely reduced compensation. As the company was not bound to issue him a duplicate, and as he was not entitled to be transported free without the presentation of his ticket, although he had lost it, it follows that he was not entitled to recover any damages for the failure of the company in any of the respects as to which he claims to have been damaged. Not being entitled to recover any damages against the company for any default shown in the pleadings, of course plaintiff was not entitled to have a verdict or judgment for the attorney's fees which he claimed. Therefore, the verdict in the justice court was contrary to law, and, as the determination of the case rested solely upon a question of law, the judge of the superior court should have finally disposed of the case, on certiorari, by a judgment in favor of the plaintiff in certiorari.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 310)

GRIFFIN et al. v. HENDERSON.

(Supreme Court of Georgia. Aug. 9, 1902.)

RECEIVER—APPOINTMENT—GROUNDS—PETITION—MULTIFARIOUSNESS.

1. A court of equity has no jurisdiction to grant relief to an administrator who, expressly waiving discovery, seeks the appointment of a receiver and an accounting from persons alleged to have in their possession property of the estate, when he does not allege that the defendants are insolvent, or the threatened injury irreparable, and when, with the exception of certain specified bonds, the administrator does not allege what is the character, amount, or value of the property in the defendants' hands.

2. Such a petition, brought against two defendants who are not alleged to hold any of the property in common, or to have acquired it in the same way, is multifarious, and bad for a misjoinder of parties defendant.

(Syllabus by the Court.)

Error from superior court, Newton county; John S. Candler, Judge.

Action by J. F. Henderson, executor, against L. D. Griffin and others. Judgment for plaintiff, and defendants bring error. Reversed.

Brown & Randolph and Spencer R. Atkinson, for plaintiffs in error. J. M. Pace and Foster & Butler, for defendant in error.

SIMMONS, C. J. An equitable petition was brought in the county of Newton by Henderson against Mrs. Griffin of that county and H. H. Brown of the county of Fulton. From this petition it appears that Mrs. Akella C. Brown, mother of Mrs. Griffin, had died testate, leaving considerable property, consisting largely of money, stocks, bonds, and choses in action. By her will she made certain bequests, and left to Mrs. Griffin a life estate in the residuum of her property, with remainder over to Mrs. Griffin's children, if she should have any. Henderson was nominated executor, and was also made testamentary trustee for Mrs. Griffin. The will was offered for probate in solemn form, but its probate was contested, and is still in litigation. At the time of her death, Mrs. Brown was executrix of the will of her deceased husband, Dr. William Brown. Her estate, and so much of the estate of Dr. William Brown as was in her possession unadministered, are now in the hands of the defendants. Petitioner does not know what part of the estates is in the hands of either of the defendants, except that H. H. Brown has, as Mrs. Brown's broker, disposed of certain stocks or bonds for the sum of \$16,250, and has invested most of the proceeds in certain described bonds, which are now in his hands, as is also \$3,800 or \$4,000 in money. Petitioner is entitled to the possession and custody of the assets of both estates, and the character and value of such assets should be ascertained. Defendants are colluding and confederating together to prevent petitioner from ascertaining of what the assets consist, and from acquiring possession and custody of the assets. Brown not only refuses to turn over the property in his hands, but speaks of paying certain lawyer's fees out of it for pretended services to him concerning such property. Mrs. Griffin is deliberately concealing from him what part of the property is in her possession, and of what such property consists, and states that she has been advised to destroy papers in her possession, though what such papers are, petitioner does not know. Expressly waiving discovery, the petition prays that the defendants be restrained from disposing of any of the assets of the estates; that a receiver be appointed to take charge of such assets; that the defendants be commanded to deliver to the receiver all the assets and papers of the estates in their control, and give the receiver all information they may have as to the character, custody, and whereabouts of such as-

sets as are not in their control; and for general relief. Upon this petition a rule nisi issued. The defendants, answering separately, for cause showed among other things that the petitioner has an adequate remedy at law; that the allegations of the petition are not sufficient to give jurisdiction to a court of equity; that the petition is multifarious, in that distinct causes of action against each defendant are joined with distinct and separate causes of action against the codefendant, without any reason for the misjoinder; that the petition does not show any privity between the defendants as to any wrongful act alleged to have been committed by either; and that there is a misjoinder of parties defendant. Upon the interlocutory hearing, at chambers, the judge passed an order enjoining the defendants as prayed, ordering Brown to collect the interest on the bonds in his hands, and deposit it and the money of the estates in his possession in a designated bank, from which it should not be drawn out except upon order of the court, and appointing a receiver to take charge of all the property of the estates in the hands of Mrs. Griffin. To this order the defendants excepted.

1. The petition does not allege that either of the defendants is insolvent, or that an irreparable injury is threatened, nor does it show any other reason for the interposition of a court of equity. If injury should be done, compensation could be had, so far as appears, in an action at law. For the recovery of the property, the remedy at law would seem to be fully adequate, unless the petitioner is without sufficient information; and discovery is not prayed in the present petition. The present proceeding seems to have been brought to extort from the defendants, by means of a decree and the appointment of a receiver, information as to the character, value, and custody of the property claimed; and yet the petition expressly waived discovery, and thus did not invoke the exercise of the equitable powers of the court as to the very matter on which the jurisdiction of a court of equity is in such cases usually based. There are no mutual demands, and discovery is waived, and therefore equity cannot take jurisdiction as for an accounting, although it appears that the petitioner does not know the character or amount of his claims. See 1 Story, Eq. Jur. (13th Ed.) §§ 458, 459. If the petitioner did not wish to sue at law to recover the property, because of his lack of information in regard to it, he should have sought discovery. Had the petition been otherwise without defect, this would probably have given the court jurisdiction to go further, and decree an accounting, and afford proper relief. Inasmuch as no discovery is prayed, there is no necessity for the exercise of any purely equitable powers of the court. There was, therefore, no jurisdiction in a court of equity to entertain this petition, or to grant any relief thereon.

2. Nor does the petition show any reason

for joining these defendants in a single action. While each is alleged to have property belonging to the estates petitioner represents, it does not appear that they hold any of this property in common; and, while petitioner sets up the same rights to the possession of the property in the hands of each, he does not allege that they acquired it in the same way, or under the same claim to its possession. He does allege that they are confederating together to conceal information from him, and also that Brown refuses to surrender the property in his hands, because he has been notified to do so by counsel for his codefendant; but the petition does not seek to gain the information by a prayer for discovery; nor would the reason assigned by Brown avail him in an action at law by the petitioner for the recovery of the property. The allegations of collusion, confederation, and fraud are not sufficiently definite, nor are the matters as to which they are alleged sufficiently essential to the petition, to give the court jurisdiction, or to justify the joining of the defendants in one action. For these reasons, we think there is nothing in the petition to justify the interposition of a court of equity, or the exercise of the equitable powers of the court; that the petitioner's remedy at law is plain, adequate, and complete; that the petition is multifarious; and that there is a misjoinder of parties defendant. We must accordingly reverse the judgment of the court below, as it was error to grant any of the equitable relief prayed.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 254)

MARTIN v. SIMKINS et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

FALSE IMPRISONMENT—LIABILITY OF, PARTNERSHIP.

1. Where a member of a partnership has a person arrested and illegally imprisoned on a charge of larceny of partnership effects, and the person so arrested sues the partnership for false imprisonment, the partnership, under Civ. Code, § 2658, is not liable for these acts of an individual partner.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by E. S. Martin against Eldred Simkins & Co. Judgment for defendants and plaintiff brings error. Affirmed.

Anton P. Wright and O'Connor, O'Byrne & Hartridge, for plaintiff in error. Osborne & Lawrence and John S. Schley, for defendants in error.

SIMMONS, C. J. An action for false imprisonment was brought by Martin against Eldred Simkins & Co., a partnership. The petition alleged that the partnership, acting by and through Simkins, one of the partners, had directed the chief of police of the city

of Savannah to telegraph the chief of police of the city of Cordele to have plaintiff arrested on a charge of larceny; that he was arrested by the officer at Cordele and imprisoned, but was subsequently discharged. The petition prayed the recovery of a money judgment against the partnership. The petition was demurred to upon several grounds, among them one to the effect that a partnership is not liable for the torts of one of its members. The trial judge sustained the demurrer, and the plaintiff excepted.

The question is thus clearly made as to whether a partnership can be held liable for the torts of one of the partners. This question has given rise to numerous decisions in this country and in England. Some courts have held that the partnership is not liable for the willful torts of one of the partners, and others that the partnership is liable when such tort is within the scope of the partnership business. After a careful investigation of the text-books and decisions, we find that the great trend of modern authority is to make the partnership liable for all torts of its members which are within the scope of the partnership business. But, whatever may be the law in other jurisdictions, the question has been settled in this state by Civ. Code, § 2658. That section is as follows: "Partners are not responsible for torts committed by a copartner. For the negligence of torts of their agent or servant they are responsible under the like rules with individuals." This is an act of the general assembly, and is binding upon the courts of this state, whatever the law may be elsewhere. It has been the law in this state since the adoption of the first code, in 1863, and has been in each subsequent code. It has never been altered or amended. The general assembly seems to have been satisfied for nearly 40 years with the law thus declared.

So far as we are advised, this court had never directly passed upon this section until the case of *Ozborn v. Woolworth*, 106 Ga. 459, 32 S. E. 581. In that case it was held that, under this section of the Code, a partnership was not liable for a slander uttered by one of its members. The decision is based entirely upon this section of the Code. Mr. Presiding Justice Lumpkin, in discussing the meaning of the section, said that it applied to the partnership as well as to the partners, which is an answer to one of the contentions of the plaintiff in error in the present case, that the section should be construed as exempting from liability, not the partnership, but the individual partners. It was also argued that the section might be construed as Warner, C. J., intimated in *Alexander v. State*, 56 Ga. 491. In that case the chief justice, in replying to an argument of counsel, said: "One copartner is not responsible and liable to be punished on the criminal side of the court for the torts or crimes of his copartner, unless he has participated

therein, and that is the true intent and meaning of the provisions of the Code." In that case this question was not involved or decided. The state of Georgia brought an action against a partnership for the fraud of one of its members. The fraud consisted in the member's presenting bills in the name of the partnership for articles which had never been delivered to the state's railroad, or which, if delivered, had already been paid for; and the question was whether Alexander, the innocent partner, was liable for the fraud of his copartner. Civ. Code, § 2657, declares in express terms that partners are responsible to third persons for damages arising from the fraud of one partner in matters relating to the partnership business, and it was this section that was under consideration, and not section 2658. That the construction suggested could not be the true one is evident when we consider the whole section. If the first part of it refers to criminal responsibility, the latter part does so as well. If its meaning is that partners are not criminally responsible for the torts of a copartner, then it also means that for the negligence or torts of their agents or servants they are criminally responsible.

Great reliance was placed by counsel for the plaintiff in error upon *Page v. Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144, and numerous extracts were made in the brief from the reasoning of Mr. Justice Cobb in that case. We have read the opinion carefully, and find nothing in it to change our decision in the present case. In the first part of the opinion, before he gets to the real question in his case, Mr. Justice Cobb simply states the decisions in other jurisdictions as to the liability of a partnership for the torts of one of its members. As we have said above, the principle announced in those decisions is the law in other jurisdictions. This question was not in the *Page Case*. The real question was whether the partnership was liable when all the members joined in the commission of the tort. It was held, and we think properly, that in such a case a partnership was liable. The opinion did not allude to the Code section on which we predicate this decision. It was scarcely necessary to do so, as the section did not apply to the case. The Code section applies to torts committed by one partner; in the *Page Case* the tort was the joint act of all the partners. The epitome, in the *Page Case*, of the law in other jurisdictions as to the torts of one partner, while correct, is not binding upon this court, when we have a statute directly to the contrary; nor do we suppose that the reasoning as to the law in other jurisdictions was intended to bind this court, but merely as an argument leading up to the real question which was decided. One interested in this question generally will find a valuable note to the *Page Case* in 51 L. R. A. 463 (a. c. [Ga.] 36 S. E. 418, 78 Am. St. Rep. 144).

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 257)

MACLEAN et al. v. WILLIAMS.

(Supreme Court of Georgia. Aug. 8, 1902.)

WILL—CONSTRUCTION—DISTRIBUTION.

1. A will contained the following item: "I give, devise, and bequeath all the rest and residue of my estate, of every description and kind, and wherever situate, and not by this will fully disposed of, as follows: I direct that two-thirds thereof be distributed in equal shares to such persons in life at the time of my decease who would then be the heirs at law of my deceased husband had he survived me, and that the other one-third be distributed in equal shares to my own heirs at law then in life." *Held*, that the distribution provided for among the heirs at law of the testatrix should be per stirpes, and not per capita.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Action by R. T. Williams by next friend against Malcom MacLean and others, executors. Judgment for plaintiff, and defendants bring error. Reversed.

Adams, Freeman, Denmark & Adams, for plaintiffs in error. Groover & Johnston and Walter G. Charlton, for defendant in error.

COBB, J. The single question involved in this case is, what is the proper construction to be placed upon the eighth item of the will of Elizabeth H. Mills, which is set forth in the headnote which precedes this opinion?

At the date of the death of the testatrix, there were no brothers or sisters of her deceased husband in life, but there were then living children and descendants of children of three deceased brothers. The kindred of the testatrix at the date of her death consisted of two half sisters on the paternal side, nephews and nieces who were children of deceased sisters, and grand nephews and nieces. The will of the testatrix is a lengthy document, consisting of many items, some of them being subdivided into numerous sections. She died possessed of a large estate, which came to her through her deceased husband, and, having no children, she divided the estate between her kindred and those of her husband. In more than one item of her will she distinctly provided for a distribution per stirpes among those who were to take under the items. The item which we are called upon to construe disposed of the residue of the estate after the greater part of the same had been disposed of by legacies both general and specific. The question to be determined is whether, under this item, those persons who answered to the description of heirs at law of the testatrix take per stirpes or per capita. The heirs at law of a deceased person are those who are entitled to take the estate, under the statute of distributions, when the decedent dies intestate. When the expression

"heirs at law" is used in a will, and is unaccompanied by any qualifying or explanatory language, there is but one place to which resort must be had to ascertain what persons are within the meaning of this descriptive term, and that is the statute of distributions. Those falling within the description are entitled to the estate of the decedent, unless there is some law declaring to the contrary, or the decedent has died testate, and the language of the will is such as to indicate that the intention of the testator was that some other persons than those who would take under the statute of distributions should take, or, if, under the will, the estate goes to those who would take under the statute, the testator intends that they shall take in a different manner than that provided in the statute. The will of a testator is the law which controls the question as to who shall take the property of the decedent; and this law, if clearly manifested by the terms of the will, will be allowed to prevail over the provisions of the statute of distributions, both as to what persons shall take the property and as to the interest which they will take therein, if there is nothing in the provisions of the will which contravenes the general policy of the state. The intention of the testator is to absolutely control. Not only may the rules of grammar be entirely disregarded in order to carry into effect the manifest intention of the testator, but even well-defined technical terms of the law will be given an unusual meaning, or will be held to be meaningless, when it is clear from the provisions of the will that the testator did not use them in their technical sense, or when, to carry out his intention, it is necessary to entirely disregard such technical terms. If, however, the will uses words which have a well-settled, definite meaning in the law, and there is nothing in the will itself to indicate that it was the intention of the testator that such words should be given any other meaning than that which the law gives them, then it is to be presumed that it was the intention of the testator that the words should be construed in that sense in which the law would ordinarily construe them.

The words "heirs at law" have in law the well-settled meaning above stated, and whenever these words are found in a will, unaccompanied by any qualifying or explanatory expressions, they will be given the meaning which the law ordinarily gives them, and only the persons will come within the class thus described who would take the property of the decedent under the statute of distributions if there had been no will. See Page, Wills, § 556. If the item of the will under consideration had simply provided that the property thereby bequeathed should go to the heirs at law of the testatrix at her death, it would seem to be clear that those who would take under the will would be those persons who were then in life answering to that description under the statute of distributions. But the will provides that the persons answering

the description of heirs at law of the testatrix at the date of her death shall take in equal shares. All individuals who may take under the statute of distributions do not necessarily take in equal shares; and it is therefore insisted that, while we must go to the statute to find who are the persons within the descriptive terms, after having determined this the statute has no further bearing upon the question; and that the individuals coming within this class are each to take an equal share in the property which passed under the item of the will. It is the general rule that a devise to named individuals in equal shares would call for a per capita distribution, and that a devise to a class, such as "all my nephews," and the like, would also call for a per capita distribution. When the words "heirs at law" are used in a will, unless there is something to indicate a contrary intention, it is to be presumed that the testator intended not only that the persons taking should be those who would take under the statute of distributions, but that the quantum of interest of each should be what each individual would take under the statute. Is the use of the expression "equal shares" alone sufficient to overcome this presumption? The shares under the statute of distributions are equal. As was said in *Odam v. Caruthers*, 6 Ga. 42, persons standing in unequal degrees are allowed to take per stirpes "to fulfill the equity of the statute, which contemplates an equal distribution." If all the heirs at law stand in the same relation to the decedent, they take equally per capita. If some stand in different degrees from others, they take per stirpes, but they take equally nevertheless. The estate in either event is divided into shares, and equal shares, although in the one case each share goes to an individual, and in the other case the equal shares go to a class of individuals. The statute of distributions sets forth the settled policy of the law as to where the estate of a decedent shall go. While a testator is allowed to ignore, either in part or altogether, the rules laid down in that statute, it will not be presumed that it was the intention of the testator to disregard the law as it is contained in the statute in any part, unless the terms of the will are such as to make this intention manifest. Mr. Page says: "A devise to 'children and heirs' of two persons named, to be divided among them 'equally,' was held to call for a distribution per stirpes, since the word 'heirs' so strongly implies representation that it overcomes the force of the word 'children' and 'equally,' both of which call for a distribution per capita." Page, *Wills*, § 556. In 15 Am. & Eng. Enc. Law, p. 322, we find the rule stated in these words: "A devise to heirs, whether to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to

be that they take as heirs would take by the rules of descent." See, also, *Schouler, Wills* (3d Ed.) § 538 et seq.

While adjudicated cases construing other wills are generally not helpful in arriving at what is the proper construction to be placed upon a will under consideration in a given case, for the reason that no two wills are in exactly the same language, still rulings in other cases serve to show what are the general rules to be resorted to in arriving at the intention of the testator in a given case, and the trend of judicial thought in reference to the proper application of such rules to devises or bequests of a similar nature to the one under consideration. In the following cases, bequests or devises in language somewhat similar to the item of the will under consideration in the present case were held to require a distribution per stirpes: *West v. Rassman*, 135 Ind. 278, 34 N. E. 991; *Taylor v. Fauver* (Va.) 28 S. E. 317; *Houghton v. Kendall*, 7 Allen, 72; *Balcom v. Haynes*, 14 Allen, 294; *In re Swinburne*, 16 R. I. 208, 14 Atl. 850; *Baskin's Appeal*, 3 Pa. 304, 45 Am. Dec. 641; *Templeton v. Walker*, 3 Rich. Eq. 543, 55 Am. Dec. 646; *Roome v. Counter*, 6 N. J. Law, 111, 10 Am. Dec. 390; *Rivenett v. Bourquin* (Mich.) 18 N. W. 537; *Ferrer v. Pyne*, 81 N. Y. 281; *Thomas v. Miller* (Ill.) 43 N. E. 848; *Kelley v. Vigas*, 112 Ill. 242, 54 Am. Rep. 235; *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Bassett v. Granger*, 100 Mass. 348; *Minter's Appeal*, 40 Pa. 111; *Dukes v. Faulk*, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745; *Hoch's Estate*, 154 Pa. 417, 26 Atl. 610. In the following cases somewhat similar language was held to require a distribution per capita: *Bisseon v. Railroad Co.*, 143 N. Y. 125, 38 N. E. 104; *Scott's Estate*, 163 Pa. 165, 29 N. E. 877; *Ramsey v. Stephenson* (Or.) 56 Pac. 520, 57 Pac. 195; *McKelvey v. McKelvey*, 43 Ohio St. 213, 1 N. E. 594; *Record v. Fields* (Mo.) 55 S. W. 1021; *Stephenson v. Lesley*, 70 N. Y. 512; *Nichols v. Denny*, 37 Miss. 59; *Farmer v. Kimball*, 46 N. H. 435, 88 Am. Dec. 219; *Brittain v. Carson*, 46 Md. 186; *Richards v. Miller*, 62 Ill. 417; *Best v. Farris*, 21 Ill. App. 49; *Hill v. Spruill*, 39 N. C. 244; *Harris v. Philpot*, 40 N. C. 324; *Lord v. Moore*, 20 Conn. 122; *Johnson v. Knight*, 117 N. C. 122, 23 S. E. 92. Of course there is no case decided by this court in which a will having identically the language of the one under consideration was construed; but there are cases which apply the principle of the rule of construction which requires that, in the absence of a contrary expressed intent, it would be presumed that the testator intended the words "heirs," "heirs at law," or the like, to describe not only the persons who were to take under the will, but the interest that each individual was to take in the property bequeathed or devised. "In the absence of anything in the will to the contrary, the law will presume that the testator intended his

property to go where the law casts it; and to disturb this natural course of descent should require plain words to that effect." *Wright v. Hicks*, 12 Ga. 156 (10), 56 Am. Dec. 451. In *Randolph v. Bond*, 12 Ga. 362, the testatrix provided that several named legatees, children of two deceased sons, should receive, "share and share alike," certain property under the provisions of certain other items of the will. It was held that, construing the whole will together, the children of the two deceased sons took per stirpes, and not per capita. In *Clifton v. Holton*, 27 Ga. 324, Judge Lumpkin said: "Courts should, in this country, lean to that interpretation of wills which carries out the provisions of the statute of distributions, rather than to that which defeats them." In *Sharman v. Jackson*, 30 Ga. 224, the court had under consideration a deed which gave certain slaves to a person for life, and provided that at his death they were "to be equally divided among the heirs of the body" of the grantee. It was held that the children of a daughter of the grantee took under the deed per stirpes, and not per capita. Judge Lyon, in referring to the words, "equally divided among the heirs," says: "It is true she says equally divided, but that is to be understood and construed as that equal division made by the distribution laws,—that is, that all the heirs related to the first taker equally, or in the same degree, should take equally, while those who were in the same line, but further removed, should take by representation,—that is, all together standing in the place of the deceased parent, and taking but the share or proportion which is equal with the shares of the children. This is an equal division among the heirs of Wm. F. Jackson, and it is not the less so that one or more of the shares must again be subdivided into as many parts as there are grandchildren distributees." In *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695, the testatrix devised certain real estate to one of her children and to "the children" of a deceased child. It was held that the children of the deceased child took per stirpes, and not per capita. It was further ruled that: "In the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent, or direct it in a different course, should require plain words to that effect." In *Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562, it was held that, under a will which provided that in a certain contingency property of a certain kind should be "divided between the children of defendant and Mary A. C. Mayer, share and share alike," the children in question and Mary A. C. Mayer, took per stirpes, and not per capita. See, also, *White v. Holland*, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87. It will be thus seen that the trend of judicial thought in this state has been,

from the time this court was organized, in favor of applying the rule that the words "heirs," "heirs at law," or even "children," under certain circumstances, would require a per stirpes distribution, unless the contrary intention is plainly manifest under the terms of the will.

It is contended by the learned counsel for the defendant in error, and it was so held by the able judge whose decision is under review, that there is no authoritative ruling by this court on the subject; it being insisted that what is said in the case of *Sharman v. Jackson*, *Fraser v. Dillon*, as well as in others, was simply dicta of the judges writing the opinions. Be this as it may; the reasoning of the judges in the cases decided in this state in favor of the rule just referred to, and the reasoning of the judges in the cases decided in other states above cited, is more satisfactory to us than that which is found in the cases holding the contrary. Even if it can be conclusively shown that the decisions above cited from this court are not authoritative rulings, we feel satisfied in following what has been said in those and other cases, for the reason that the line of judicial thought in this state seems to be almost unbroken in favor of applying the rule which we adopt in this case. The case of *Almand v. Whitaker*, 113 Ga. 889, 39 S. E. 395, is not in conflict with this line, for the reason that the will in that case named the individuals to whom the property was to go. It was held in the case of *Randolph v. Bond*, 12 Ga. 362, cited above, that under the will then being dealt with the distribution was per stirpes, even though the persons who were to take were designated by name. We are not now concerned to ascertain whether these two cases are in conflict with each other, but we are clear that no conflict exists between the *Almand* Case and the present case. We therefore reach the conclusion in the present case that, as there is nothing in the item of the will except the expression "equal shares" to qualify the words "heirs at law," it is not plainly manifest from the terms of the item that it was the intention of the testatrix that her heirs at law should take per capita instead of per stirpes, as they would have taken under the statute of distributions if she had died intestate. It is insisted that because the testatrix in express terms provided for a distribution per stirpes in other items of the will, and did not in terms provide for such a distribution in the item under consideration, she intended the distribution under that item to be per capita. We do not think this reasoning is sound. The presumption is that the testatrix intended the statute of distributions to prevail wherever she failed to provide to the contrary, and there is nothing in the item now under consideration which indicates an intention on her part that the statute should not be looked to both for the purpose of ascertaining the persons who are to take, and

the interest of each therein. Merely because in other items she expressly provided that those taking thereunder should not take per capita does not mean that under the item now under consideration those taking should take per capita.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 817)

DEMERE v. GERMANIA BANK.

(Supreme Court of Georgia. Aug. 9, 1902.)

ACTION ON NOTE—RECOVERY OF ATTORNEY'S FEE.

1. Under the Civil Code (section 3667), as it stood before the act of 1900, an obligation to pay attorney's fees upon a note, in addition to the stipulated rate of interest, whether such obligation be contained in the note or in a deed given to secure the note, is unenforceable unless to a suit upon the note the defendant files a plea which is not sustained.

2. Where, in such case, the record shows that the defendant did not appear or plead, and judgment was nevertheless rendered for principal, interest, and attorney's fees, that part of the judgment which is for attorney's fees is void.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by the Germania Bank against Marie V. Demere, executrix. Judgment for plaintiff, and defendant brings error. Reversed.

Adams, Freeman, Denmark & Adams, for plaintiff in error. Geo. W. Owens, for defendant in error.

SIMMONS, C. J. In 1897 a promissory note for \$3,000 was given the Germania Bank by Mrs. Ferrill. To secure this note and all renewals of it, she made a deed to certain property. This deed contained a covenant that, "should [the bank] proceed to enforce the payment of any sum that might be secured by said deed, after default, by placing the same in the hands of an attorney for collection, or otherwise, the said [bank] should be entitled to recover, as part of the debt secured, ten per cent. of the amount found to be due, as attorney's fees on the same." The promissory note was renewed from time to time until November 18, 1898, when Mrs. Ferrill gave the bank a note for \$30,000, due 30 days after date. On this note suit was brought to the February term, 1900, of the city court of Savannah, the petition setting out the foregoing facts. From the record it appears that the defendant did not appear or plead, and on February 13, 1900, judgment was rendered in favor of the bank for principal and interest and attorney's fees. The judgment recited that due proof had been submitted, and also that the defendant had been called, and had made default. It gave a special lien on the land described in the deed. A year later the de-

fendant filed a motion to set aside this judgment. She first paid the principal and interest of the judgment, and the sole question made was whether the judgment was a valid one as to attorney's fees. The judge below held the judgment good, and refused to set it aside. Movant excepted. The plaintiff in error having died, and her death having been suggested in this court, her executrix was made a party in her stead.

Under the terms of the deed, the defendant below would seem to have been liable for attorney's fees immediately upon the bank's placing the claim in the hands of an attorney for collection. Her counsel contend, however, that this obligation, under the act of 1891, became binding only in the event the defendant filed a plea which was not sustained. This act is now codified in section 3667 of the Civil Code as follows: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless a plea or pleas be filed by the defendant and not sustained." This section was amended in 1900 (see Van Epps' Code Supp. § 6185), but the amending act is not here applicable, as its passage was subsequent to the rendition of the judgment against Mrs. Ferrill. Counsel for the bank, the defendant in error, contend that this section of the Code is applicable only where the contract to pay attorney's fees is contained in the note or other evidence of indebtedness, and that a deed given to secure a note is not an evidence of indebtedness. It was also argued at length that this statute, being in derogation of common law, and imposing a limitation on the right to contract, should be strictly construed, and not applied to any case which does not come within its letter.

Our opinion is that the judgment for attorney's fees is void. A deed to secure a note is probably not an evidence of indebtedness (*Littlefield v. Clary*, 66 Ga. 322), but we think that this Code section applies without regard to whether the obligation to pay attorney's fees be contained in the evidence of indebtedness or in some other paper. In the first place, we think that this statute is not one which must be strictly construed. As suggested in the admirable brief for the plaintiff in error, an undertaking to pay attorney's fees in addition to principal and interest is in the nature of an agreement for a penalty, and the statute under consideration is to take away the penalty in certain cases, and is remedial. Then, too, it must be remembered that the cardinal principle in the interpretation of any statute is the intention of the legislature, "keeping in view at all times the old law, the evil, and the remedy." Pol. Code, § 4, par. 9. If necessary to give an act its true intent, courts will even depart from its letter. Before the passage of this act, a stipulation to pay attorney's fees subjected

the debtor to a penalty for a failure to pay his indebtedness, even though he honestly could not pay, and made no resistance to the creditor's suit. This was the evil at which the act was directed, the remedy being to relieve the debtor from the payment of attorney's fees except where he litigated with the creditor, and resisted the suit on grounds which were not in any part upheld, except where "a plea [was] filed by the defendant and not sustained." If the act were susceptible of two constructions, and under one of them it could be avoided merely by placing the agreement for attorney's fees in a separate paper, the other construction should be adopted. The first would render the act so easily defeated as to be practically nugatory. But we think that the present case comes not only within the spirit, but within the letter, of the statute. The statute does not say "obligations in any note or other evidence of indebtedness." The word "upon" is used, and carries a broader signification, especially as it follows, not the word "obligations," but the phrase "obligations to pay attorney's fees." The words, "obligations to pay attorney's fees upon any note or other evidence of indebtedness," seem clearly broad enough to include all obligations, wherever found, in the note or elsewhere, to pay attorney's fees upon a note or other evidence of indebtedness. There is no limitation of "obligations" as to the place where found, but only as to kind,—that is, obligations to pay attorney's fees upon any note or other evidence of indebtedness. The prepositional phrase introduced by "upon" limits not "obligations," but "pay." Nor does the succeeding clause change this construction. In that clause, the word "therein" refers to the rate of interest which is specified in the evidence of indebtedness, but it does not have the effect of restricting the statute to obligations contained in such evidence of indebtedness. In the present case, we think it immaterial that the agreement to pay attorney's fees was placed in the deed, and not in the note; and that the Code section applies to any obligation, in the note or elsewhere, to pay upon the note attorney's fees in addition to the stipulated rate of interest. It follows that so much of the judgment as was for attorney's fees was invalid, and that the judge erred in overruling the motion to set aside that portion of the judgment.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 275)

HUDGINS v. McLAIN et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

EXECUTION SALE—DEATH OF DEFENDANT—SETTING ASIDE.

1. A sheriff's sale made after the death of the defendant in execution, under an execution issued in his lifetime, will not be set aside,

though at the time of the sale no legal representative had been appointed upon the estate of the decedent, and there were minor heirs of the intestate, and debts due by the estate of higher dignity than the lien of the execution under which the sale was had.

(Syllabus by the Court.)

Error from superior court, Pickens county; Geo. F. Gober, Judge.

Action by W. M. Hudgins, administrator, against M. C. McLain and others. Judgment for defendants, and plaintiff brings error. Affirmed.

S. A. Darnell and Isaac Grant, for plaintiff in error. John W. Henley, for defendants in error.

OOBB, J. Hudgins, as administrator of the estate of R. W. Dearby, brought an equitable petition against McLain and Tate and Wheeler, sheriff, alleging substantially the following facts: The plaintiff's intestate died on or about January 3, 1901. Prior to his death, the defendants McLain and Tate had recovered a judgment against him in a justice's court for a sum due them. Execution was issued on this judgment, and was levied by a constable upon a described tract of land on December 12, 1900. The execution with the levy thereon was afterwards returned to Wheeler, the sheriff, in order that he might advertise and sell the land. The sheriff adopted the levy of the constable, and dated it January 8, 1901. The land was then advertised for sale, and on the 5th day of February, 1901, was exposed to sale, and was bid in by the defendants McLain and Tate at and for the amount of the debt due them, and the sheriff executed a deed to them conveying the land sold. At the time the sale took place no legal representative had been appointed upon the estate of the defendant in execution, and the defendants well knew this fact. It is alleged that for this reason the sale was of no effect, and that the deed made in pursuance thereof was void. The prayers of the petition were that the levy be dismissed, that the sale be declared void, and that the deed made by the sheriff be set aside and canceled. By amendment to the petition it was alleged that the plaintiff's intestate left surviving him a widow and minor children who were not represented at the time of the sale by guardian or otherwise; that there were also numerous creditors of the estate besides the defendants; that no year's support had been set apart to the widow and minor children; that the estate owed other debts of higher dignity than the defendant's judgment; and that under the circumstances alleged the sale was a fraud on the widow and children and the other creditors of the estate. The defendants filed a demurrer to the petition, on the ground that no cause of action was set forth therein, and that under the allegations of the petition the plaintiff was not entitled to the relief prayed for, or to relief of any character. The court sustained the demurrer, and the plaintiff excepted.

¶ 1. See Execution, vol. 21, Cent. Dig. § 272.

There being no allegation of any fraudulent or collusive conduct on the part of the defendants, the sole question presented for decision is whether property which formerly belonged to an intestate can be sold, before any legal representative has been appointed on his estate, under an execution issued in his lifetime. The case of *Brooks v. Rooney*, 11 Ga. 424, 56 Am. Dec. 436, is directly in point, and controlling on the question. It was there ruled: "Where a judgment has been obtained, and an execution has issued in the lifetime of the defendant, his subsequent death will not arrest the collection of the debt by levy and sale of the intestate's property, notwithstanding his heirs at law are minors, and no administration has been granted upon the estate." In the opinion in that case it appears that counsel conceded that at common law the execution could proceed notwithstanding the death of the defendant in execution, but contended that the statutes of this state repealed the common law by implication. It was argued that inasmuch as, under the law of this state, the defendant had a right to arrest the progress of the execution for any irregularity, to point out what property should be seized, to have notice of the levy, to sue for and recover the difference between the price bid at the first and second sales in case the purchaser at the first sale failed to comply with his bid, to appear in court and personally superintend the proper appropriation of the money arising from the sale, either the defendant himself must be in life, or be legally represented if dead, before the process could be enforced. It was held that the common-law rule was still of force in this state, and that these statutory provisions did not operate to repeal it by implication. It was, however, suggested that a court of equity would, on a proper case-made, protect the rights of minor heirs or adults or priority creditors, or any others who were likely to be injured by the enforcement of the execution for want of an administration. Since the date of that decision a statute has been passed providing that, "on the death of a defendant after final judgment, when no execution has been issued previous to such death, execution may issue as though such death had not taken place." Civ. Code, § 5034. This provision of law goes one step farther than the common law. Under the common law, an execution issued in the lifetime of the defendant in execution would not abate by his death; whereas, under the provision quoted, execution may issue after his death on a judgment rendered before. See, also, *Hatcher v. Lord*, 115 Ga. 619, 41 S. E. 1007.

It is argued, however, that the petition in the present case shows that there are debts due by the estate of higher dignity than the defendants' judgment, and that the widow and her minor children have a claim for year's support which has not been satisfied. The petition does not allege that the property

in controversy was the only property belonging to the estate. For aught that appears from the petition, there are sufficient assets belonging to the estate to satisfy all the claims against it of higher dignity than the defendants' judgment debt. The petition distinctly alleges that the year's support for the widow and minor children has not been set apart. If they should hereafter assert, and have allowed, their claim for a year's support, and if the purchasers at the sale bought subject to their claim, it would, of course, be a lien upon the land superior to the defendants' title. But, under the allegations of the petition, it is no concern of the administrator that the widow and children may have a claim for a year's support. It will be ample time to test the question as to whether their claim for a year's support is superior to the defendants' title after their claim has been asserted and allowed. It is never well to anticipate trouble, and this rule applies with peculiar force to litigation.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 279)

**PEOPLE'S BANK OF TALBOTTON v.
MERCHANTS' & MECHANICS' BANK
OF COLUMBUS.**

(Supreme Court of Georgia. Aug. 9, 1902.)

**STIPULATION—CONSTRUCTION—CONTINU-
ANCE PENDING SIMILAR ACTION
—FINAL JUDGMENT.**

1. Where two distinct cases, having different parties plaintiff, and supposed to involve the same issues of law and fact, were pending against the same defendant, in the same court, at the same time, and the parties to the second one of such cases entered into a written agreement to the effect that the verdict and decree to be rendered after trial in the first should control and govern the second case, and when the first should be decided a verdict and decree should be rendered in the second in accordance therewith, and in the meantime the second case, which was the subject-matter of the agreement, should stand continued, and that agreement was approved by the judge and entered on the minutes of the court, *held*: (1) That the verdict and decree contemplated by the agreement is the final verdict and decree to be rendered in the case. (2) That a judgment rendered in such a case cannot be treated as final, so long as either of the parties thereto had the right to have the same reviewed by a writ of error. (3) That the trial judge erred when, at a term of the court at which a verdict and judgment was rendered in the first case, and within the time in which the parties to such judgment had the right to apply for a new trial and to sue out a writ of error seeking a reversal, he rendered a judgment for the plaintiff in the second case, over the objection of the defendant.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by the Merchants' & Mechanics' Bank of Columbus against the People's Bank of Talbotton. Judgment for plaintiff, and defendant brings error. Reversed.

Pearsons & McGehee and J. H. Martin, for plaintiff in error. Hatcher & Carson, for defendant in error.

LITTLE J. The Exchange Bank of Macon and the Merchants' & Mechanics' Bank of Columbus each separately instituted an equitable petition in the superior court of Talbot county against the People's Bank of Talbotton, in each of which cases the petitioners sought to require the latter bank to transfer on its books certain certificates of its stock to each of petitioners, and to issue new certificates on the shares of stock so to be transferred. The case of the Exchange Bank had been returned to the September term of the court, and that of the Merchants' & Mechanics' Bank to the following March term. The case of the Exchange Bank was, by consent of parties, referred, by order of court, to G. Y. Tigner, as auditor, to hear the same and report his finding to the next term of the court. Thereupon counsel for the Merchants' & Mechanics' Bank entered into a written agreement with counsel for the People's Bank, which was as follows: "Whereas, there is a certain equitable petition in favor of the Exchange Bank of Macon against the People's Bank of Talbotton, being a petition asking that debt, be decreed to transfer to plff. certain bank stock therein described, and which suit has been referred to G. Y. Tigner, as auditor, to report to the next term of this court, it is hereby agreed between counsel in above-stated case that the verdict and decree in said case of Exchange Bank shall control and govern in the case of the Merchants' & Mechanics' Bank, and that, when decided, a verdict and decree shall be rendered in accordance therewith, and in the meantime said case shall stand continued." The agreement was approved by the judge and entered on the minutes of the court. The auditor heard the Exchange Bank case, and before the next term of the court filed his report therein. To this report the Exchange Bank filed exceptions both of law and of fact, which came on to be heard, and, before the same were passed on, counsel for the Merchants' & Mechanics' Bank presented a decree in its favor, already prepared, requiring the defendant to transfer to it the shares of stock which were the subject-matter of its petition, and moved the court to sign the same. Counsel for the People's Bank objected to the rendition of this decree, on the grounds that it would be in violation of the written agreement entered into by the respective parties, and that the proposed decree was not based or predicated upon a judgment or decree in the case of the Exchange Bank, but was independent thereof. Thereupon counsel for the Merchants' & Mechanics' Bank read to the court a part of the finding of the auditor which had been made in the Exchange Bank case, and also read to the court a part of the evidence of one of the witnesses who testified before the auditor in that case. Sub-

sequently the judge passed on the exceptions to the report of the auditor in the case of the Exchange Bank, and entered a decree in that case in favor of the Exchange Bank against the People's Bank, and overruled the objections made by counsel for defendant in error against the granting of a decree in favor of the Merchants' & Mechanics' Bank, and entered up a decree in its favor as prayed for. In this decree, after reciting certain evidence given by a witness on the hearing before the auditor in that case, the further recital is made: "And said ruling being unexcepted to, the premises considered, the petition of plff., the answer of deft., and report of the auditor being duly considered, and it appearing that defendant received, on its indebtedness due to it by Estes, the proceeds of the loan by the plaintiff, and had knowledge of the transfer, it is ordered, adjudged, and decreed that the debt, its president, directors, and agents, do accept from the plff. the stock issued to * * * Estes and transferred to plaintiff, and to issue and deliver to it a new certificate for ten shares, as by law provided; and upon default the legal title is hereby decreed to be in the plaintiff, and to the stock transferred to it as aforesaid, and described in its petition." To the rendition of this decree, the People's Bank excepted.

There were two good reasons why this decree should not have been rendered:

First, it was prevented by the agreement which had before that time been entered into by the parties, and approved by the court. When properly construed, that agreement will be found to mean that the case of the Merchants' & Mechanics' Bank against the People's Bank was never to be tried at all, but that it should be governed and controlled by the decree to be rendered in the case of the Exchange Bank against the People's Bank. This certainly did not mean that it was to be governed and controlled by a decree that might thereafter be set aside. The decree contemplated was evidently the final decree in that case,—that action of the court which definitely and finally fixed the rights of the parties; and it was not until such a decree had been rendered that the Merchants' & Mechanics' Bank was, under their agreement, entitled to any further action in its case. If the final decree was in favor of the Exchange Bank, then the Merchants' & Mechanics' Bank was entitled to a decree against the People's Bank for the transfer of the stock claimed by the Merchants' & Mechanics' Bank. If this final decree was adverse to the Exchange Bank, then the Merchants' & Mechanics' Bank would not be entitled to any decree in its favor. Suppose a decree had been rendered in favor of the People's Bank against the Exchange Bank, and the latter had, by writ of error, reversed the judgment, and thereafter secured a decree in its favor. Would the rights of the Merchants' & Mechanics' Bank have been settled by that first or by the final decree?

Evidently the spirit of the agreement would not have been carried out by having the rights of the Merchants' & Mechanics' Bank settled by a decree which was thereafter set aside and reversed. A decree which controls and governs is a final decree, and no judgment or decree can, under our system, be said to be final until the time prescribed by law in which a motion for a new trial may be made or a writ of error seeking to set aside such a judgment has expired. It was only when a final decree had been rendered in the Exchange Bank case that a decree could have been rendered under the agreement in the Merchants' & Mechanics' Bank case.

The second reason why the decree complained of in the present case should not have been rendered is that it is based, in terms, upon a finding of the auditor in the Exchange Bank case, as appears in his report, and on the evidence of one of the witnesses who testified on the hearing of that case before the auditor. In our judgment, neither the report of the auditor in the Exchange Bank case, nor the evidence of any witness on the hearing of that case before the auditor, had anything to do with a rendition of a decree in the Merchants' & Mechanics' Bank case. That case had been continued indefinitely by agreement and by order of the court until the verdict and decree in the Exchange Bank case had been finally rendered. When such final decree had been rendered, then the Merchants' & Mechanics' Bank was entitled to have a decree and judgment rendered in exact accordance with the final judgment and decree rendered in the Exchange Bank case.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 284)

**CENTRAL OF GEORGIA RY. CO. v.
VINING.**

(Supreme Court of Georgia. Aug. 9, 1902.)

INJURY TO SERVANT—NEGLIGENCE OF CO-EMPLOYEES—EVIDENCE—RULES OF COMPANY.

1. A card furnished by a railroad company to its engineers, and containing a column headed "Minimum time freight trains between stations," but relatively to which there is no rule of the company making it an engineer's duty to regard this minimum time, is not legally binding upon the engineer, so as to forfeit the right of his widow to recover, if he, while attempting to run his train between two stations in less than the time given in the column mentioned, is killed by the negligence of his co-employees.

2. The plaintiff having clearly showed negligence on the part of the company, it was incumbent on the latter to show that the engineer was negligent. On this point the evidence was conflicting, and the jury having determined the issue in favor of the plaintiff, and the trial judge having approved their finding, this court will not control his discretion in refusing a new trial.

¶ 2. See Master and Servant, vol. 24, Cent. Dig. § 203.

3. There was no material error in the rulings of which proper complaint is made in any of the other grounds of the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Early county; H. C. Sheffield, Judge.

Action by Emma D. Vining against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Kiddoo and Lawton & Cunningham, for plaintiff in error. Hardeman, Davis & Turner, Hoke Smith, and H. C. Peebles, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 246)

MCGINNIS et al. v. RAGSDALE, Ordinary.

(Supreme Court of Georgia. Aug. 8, 1902.)

GRAND JURY—RECOMMENDATIONS—ALTERNATIVE ROAD LAW.

1. When a special term of a superior court is convened for the purpose of disposing of any and all business before the court, and the grand jury which served at the preceding regular term is required to be in attendance at such special term, such grand jury has authority to make a recommendation, under the provisions of the Political Code (section 573 et seq.), that the alternative road law be adopted in the county.

2. The alternative road law as contained in the Code sections above referred to was not repealed by the act of 1896, providing an additional scheme for working the roads in the different counties, which might be adopted by a popular vote, nor by the act of 1898 which was amendatory of the act just referred to.

3. An act of the general assembly which operates uniformly upon all persons within a designated class is a general law, and not in violation of that provision of the constitution of this state which requires that all laws of a general nature shall have uniform operation throughout the limits of the state, unless it is manifest that the classification is arbitrary or unreasonable.

4. An act dividing the people of the state into two general classes, one embracing all those residing within the limits of incorporated cities and towns, and the other all those residing without such limits, and making provision for working the roads by the latter class, which is different from that prescribed by law as the method to be followed by the former, does not make an arbitrary or unreasonable classification.

(Syllabus by the Court.)

Error from superior court, De Kalb county; John S. Candler, Judge.

Action by C. B. McGinnis and others against William R. Ragsdale, ordinary. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. W. Braswitt, for plaintiffs in error. Candler & Thomson, for defendant in error.

COBB, J. This was an application by citizens and taxpayers of De Kalb county for an injunction to restrain the ordinary from causing the roads of that county to be work-

ed under what is known as the alternative road law, embraced in the Political Code (sections 573-583), and from assessing or levying any commutation or ad valorem tax under the provisions of that law, or executing any of the provisions of the same. The judge refused to grant the injunction prayed for, and the plaintiffs excepted.

At a special term of the superior court of De Kalb county, held in December, 1900, the grand jury serving at that term made a recommendation in the following language: "We recommend that the alternative road law, contained in title 2, c. 11, art. 2, §§ 573-583, inclusive, of volume 1 of the Code, be put in operation in said county," this recommendation being contained in the general presentments. This special term was held pursuant to an order, passed by the judge of the circuit, calling a special term to begin on Monday, December 17, 1900, "for the purpose of trying and otherwise disposing of the business pending in said court, either civil or criminal." The order directed that the grand jury which had served at the August term, 1900, of that court should report for service at the special term, and that they should be notified to this effect by the sheriff of the county. Pol. Code, § 583, as amended by the act of 1897, provides: "This article shall not go into effect in any county in this state until it is recommended by the grand jury of said county, said recommendation to be made at any term of court; and the operation of this article shall be suspended in any county of this state upon a like recommendation of the grand jury, made at any term of court, after the lapse of three years from the time this article goes into effect." Acts 1897, p. 20; Van Epps' Code Supp. § 6130. It is contended that, under the provisions of the statute just quoted, a grand jury would have no authority at a special term of the court to make any recommendation in reference to the alternative road law; that the expression "any term of court" means a regular term; and that, therefore, the recommendation in the present instance was void.

Under the law of this state, the terms of the superior court which are authorized to be held by the judges thereof are divided into three classes: regular, adjourned, and special terms. The law provides for the holding of two regular terms of the superior court in each county each year, except in the county of Chatham, in which there are annually held three regular terms under the provisions of a statute passed long before the adoption of the constitution of 1877. An adjourned term of the court is said to be held where the regular term has never been adjourned, but the session has been continued by an order providing that the court shall reconvene as in regular term after the lapse of a recess other than the ordinary recess when the court is in session from day to day. A special term is a term called to convene after the adjournment of one regular term, and before the time ar-

rives for the holding of another regular term. The law provides that the judges of the superior courts "are authorized to hold special terms of said courts for the trial of criminals, or for the disposition of civil business, either or both, in any county of their circuits, at discretion, and to compel the attendance of grand or petit juries, either of a previous term, or to draw new jurors for the same, according to the laws now in force." Civ. Code, § 4345.

At a special term called by the judge for the purpose of disposing of any civil or criminal business before the court, the judge is certainly authorized to dispose of any business that may be on the dockets of the court at the time the special term is convened; and, as the judge is authorized expressly to compel the attendance of the grand jury, the court can also dispose of any criminal business which may be brought before it upon presentments or indictments made at the special term. We do not think it will be questioned that the grand jury at a special term may return an indictment or presentment, and that the judge may at that term try the persons thus presented or indicted. A special term of the court is undoubtedly a term of court within the meaning of the law; and, as the judge in his discretion is authorized to require the grand jury to be in attendance at such a term, it would seem that, when the grand jury is in attendance at that term, it is vested with all the authority which it has under the law at any term of court. The court may dispose of any business at a special term, unless there is a law which in express terms, or by necessary implication, deprives it of this power; and, when there is a grand jury in attendance at such special term, such grand jury may dispose of any matter which it has authority to pass upon at a regular term. There is nothing in the Political Code (section 583) which either in express terms or by necessary implication requires that the recommendation in reference to the alternative road law shall be made at a regular term of the court. The grand jury at a special term can do anything which it could have lawfully done at the regular term preceding the special term, but of course cannot do anything which is by law required to be done at the succeeding term. The grand jury at the September term, 1900, of De Kalb superior court could have made this recommendation, and when this same grand jury was in session at the special term there was no reason why it should not act upon the matter. For many, if not for all, purposes, the special term is to be treated as a continuation of the last preceding regular term of the court. There is nothing in this ruling to conflict with the decision in *Stripland v. State*, 115 Ga. 573, 41 S. E. 987, where it was held that, when a person charged with a crime has made a demand for trial, a failure to try at a special term would not have the effect of discharging the accused, as the law

in reference to such a demand contemplated regular terms of the court. At the time of the passage of the law providing that where persons accused of certain crimes had made a demand for trial, and a trial was not had within two terms after such demand was made, the accused should be discharged, there was no law providing for the calling of special terms for the trial of criminal cases; and it is therefore necessarily to be presumed that the legislature had in contemplation regular terms. Counsel in argument sought to analogize the law under consideration to the divorce law, which requires that two concurrent verdicts shall be rendered at different terms of the court; and he contended that, inasmuch as the terms referred to in the divorce law were manifestly regular terms, the same construction will be given the words "any term" as used in the alternative road law. A sufficient reply to this suggestion is that the provision in the constitution in reference to divorces was adopted at a time when the judges of the superior courts had no power to call special terms of the courts; and, therefore, it is to be inferred that the terms referred to in the constitutional provision are regular terms.

2. It was further urged, as a reason why the judge erred in refusing to grant an injunction, that the alternative road law embraced in the sections of the Political Code above referred to was no longer of force, having been repealed by later legislation. The law as contained in the Code provides a scheme for working the roads, which was to go into effect in a county only when recommended by the grand jury. In 1896 (Acts 1896, p. 78) an act was passed which amended the act of 1891 embodied in the Code by providing an additional scheme for working the roads, which scheme was not to go into effect in any county until it had been adopted by a popular vote of the county at an election called for that purpose. While the act of 1896 was an amendment of the act of 1891, it was distinctly provided in the act of 1896 "that it shall be optional with the counties of this state to adopt the road-working plan provided by the act of which it is amendatory, or that provided by this act, as the counties may express their preference as provided by law." Acts 1896, p. 80. While the act of 1896 has a general repealing clause, the effect of this clause is to repeal only the acts in conflict with that act, and by the very terms of the act of 1896 the act of 1891 is not only not repealed, but is kept in force, and the people in the different counties are given the right to decide whether they will adopt the scheme provided by the one act, or that provided by the other. The act of 1898 (Acts 1898, p. 110) is upon its face simply an act amendatory of the act of 1896, and changes the scheme provided by that act in various particulars; and it is provided that the provisions of the act of 1898 shall not go into ef-

fect in any county except in those which have adopted or may adopt the provisions of the act of 1896 by a popular vote, and, in counties which have already adopted the act of 1896, only after the provisions of the amendatory act of 1898 have been adopted by the grand jury of the county. This act has also a general repealing clause, but, as there is nothing in the act of 1891 which is at all in conflict with this act, that act stands unaffected by the passage of the act of 1898. Under the legislation as it now stands, a county which has never passed upon the question of adopting either of the laws commonly called the "Alternative Road Law" has the right to adopt, by a recommendation of the grand jury, the scheme provided in the act of 1891, now embraced in the Code, or by a popular vote to adopt the scheme provided in the act of 1896 as amended by the act of 1898. While the schemes are entirely different in some particulars, it is clear from the legislation on the subject that the general assembly intended to keep the two schemes in force, and allow the different counties of the state to decide which of the two, if either, they desired to adopt. See, in this connection, *Haisten v. Glower*, 114 Ga. 992, 41 S. E. 48.

3, 4. It is alleged in the petition that the alternative road law contained in the Code "is unconstitutional and void, for the reason that it contravenes that provision of the constitution of the state which provides that 'laws of a general nature shall have uniform operation throughout the state'"; it being insisted that, as that law excepts from its operation the citizens of towns and cities, it does not and cannot have uniform operation through the state. There is a provision in the alternative road law contained in the Code, to the effect that "citizens of cities and towns shall not be required to work the public roads outside the corporate limits, nor to pay the commutation tax." Pol. Code, § 579. When the general assembly passed this law, it divided the people of this state into two general classes, viz., those residing within the limits of towns and cities, and those residing without such limits. The act of 1891 applies to all persons embraced within the latter class, but does not apply to any one embraced within the former class. A law which operates uniformly upon all persons of a designated class is a general law within the meaning of the constitution, provided that the classification thus made is not unreasonable. See *Trust Co. v. Dottenheim*, 107 Ga. 606, 34 S. E. 217 (2), and cases cited. It will not be seriously contended that the classification made by the general assembly in the alternative road law is either arbitrary or unreasonable. The judge did not err in refusing to grant the injunction.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 321)

THE ANVIL v. SAVERY et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

CORPORATION—INSOLVENCY—APPOINTMENT OF RECEIVER.

1. Applications for receivers in all cases, and especially where the applicants are creditors of an insolvent corporation, and there are charges that the persons in control of the assets of the corporation are misapplying them, are addressed to the sound discretion of the judge; and the appointment of a receiver will never be interfered with unless it is manifest that this discretion has been abused.

2. It does not appear that the judge abused his discretion in appointing a receiver in the present case.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Action by Fatie M. Savery, by her next friend, and Elizabeth A. Robinson against the Anvil. Judgment for plaintiffs, and defendant brings error. Affirmed.

Garrard & Meldrim, for plaintiff in error. Travis & Edwards and Alexander & Hitch, for defendants in error.

COBB, J. Fatie May Savery, by her next friend, and Elizabeth A. Robinson brought an equitable petition against the Anvil, a fraternal mutual aid society and co-operative life insurance company, incorporated under the laws of Georgia. The petitioners alleged that they were creditors of the defendant. The claim of Fatie May Savery was for \$1,000, and was due to her under the terms of a benefit certificate which had been issued to her father, and which had matured upon his death in August, 1901; and it was alleged that the defendant admitted its liability to her. The claim of Elizabeth A. Robinson consisted of a judgment rendered in the state of North Carolina, upon a benefit certificate of which she was the beneficiary, and which was for the sum of \$1,000; the judgment having been rendered in February, 1902. It was alleged that the defendant, while admitting the justice of the claims of the plaintiffs, confessed its insolvency and inability to pay the same. It was also alleged that the defendant had attempted to make a sale and transfer of its entire assets and business to the American Guild, an insurance corporation of the state of Virginia; that the officers of the defendant were no longer performing the duties of their several offices, and were refusing to collect the debts due the corporation, and there was no one to manage the funds or property of the corporation, or to collect the debts due it; that the officers were preparing to dissolve the corporation, so far as they could do, and to go out of business, leaving its creditors unpaid, the evident intent and purpose being to place the assets of the defendant beyond the reach of its creditors and beyond the jurisdiction of

the court; that there was danger of destruction and loss of the funds and property of the defendant, unless a court of equity interfered in behalf of the plaintiffs; that the assets of the defendant were charged with the payment of its debts, and there was manifest danger of loss or destruction thereof or material injury thereto, unless a receiver was appointed to take charge of and hold the same under the order of court. It is charged upon information and belief that there are numerous other outstanding claims against the defendant; that the books and papers are still in the hands of its officers in this state; that there is danger that the same will be destroyed and disposed of or placed beyond the jurisdiction of the court; and that it is necessary to proceed to collect the assets and appropriate the same to the creditors of the defendant. The prayers of the petition were for an injunction to prevent the officers of the defendant from destroying or removing beyond the jurisdiction of the court the books, property, and assets of the defendant; that a receiver be appointed to take charge of the assets, property, and funds of the defendant, and to collect whatever may be due it from any source; that plaintiffs have judgment against the defendant for the amounts of their claims, and the funds realized from the assets and property be distributed to them and such other creditors as may hereafter be made parties to this proceeding. The petition concluded with a prayer for general relief and for process.

The defendant by its answer admitted that the claims of the plaintiffs were just, due, and unpaid, and that it was insolvent. It denied the allegations as to an attempt on its part to make a sale and transfer of its assets, and all allegations to the effect that the officers were seeking to manage the affairs of the corporation in such a way as to defeat plaintiffs in the collection of their claims. It was admitted in the answer that an agreement had been entered into between the defendant and the American Guild by which the former was to go out of business and the latter was to receive into its membership, upon certain terms, all of the members of the defendant, but it was averred that the purpose of the agreement was not to place the assets of the defendant beyond the reach of its creditors and beyond the jurisdiction of the court, but to so administer the same as to save for the members of the association the largest possible sum; that the only debts due by the defendant were those due to persons holding claims for death losses and to the directors of the association, who had advanced large sums out of their own means to promote the solvency of the association. It was denied that there was any danger of loss or destruction of the assets and property of the defendant; and the defendant averred its willingness to give any bond that might be required, "to properly conserve and protect the interests of any of the stockholders

1. See Corporations, vol. 12, Cent. Dig. §§ 2202, 2204.

or parties in interest under the agreement made with the American Guild." It denied that there was any property for a receiver to take charge of, and averred that there would be nothing for a receiver to do except to collect assessments, which could better be done by the officers of the association than by a receiver. Attached to the answer was a copy of the agreement entered into between the defendant and the American Guild, from which it appeared that T. H. McMillan was appointed trustee to receive from the Guild such sums as might be collected by it and due under the agreement to the defendant. It appeared from the allegations in the answer that McMillan resided in this state, and that he was in possession of the books and papers that belonged to the defendant, they not having been turned over to the American Guild.

At the hearing, there was much evidence introduced in behalf of the plaintiffs, tending to show that there was little or no disposition on the part of the officers of the defendant or McMillan, trustee, to facilitate the plaintiffs in the collection of their claims; that, notwithstanding the insolvency of the defendant, other creditors holding claims of equal rank with the plaintiffs had been paid in full since the claims of the plaintiffs became matured demands. There was evidence in behalf of the defendant, which it was claimed showed that such amounts as were paid out by the officers were properly paid.

The judge found that there was no dishonesty or fraud in any of the transactions in which the officers of the defendant had engaged, but he also found that, notwithstanding they had acted apparently in good faith and with pure motives, they had, with a full knowledge that the corporation was insolvent and unable to pay all persons holding claims against it in full, paid to some of the persons holding claims the full amount due, and had failed and refused to pay the plaintiffs anything on their claims, although they held claims of equal rank and dignity with those that were paid. The judge held that this misapplication of the funds of an insolvent corporation was sufficient to justify him in appointing a receiver to take charge of the books and assets of the corporation, in order that the rights of the plaintiffs might be protected. We cannot say that he erred in so holding. While in his discretion he might have left the affairs of the corporation in the hands of its officers and trustees, at the same time he had a right to exercise his discretion, under the evidence before him, by holding that it was to the best interests of the plaintiffs that the affairs of this insolvent corporation should be administered through the medium of a receiver of the court. The defendant offered in its answer to give a bond to pay to the plaintiffs whatever might be due them under the agreement between the defendant and the American Guild. We do not think the offer to give a bond of this character was sufficient to prevent the judge

from appointing a receiver. The plaintiffs were no parties to this agreement. It was made without their knowledge or consent. They are not bound to look to the American Guild directly or indirectly for the payment of their claims. They are entitled to look to the property of the defendant for payment, just as if this contract had never been entered into. If the defendant has any property, it must be used for the payment of its debts; and if there are any claims due it, by way of assessments or otherwise, which would be liable to the payment of the plaintiffs' claims, these debts should be collected, and the amounts thereof appropriated to the payment of the demands due the plaintiffs and other creditors. There being no relief prayed against the American Guild, the relief prayed for being simply that the assets of the Anvil be applied to the payment of its debts, the American Guild was not a necessary party to the case.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 33.)

STROUD v. HANCOCK, Sheriff.

(Supreme Court of Georgia. Aug. 9, 1902.)

CHATTEL MORTGAGE—FORECLOSURE—DEFENSES—BOND.

1. When, in defense to the foreclosure of a chattel mortgage, the defendant files a counter affidavit, and gives a bond intended to be such as the statute requires in such cases, and thereupon the papers are returned to court, and the issue thus formed tried upon its merits,—the parties treating the bond as being in conformity to the statute,—*held* that, after judgment against the defendant, the surety on such bond, though the same be really only a forthcoming bond payable to the levying officer, and conditioned for the delivery of the property at the time and place of sale, will not be heard to set up in defense to an action by the officer on the bond that no demand or notice to produce the property had been given, or that no levy had been in fact made, or that there was really no such property in existence, belonging to the defendant in execution, as that described in the levy or in the bond.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

Action by Jack Hancock, sheriff, against J. W. Stroud's executrix. Judgment for plaintiff. Defendant brings error. Affirmed.

W. J. Wallace and H. A. Mathews, for plaintiff in error. Hardeman, Davis, Turner & Jones, for defendant in error.

FISH, J. Jack Hancock, sheriff of Crawford county, brought suit against Mrs. Stroud, widow and executrix of J. W. Stroud, making by his petition substantially the following case: In October, 1897, Napier Bros. foreclosed in the superior court of Pike county a mortgage on personalty against A. G. Simmons, and petitioner, as sheriff, duly levied on the property in Crawford county. Simmons filed an affidavit of illegality to

the mortgage foreclosure, and gave a bond for the forthcoming of the property, signed by himself as principal, and J. W. Stroud as surety. On the trial of the issue formed on the affidavit, the illegality was dismissed, and judgment was rendered in favor of Napier Bros. for damages. The property was then duly advertised for sale in the paper in which the sheriff's advertisements are published, and, when the day of sale arrived, the sheriff, during the legal hours and at the legal place of sale, called for the property, and it was not forthcoming. By reason of the breach of the forthcoming bond, petitioner was damaged in a named sum, for which he prayed judgment. To this petition the defendant filed a general demurrer, which was overruled. She also filed a plea in which she averred that, for want of sufficient information, she was unable to either admit or deny the allegations of the petition with reference to the foreclosure of the mortgage, and the filing and trial of the affidavit of illegality, but denied that any levy had ever been made upon the property described in the petition, and claimed that she, as executrix of her husband, had never been notified to produce the property at the time and place of sale, and had no notice that J. W. Stroud had ever signed such a bond as the one sued on until after his death, and long after the time when the property was advertised for sale. The sixth paragraph of the petition averred "that it was impossible for J. W. Stroud to produce said property at [the] time and place of sale, as J. W. Stroud was dead, and it was also impossible for her to produce said property, not having received any notice to produce same on said first Tuesday in November, 1898; * * * that the property mortgaged to Napier Bros. by A. G. Simmons, and which it is alleged in plaintiff's petition was levied on by Jack Hancock, sheriff, was not the property of said A. G. Simmons; that at the time of the execution of said mortgage A. G. Simmons did not own the property mortgaged to Napier Bros., nor did A. G. Simmons own any such property at the time it is alleged said mortgage was foreclosed; * * * that it was impossible for her to produce said property, as she is informed that no such property as is described in said bond was ever in existence, that A. G. Simmons never did own any such property, and that Jack Hancock, sheriff, never did levy upon or seize any such property as is described in said bond; * * * that when said mortgage *fi. fa.* was placed in the hands of Hancock, sheriff, he * * * turned said *fi. fa.* over to W. J. P. Lowe, deputy sheriff; that when said deputy sheriff went to make said levy * * * he was informed * * * that A. G. Simmons did not own any such property as set forth in said mortgage *fi. fa.*, and for this reason said deputy sheriff did not make levy; that on the following morning A. G. Simmons came

into Knoxville, and went to Hancock, sheriff, and told him that he would admit or acknowledge levy, whereupon Hancock, sheriff, made entry of levy on [the] *fi. fa.*; that, at the time J. W. Stroud signed said bond, Hancock, sheriff, well knew that no legal levy had been made on the property set out in said bond, and well knew, also, that the recital in said bond to the effect that said property had been levied upon by him was not true in fact; that it was the duty of Hancock, sheriff, to put said J. W. Stroud on notice as to the truth or falsity of said bond, and which he failed to do. She therefore says that [neither] said J. W. Stroud, nor she as his executrix, is liable for any breach of said bond, Hancock, sheriff, being primarily liable to the plaintiff; * * * that inducing, or standing by and allowing, Stroud to sign said bond, when the said sheriff knew that the recitals therein were false, was a moral fraud upon Stroud, and [neither] he nor his representative should be held liable for any breach of said bond." To this plea the plaintiff demurred on the ground that no sufficient reason was given for the failure of the defendant to either admit or deny the allegations of the petition as to the foreclosure of the mortgage and the filing and trial of the affidavit of illegality, these being matters of record accessible to the defendant, and on the further grounds that the answer was not good as a plea of non est factum, and was not responsive to the allegations of the petition. To paragraph 6 of the answer he demurred "because the same sets forth no defense to said petition, and because said defendant is estopped from denying the levy or ownership of said property by the bond sued upon." This demurrer was sustained, and every paragraph of the plea except two, which were unimportant, was stricken. The defendant then offered the following amendment to her plea: "Defendant avers that the property described in the entry of levy by the sheriff, and set out in the alleged bond, * * * is not, and was not at the time of the alleged levy, the property of the defendant in *fi. fa.*, A. G. Simmons, and was not subject to the *fi. fa.* in [the] hands of the sheriff in favor of Napier Bros., and, in consequence of this material fact, no damage has been suffered by the said Jack Hancock, sheriff, on account of the alleged breach of the bond." The plaintiff filed a general demurrer to this amendment, which was sustained, and the amendment was stricken. The bill of exceptions recites that, "there being no issue raised by the pleas of the defendant as to the amount of the mortgage *fi. fa.* in favor of Napier Bros., to which A. G. Simmons interposed an illegality, or as to the value of the property described in the entry of levy by the sheriff, the plaintiff only introduced the *fi. fa.*, the judgment of the superior court of Pike county for damages; * * * and, there being no issue

for the jury to pass on, * * * the plaintiff's attorney made out and submitted a calculation for the jury, based on the mortgage *fi. fa.* and the judgment for damages in Pike superior court, and the jury * * * found accordingly." Before this was done, however, the defendant made a motion for a nonsuit, which was denied. The defendant excepts to the overruling of her demurrer to the petition, to the sustaining of the plaintiff's demurrers to her plea and amendment, and to the refusal of the court to grant a nonsuit.

The only question which we feel called upon to decide is that of the legal sufficiency of those portions of the plea and the amendment thereto which were stricken on demurrer, for the correctness of the rulings of the trial court on the demurrer to the petition and on the motion for nonsuit are necessarily involved in the decision of that question. It is evident that the bond sued upon is not such a bond as is contemplated by Civ. Code, § 2766, as the accompaniment of an affidavit of illegality to the levy of a mortgage *fi. fa.* That section provides for a bond payable to the plaintiff in *fi. fa.*, "who may sue thereon for condition broken," conditioned for the return of the property when called for by the levying officer. The bond given in the present case was an ordinary forthcoming bond, payable to the sheriff, and conditioned for the return of the property at the time and place of sale. The right of the sheriff to recover on such a bond, however, is clearly determined by the sweeping provision of the Civil Code (section 5436) which declares: "All bonds taken by the sheriffs or other executing officers, from the defendants in execution, for the delivery of property (on the day of sale or any other time) which they may have levied on by virtue of any *fi. fa.*, or other legal process from any court, shall be good and valid in law, and recoverable in any court in this state having jurisdiction thereof." The question then arises, is the surety on an irregular bond, like the one now under consideration, estopped by its recitals to deny the existence of the mortgaged property, or the circumstance of the levy? Estoppels are not favored, and, to support one of this character, it must appear that some benefit has been received by the party estopped, or some injury done to the party in whose favor the estoppel is invoked, which would render it unconscionable for the party estopped to deny the act or circumstance sought to be overcome. It must be borne in mind that, while the bond sued on in this case was not the instrument provided for by the Civil Code (section 2766), it was so treated by both the plaintiff and the defendant in *fi. fa.*, and stood, for all practical purposes, in lieu of such a bond. By means of it, whether there was ever a levy upon the property or not, the progress of the execution was stayed, and the defendant therein was enabled to interpose a defense to the foreclosure of the mortgage.

As, by reason of the acceptance of this bond by the sheriff, the defendant in *fi. fa.* acquired a definite and substantial benefit, he would be estopped to deny the recitations therein in reference to the levy and the existence of the property. *Cohen v. Broughton*, 54 Ga. 296; *Scolly v. Butler*, 59 Ga. 849; *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539 (7). As *Simmons*, the principal in the bond, would be estopped, there can be no doubt that *Stroud*, his surety and privy in contract, would be likewise estopped.

It is not intended by the foregoing to hold that there was any legal obstacle to Mrs. *Stroud's* setting up fraud on the part of the sheriff in procuring the signature of her husband to the bond sued on. She seems to have attempted in her plea to make this defense, but the charges of fraud were not sufficiently clear and distinct to save the answer from the effects of a demurrer. Something more than the mere silence of the sheriff was necessary, under the averments of the plea, to constitute fraud on his part. There appears to have been nothing to make it to his interest that the bond should be given, and there is not even an averment in the plea that the surety on the bond did not know as well as the sheriff, or did not have equal means with the sheriff of knowing, the real facts in regard to the levy of the mortgage *fi. fa.* It is not made to appear that that officer was under any duty, legal or moral, to inform the surety of the true situation, and under such circumstance, of course, his mere silence could not constitute fraud.

We deem it unnecessary to discuss the point made by the plaintiff in error that she received from the sheriff no demand or notice to produce the property at the time and place of sale. We are not aware of any law in this state which requires, or even provides for, such demand upon or notice to either principal or surety on a forthcoming bond. The point is not argued in the brief of counsel for the plaintiff in error, and will therefore be treated as having been abandoned.

Judgment affirmed. All the justices concurring, except *LEWIS, J.*, absent on account of sickness.

(116 Ga. 522)

CONEY et al. v. BRUNSWICK & F. STEAM-BOAT CO. et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

INJUNCTION—PARTIES—USE OF PIER.

1. The owner of property who has leased it to another, who is to keep it in repair, has no right to maintain a petition for an injunction to prevent interference with the mere use, occupation, and enjoyment of such property in the hands of the lessee and during his term.

2. The lessee of the owner of a pier, though the same extends into the waters of the ocean beyond the line of low-water mark, is, however, entitled to enjoin from using the same one who bases his alleged right to do so solely upon the claim that it is a public pier.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. W. Bennet, Judge.

Action by the Brunswick & Florida Steamboat Company and others against Coney & Parker and others. Tupper & Co. were thereafter added as parties plaintiff. Judgment for plaintiffs, and defendants bring error. Affirmed.

Ernest Dart and Crovatt & Whitfield, for plaintiffs in error. W. E. Kay, for defendants in error.

FISH, J. This was an application by the Brunswick & Florida Steamboat Company, hereinafter called the "Steamboat Company," against Coney & Parker and others, to enjoin the defendants from using a wharf called "Ocean Pier," on St. Simon's Island, for the purpose of landing thereat vessels carrying passengers. The original petition was amended by making Tupper & Co. parties plaintiff, who alleged that they had leased from the original plaintiff the pier in question, with the right to the exclusive use thereof. The amendment was allowed over objection by the defendants. The defendants filed a demurrer to the petition, and also answered the same. At an interlocutory hearing which followed, the court, upon considering the petition, demurrer, answer, and the evidence submitted, granted an injunction as prayed.

1. It is quite clear, we think, that no injunction should have been granted in favor of the Steamboat Company, the original plaintiff. The purpose of the injunction was merely to restrain interference with the use, enjoyment, and occupation of the pier. For the time being, the exclusive right to the use of the pier was in Tupper & Co., the lessees of the plaintiff, and any interference therewith by the defendants could affect injuriously the lessees only, they having bound themselves to keep the pier in repair. There was no occasion, therefore, for the Steamboat Company to invoke equitable aid to prevent such interference. As to this matter, an appropriate direction will be given.

2. There was evidence sufficient to warrant the judge in finding that the pier in question was originally constructed by a street-railroad company, which, under its franchises, had the right to erect and use an improvement of this kind, and also that the rights and franchises of this company had duly and regularly passed to the Steamboat Company, as the successor in right and title of the street-railroad company above mentioned, and that the Steamboat Company had partially rebuilt the pier, and kept it in repair, and had the exclusive use of the same for many years. It also appeared that the defendants, recognizing the right of the Steamboat Company to possess and use the pier in question, had, during the previous season, paid it for the privilege of landing their steamboats there. Indeed, the court was authorized to find from the evidence that the defendants had admitted, prior to the

institution of this suit, that they had no right to use the pier without paying for the privilege. Their alleged right to use it at all was based solely upon the claim that it was "a public pier," at which any person could lawfully land his craft. We are of opinion that in so far as the injunction protected the rights of Tupper & Co., the lessees, from interference by the defendants, it was properly granted. Under the facts appearing, the pier in question could not properly be characterized as a "public pier," save only upon the theory that it extended out into the waters of the ocean beyond the line of low water, and that to this extent at least it was open to the entire public. We do not think that this bare fact entitled the defendants to treat and use the pier as public property. It may be that the state of Georgia might have authority to cause the removal of so much of the structure as extended into the waters of the ocean, if it appeared that it was erected there without the proper authority from the state. What may be the law in this regard is not a question which now presents itself for our determination. The owner of the pier before leasing it, and its lessees after the lease had been made, were, in our judgment, entitled to its exclusive use and enjoyment as against one setting up no better claim than that presented by the defendants. As we have seen, there was evidence to the effect that they themselves recognized that the rights of the Steamboat Company and its lessees were superior to theirs, and that they only claimed the right to use the pier upon paying for the privilege. The right to demand pay for the use would, it seems, carry with it the right to prevent interference, unless the party seeking the use should resort to condemnation proceedings, and thus acquire a right to the use, and pay for the same accordingly.

There is in the bill of exceptions an assignment of error alleging that the judge erred in allowing the amendment making Tupper & Co. parties plaintiff; to which, as we have seen, the defendants objected at the time the amendment was offered. We cannot now pass upon this exception, for the reason that the case came here on a *fast writ* of error, which properly brings to this court only the interlocutory order granting the injunction.

Judgment affirmed with direction. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 48)

EASTLICK v. SOUTHERN RY. CO.
(Supreme Court of Georgia. July 24, 1902.)

HEARSAY EVIDENCE.

1. Since ordinary hearsay testimony is not only inadmissible, but wholly without probative value, its introduction without objection does not give it any weight or force whatever in establishing a fact.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Beece, Judge.

Action by E. I. Eastlick against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. J. Neel and J. M. Neel, for plaintiff in error. Shumate & Maddox and Harris, Chamlee & Harris, for defendant in error.

LUMPKIN, P. J. Mrs. Eastlick brought against the railway company an action for the homicide of her husband, was nonsuited, and thereupon excepted. She introduced, at the trial, evidence warranting a finding that the deceased was killed by the running of a train of the defendant. She also introduced testimony tending to show that the engineer in charge of the train made, after the homicide, certain declarations to the effect that the deceased was sitting upon the track, "with his hands up to his jaws," when his presence was discovered. Without objection from the plaintiff, several of the witnesses introduced in her behalf were permitted on cross-examination by the defendant's counsel to state in detail all that the engineer said on that occasion. If the declarations on his part which were testified to were true, he exercised such diligence in the premises as would undoubtedly relieve the company from all liability for the homicide. There can be no question that the plaintiff, but for the testimony with respect to these declarations of the engineer, would have been entitled to go before the jury, for the evidence as to the cause of her husband's death, in connection with the legal presumption of negligence against the company, was sufficient to make out in her behalf a prima facie case. Ought she to have been denied the privilege of having the jury pass upon the case merely because of the introduction of the hearsay testimony above pointed out? We think not. Such testimony, save as to well-defined exceptions, is inadmissible for any purpose, because it is wholly without probative value. The fact that it is admitted cannot give it any such value. In other words, testimony of this character which does not come within any of the exceptions just referred to is, in legal contemplation, wholly worthless, and has been so regarded and treated through all the ages of the English law. While a party who permits hearsay testimony to be introduced without objection, or who has himself introduced such testimony, will not be heard to complain of the fact that it went to the jury, and must suffer whatever disadvantage may come of their giving it sufficient weight to turn the scale against him when there is enough legal testimony before them to support a finding in favor of his adversary, it will not do to say that such a finding, resting upon hearsay testimony alone, can lawfully stand merely because the losing party did not object to such testimony when offered by his adversary, or himself introduced the same. No plaintiff should ever, under any circumstances, lose his case when there is

evidence to warrant a recovery by him, and the verdict or judgment in favor of the opposite party has nothing upon which to rest but inadmissible hearsay testimony.

It ought not to require the citation of authority to establish the soundness of these time-honored and thoroughly settled propositions. We will, however, as it happens to be before us, call attention to the case of *Bank v. Woody*, 10 Ark. 638, which upon its facts is closely in point, and in which it was held that: "Hearsay is inadmissible, not only because it supposes better evidence in existence, but on account of its intrinsic weakness and incompetency to satisfy the mind; and the admission of this kind of evidence without objection does not give it any new attribute or weight, its nature and quality remaining the same so far as its intrinsic weakness and incompetency to satisfy the mind are concerned." In the opinion delivered by Mr. Justice Scott, he makes it very clear that ordinary hearsay testimony should not be treated as sufficient to establish any fact. Our own case of *Barclay v. Waring*, 58 Ga. 86, is on the same line, and affords an apt illustration of the application of the rule that testimony which is incompetent and inadmissible because the law stamps it as wholly unworthy of consideration or credit cannot, merely because it may not have been challenged on the trial of a case, be treated by a reviewing court as having any probative force or value whatever. The present case ought to have gone to the jury. Had it been submitted to them, and the engineer had as a witness testified without contradiction to the truth of the statements embraced in his alleged declarations, a verdict for the defendant would have been well warranted.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 224)

ATLANTIC & B. R. CO. et al. v. SOUTHERN PINE CO. OF GEORGIA.

(Supreme Court of Georgia. Aug. 8, 1902.)

MISJOINDER OF PARTIES—INJUNCTION—BREACH OF CONTRACT.

1. A misjoinder of parties plaintiff results from joining, with one having a right to maintain an equitable proceeding to enjoin a threatened breach of contract, persons between whom and the defendant to the action there is, with respect to the subject-matter thereof, no privity of contract, and who for that reason have no concern in the outcome of the litigation.

2. As the real party at interest in the present case failed to establish by proof any contractual relation with the defendant, an interlocutory injunction was properly refused.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. W. Bennet, Judge.

Action by the Atlantic & Birmingham Railroad Company and others against the Southern Pine Company of Georgia. Judgment for

defendant, and plaintiffs bring error. Affirmed.

J. L. Sweat, for plaintiffs in error. W. E. Kay and John C. McDonald, for defendant in error.

LUMPKIN, P. J. A petition for injunction and other relief, in which the Southern Pine Company of Georgia was named as defendant, was filed by "the Atlantic & Birmingham Railroad Company, formerly the Waycross Air Line Railroad Company, and J. E. Wadley, J. L. Sweat, C. C. Grace, W. W. Beach, A. Sessoms, and J. S. Bailey; also J. S. Bailey & Co. and J. R. & T. Bunn, who sue for the use of said railroad company." The action appears to have been brought in renewal of the litigation involved in the case of Waycross Air Line R. Co. v. Southern Pine Co., 115 Ga. 7, 41 S. E. 271, in which this court held that the railroad company could not, in its own name and right, invoke the relief sought by it. In addition to the facts then relied on, which are set forth in the opinion filed in that case by Chief Justice Simmons, the plaintiffs in the present proceeding alleged the following: The Atlantic & Birmingham Railroad Company is the legal successor of the Waycross Air Line Railroad Company. On February 4, 1899, in pursuance of a previous understanding between the stockholders of the latter company and certain parties to whom its line of railway had been sold, a written contract was duly entered into "by and between said J. S. Bailey & Company and the said Waycross Air Line Railroad Company" whereby, in consideration of certain reduced freight rates and other inducements offered by the railroad company, Bailey & Co., who were the owners of a large tract of timber, agreed to erect a sawmill, and to ship over that company's line the entire marketable product manufactured from the timber standing upon various lots of land which comprised the tract just referred to. Bailey & Co. subsequently sold this tract of timber to J. R. & T. Bunn, under covenant by them to perform the above-mentioned contract, and they, in turn, sold the timber to the Southern Pine Company under a like covenant. That company erected a sawmill upon the land, and, agreeably to its covenant with J. R. & T. Bunn, shipped lumber over the Waycross Air Line Railroad "until the month of April in the year 1901, when, upon said sawmill * * * being destroyed by fire, said Waycross Air Line Railroad Company and said Southern Pine Company of Georgia thereupon agreed that, upon the same terms, and with existing rights and privileges, the Bailey & Company timber should thereafter be sawed at the Nicholls mill * * * of the said Southern Pine Company of Georgia, and the lumber therefrom shipped over the said Waycross Air Line Railroad, the only new condition demanded of plaintiff [the Air Line

Railroad Company, presumably] by defendant being additional switch facilities at that point, and for the purposes aforesaid, which were furnished"; whereupon the Southern Pine Company continued, for a short time, to make its shipments of lumber over the Air Line Railroad at the reduced rates of freight agreed on. Later, however, it diverted its shipments to other transportation lines, and refused, and still refuses, to comply with its obligations under the contracts above referred to, notwithstanding "the said railroad company, relying upon the terms and conditions of the contracts, covenants, and agreements aforesaid, and acting thereunder in the utmost good faith, expended large sums in the improvement and better equipment of its said road to enable it properly to transport the lumber sawed from the aforesaid timber." The result of the refusal on the part of the Southern Pine Company to comply with its obligations in the premises has been "to deprive said railroad company of revenue arising from its proportion of the freight rate provided for" in said contracts, "amounting to fifty thousand dollars, or other large sum, in which sum said railroad company has been damaged; and unless said Southern Pine Company of Georgia is restrained and enjoined and compelled to specifically perform the terms and conditions of the agreements, contracts, and covenants aforesaid, by shipping the lumber sawed from said timber over the road of said railroad company. * * * it will be further defrauded and damaged in the additional amount of fifty thousand dollars, or other large sum." The Southern Pine Company, "if permitted to cut and divert the shipment of the lumber as aforesaid, would not be able to respond in damages, and, besides, is subject to have its affairs wound up at any time and to be dissolved." Though the sum just named would be the approximate amount of the loss sustained, "it would be difficult to properly estimate said damages; and, moreover, the said railroad company requires all the revenue to which it is entitled promptly paid, from time to time, to meet its operating expenses. * * * and hence the loss, injury, and damage to which it is and would be subjected * * * are irreparable." To the end that a multiplicity of suits may be avoided, it is necessary that the rights and duties of all parties concerned should be ascertained and determined in one and the same action. The following amendment was subsequently presented and allowed: "And now comes [?] plaintiffs in above-stated case, and, by leave of the court, amends [?] the petition filed therein, so far as concerns J. S. Bailey & Company and J. R. & T. Bunn, or effects [?] them in any wise whatever, by alleging that the contract set out in the fourth paragraph of said petition [viz., that between Bailey & Co. and the Air Line Railroad Company] alleged to have been made and executed, and the damages sustained by

the railroad company for a breach thereof, is so alleged by the plaintiff the Atlantic & Birmingham Railroad Company."

The plaintiffs' petition was met by a special demurrer containing various grounds,—among them, the following: (1) "There is a misjoinder of parties plaintiff, there being no connection, contractual or otherwise, shown between defendant and any of the plaintiffs except J. R. & T. Bunn"; (2) "no cause of action is alleged or attempted to be shown against defendant in favor of said J. R. & T. Bunn, said plaintiff not being alleged to have suffered any injury or damage, and no breach of the alleged contract between defendant and said J. R. & T. Bunn being alleged"; (3) "there is neither privity nor mutuality of contract alleged or shown between defendant and said plaintiffs J. S. Bailey & Co., J. S. Bailey, J. E. Wadley, J. L. Sweat, C. C. Grace, W. W. Beach, or A. Sessoms, nor is there alleged any breach of any contract between them, or either of them, and defendant, nor is it alleged that they, or either of them, have suffered any injury or damage at the hands of defendant, and therefore they are improper parties plaintiff"; (4) that the allegation of the petition with respect to the sale of the Air Line Railroad to Wadley and his associates, and the subsequent contract between the railroad company and Bailey & Co., are wholly immaterial and irrelevant, as are also the allegations as to the contract between Bailey & Co. and J. R. & T. Bunn and that between the firm last named and the Southern Pine Co.; (5) there is no charge of insolvency on its part; and (6) "It appears from said petition that the damage alleged is capable of computation, and no facts are alleged going to show that a judgment in law should not be obtained therefor, or that such a judgment, if obtained, could not be collected from the defendant." The Southern Pine Company also filed an answer in which it denied that it had, as alleged, upon the burning of its sawmill, entered into a contract with the Air Line Railroad Company, such as that declared upon, or a contract of any kind with respect to the shipment over its line of all of the lumber manufactured from what was known as the "Bailey & Co. tract of timber." An interlocutory hearing of the case was had upon the plaintiffs' petition as amended, and the defendant's demurrer and answer thereto, at which much evidence was introduced by both sides, and which resulted in an order denying the injunction prayed for. Error is assigned upon the passing of this order.

1. In view of the decision rendered by this court in *Waycross Air Line R. Co. v. Southern Pine Co.*, cited supra, it is obvious that, as was clearly pointed out in the defendant's special demurrer, "there is neither privity nor mutuality of contract alleged or shown between" the Southern Pine Company and "Bailey & Co., J. S. Bailey, J. E. Wadley, J.

L. Sweat, C. C. Grace, W. W. Beach, or A. Sessoms." Accordingly, none of these parties should have been joined with either the railroad company or J. R. & T. Bunn as plaintiffs to the action. It is true that privity of contract is shown between the defendant and J. R. & T. Bunn; but why they were deemed necessary, or even proper, parties to the present action, is not altogether clear. Apparently they had nothing more than a bare speaking acquaintance with the Waycross Air Line Railroad Company, and do not appear to be on terms of any greater intimacy with its successor. They were not parties to the alleged contract between the Air Line Railroad Company and the Southern Pine Company, and therefore have no right to demand its enforcement. It is equally apparent that, as the Air Line Railroad Company was not a party to the contract between the defendant and J. R. & T. Bunn, the plaintiff railroad company can claim nothing under that contract. While J. R. & T. Bunn undertake to "sue for the use of said railroad company," they do not set up any facts going to show they have a right to maintain the action for their own benefit or protection, and are therefore in a position to nominate the plaintiff railroad company as usee. They cannot possibly sustain any injury or loss, save in the event they are called upon by Bailey & Co. to respond in damages for a breach of contract. The plaintiffs' petition does not seem to have been framed upon the theory that, unless the Southern Pine Company is enjoined from making itself further liable in damages, there is reason to apprehend that the Atlantic & Birmingham Railroad Company will enter suit upon the contract between its predecessor and Bailey & Co., and that they, in turn, will institute an action for damages on the contract between them and J. R. & T. Bunn, who, because of the insolvency of the defendant, will be the ultimate sufferers. We certainly would not feel authorized to place upon the petition such a construction, had it been demurred to on the ground that there was a misjoinder of causes of action. Giving effect to the amendment filed to the petition, wherein it was explicitly stated that neither Bailey & Co. nor J. R. & T. Bunn joined with the plaintiff railroad company in alleging the execution and breach of the contract between its predecessor and Bailey & Co., we are forced to the conclusion that the idea of the pleader was that by making the firm of J. R. & T. Bunn a nominal party plaintiff, ostensibly interested in protecting the Atlantic & Birmingham Railroad Company against further loss, it would be placed in a situation where it could demand the enforcement of a contract to which it was not a party, and in which it had no interest whatsoever. It is not within the province of a court of equity to make parties to contracts. This we undertook to decide when the case above cited was before us. Under the averments of the plaintiffs' petition as amended, J. R. & T. Bunn appear to be neither more

nor less than interlopers, attempting to intermeddle in a legal controversy with the outcome of which they have no real concern. If, for their own protection and the incidental benefit of the plaintiff railroad company, they desired to enforce by way of injunction the contract between them and the Southern Pine Company, they should have instituted in their own name and right a separate and independent proceeding, fully setting forth the facts upon which they relied as entitling them to equitable relief. If the Southern Pine Company is, in point of fact, insolvent, and therefore unable to respond in damages, we see no reason why such a proceeding might not have been successfully prosecuted. But it is a matter of grave doubt whether J. R. & T. Bunn would be entitled to an injunction upon the theory that the damages resulting from a further breach by the Southern Pine Company of its contract with them would be incapable of ascertainment, since, were this true, they could not be held liable on their covenant to Bailey & Co. for more than nominal damages, the payment of which would not operate as an irreparable injury, to prevent which a court exercising equitable jurisdiction could be called upon to adopt prompt and effective measures.

2. As has been seen, it was alleged in the plaintiffs' petition that, after the sawmill erected by the Southern Pine Company was destroyed by fire, it entered into a new and independent contract with the Waycross Air Line Company with respect to the future shipment of lumber over that company's line of road. We are much inclined, however, to agree with counsel for the defendant in error that no satisfactory reason was assigned why it was necessary to the protection of the railroad company that the Southern Pine Company should be enjoined from committing a further breach of this alleged contract. But be this as it may, his honor below rightly held that the plaintiff railroad company was not entitled to the extraordinary relief sought; for on the interlocutory hearing of the case the fact was developed that no such contract was ever entered into by and between the Southern Pine Company and the Waycross Air Line Railroad Company. As the rulings above announced practically dispose of the case upon its substantial merits, we deem it unnecessary to deal with other points presented by the bill of exceptions.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 298)

WALDEN v. A. P. BRANTLEY CO.

(Supreme Court of Georgia. Aug. 9, 1902.)

HOMESTEAD EXEMPTIONS.

1. Though land bought with the proceeds of a homestead is homestead property, and ordinarily stands, as to exemptions from sale, on the

same footing as the original homestead, this is not true as against the rights of one who, bona fide and for value, acquires a lien on such land, without knowledge, either actual or constructive, of its homestead character.

2. Applying the rule above announced to the conflicting evidence in the present case, and giving to the defendant in error the benefit of that view of the same most favorable to it, as it was the right of the judge to do, there was no abuse of discretion in refusing to grant the interlocutory injunction.

3. The ruling made in *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749, is not in conflict with this ruling.

(Syllabus by the Court.)

Error from superior court, Pierce county; Jos. W. Bennet, Judge.

Action by C. E. Walden against the A. P. Brantley Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John C. McDonald, for plaintiff in error.
Leon A. Wilson, for defendant in error.

LITTLE, J. Walden, as head of a family, sought to enjoin the Brantley Company from selling a house and lot in the city of Waycross. By his petition he made substantially the following case: In March, 1877, he had set apart to him, as the head of a family, a homestead of realty and personalty, the realty being a certain place whereon he then resided. Thereafter, in 1881, under an order granted by the judge of the superior court, the realty and some of the personalty exempted was sold, and the proceeds were reinvested in a house and lot on Albany avenue, in the city of Waycross. In 1899 that property was exchanged for the house and lot situated on the northwest corner of Isabella and Remahart streets, in the same city. He removed his family there, and that has been their home continuously to this day. This last-named property was purchased with the proceeds of the homestead which had been regularly set apart to him. The deed conveying this property to petitioner was made by A. L. Johnson. It conveyed the land directly to petitioner, and was duly witnessed and recorded. In the year 1901 petitioner and C. T. Walden, his brother, engaged in the naval stores and turpentine business in Clinch county, and bargained for a turpentine plant from one Guthrie, who was indebted to the A. P. Brantley Company. Guthrie sold this plant to the petitioner and his brother, and took their promissory notes in payment therefor. These notes Guthrie transferred to his creditors, and in that way the Brantley Company came into possession of them. Petitioner and his brother borrowed \$500 from the Brantley Company, and executed a mortgage to secure the notes so transferred, as well as the \$500 borrowed, covering certain property, among which was the property in question. The petitioner alleged that he had no right to execute that mortgage, and that the Brantley Company knew, or ought to have known, such fact, as the property was homestead property; that the mortgage given con-

¶ 1. See *Homestead*, vol. 25, Cent. Dig. § 223.

tained a power of sale, and the Brantley Company were proceeding under that power to sell, were advertising all of the property described in the mortgage, and, if not restrained, would sell the house and lot in Waycross. Waiving discovery, petitioner asked for an injunction to restrain the Brantley Company from selling the house and lot before described. To this petition were attached copies of the homestead proceedings, which were regular on their face, and set apart certain described property as an exemption of personality and realty. On the presentation of this petition, a temporary restraining order was granted, and a rule nisi directed to issue. The defendant answered, setting up the fact that petitioner and his brother had borrowed \$500 from it, and had executed a mortgage to secure this sum, together with certain promissory notes which it held against the firm of C. E. & C. T. Walden. It denied that the realty described in the mortgage was obtained by the proceeds of a sale of a homestead, but averred that it was the property of the petitioner, and was his property at the time of the execution and delivery of the mortgage, but alleged that, if the proceeds of any homestead were invested in this property, it had no notice or knowledge of any such fact at the time, and that it in good faith and for value accepted the notes of C. E. & C. T. Walden, and the mortgage given to secure them. The defendant further answered that before the execution of the mortgage it held a note signed by C. E. & C. T. Walden, payable to Guthrie, for \$750, and that at the time of the maturity of the same it was not paid, and the defendant entered suit on the same. Thereupon the Waldens proposed that, if defendant would advance them \$500 in money and goods for the purpose of operating their turpentine business, they would secure defendant with the property mentioned in the mortgage. This proposition was accepted, and thereupon the makers of the notes executed a mortgage on the property described, which includes the house and lot in the city of Waycross, to secure their notes, aggregating the sum of \$1,200. Before the notes and mortgage were executed, the president of the defendant company asked both C. E. and C. T. Walden if there was any incumbrance on the property sought to be mortgaged, and both stated to him there was not. They also stated that there was no homestead against the property. Defendant acted in good faith throughout the transaction, and took the notes and mortgage bona fide and for value, without any knowledge that any of such property was impressed with the homestead, or proceeds of the homestead.

At the hearing, it was shown that in April, 1890, A. L. Johnson, in consideration of \$500, conveyed to Charles E. Walden the house and lot in the city of Waycross, on the corner of Isabella and Remshart streets; and after testifying that he was the head of a family,

and that the house and lot had been purchased by the proceeds of the homestead which had been set apart to him, he further said that before the execution of the mortgage he told Mr. A. P. Brantley, the chief officer of the defendant company, that, while there was no mortgage or lien against the property, yet he had obtained a homestead for his family several years ago, and that the proceeds of that homestead was his Waycross home, on which he was about to execute this lien. He further said that when the original homestead property was sold, and reinvested in a home on Albany avenue, he did not obtain from the owner any deed to that place, up to the time he made an exchange of the property on Albany avenue for the property on Remshart street, and when he exchanged the property on Albany avenue for his present home he had the original owner to execute titles to the same to A. L. Johnson, and that Johnson, in turn, executed to plaintiff title to the property on Isabella and Remshart streets. C. T. Walden also testified that, before the mortgage to the Brantley Company was executed, he had heard his brother, the petitioner, tell A. P. Brantley, of the Brantley Company, that the property he was mortgaging was the proceeds of an alleged homestead set apart for the use of his family some years ago. Defendant introduced its mortgage, and the evidence of two witnesses who testified, in substance, to the facts set up in its answer, and, among other facts, that the makers of the mortgage came to an agent of the company and proposed to adjust their indebtedness by a mortgage on the property in Waycross; that this was accepted, and the notes and mortgage then executed; and that, on inquiry, each of the mortgagors said there was no homestead or exemption on the property. At the conclusion of the evidence, the judge refused to grant the injunction as prayed for, and revoked the temporary restraining order, to which Walden excepted.

1. The only question which arises in this case is whether the trial judge erred in refusing to grant the injunction. It is not contested that, at the time of the execution of the mortgage, C. E. Walden held a deed to the lot which he had mortgaged, and that Johnson, the previous owner, had executed title to him individually. It has been repeatedly ruled by this court that property purchased with the proceeds of a homestead is as much exempt from levy and sale as the original property set apart as a homestead would be. In the case of *Johnson v. Redwine*, 105 Ga. 449, 33 S. E. 676, it was also ruled that one who takes a mortgage upon land purchased with the proceeds of exempted property, and who knows, or is chargeable with notice, that such was the fact, acquires his lien subject to the exemption rights. On the other hand, the rule that a mortgagee, to the extent of his interest in the land mortgaged, stands upon the same footing as any other bona fide purchaser without

notice, has been repeatedly recognized (*Lane v. Partee*, 41 Ga. 202; *Broome v. Davis*, 87 Ga. 584, 18 S. E. 749), and that an innocent purchaser of land, for value and without notice, is protected against any secret equity which another has in such land, so that assuming that the house and lot in question was purchased with the proceeds of a homestead regularly set apart, yet if, at the time of the execution of the mortgage, the Brantley Company did not have, and were not chargeable with, notice of such fact, and in good faith advanced money to Walden on the security of a lien on the property, title to which then stood in his name, it took a lien superior to the claim of the homestead thereon. On the contrary, if the company had such notice, or was chargeable with the same, the lien which it took was subject to the homestead right.

2. In this state an interlocutory injunction is not a matter of right, but of discretion. This discretion is intrusted by law not to the supreme court, but to the judges of the superior courts. *Barfield v. Putzel*, 92 Ga. 442, 17 S. E. 616; *Brumby v. Bell*, 65 Ga. 116. If the Brantley Company took their mortgage with notice that the house and lot on which it took a lien was homestead property, either directly or indirectly, then the judge should have granted the injunction. On the contrary, if it did not have such notice, the injunction should not have been granted. Whether it had notice or not was a question of fact. The evidence in relation thereto was in direct conflict. The truth as to the question raised was involved. An equal number of witnesses swore to the contrary as to this point, and the judge, in determining the question, was required to pass on the credibility of the witnesses and determine the truth of the matter. In doing so, he gave credit to the witnesses of the defendant; and, if they were to be believed, the injunction was rightly and properly refused. This court cannot lawfully reverse the judgment, which depended upon the solution of this contested question of fact, unless the judge abused his discretion, and we are not able to say that he did. But it is argued by counsel for the plaintiff in error that the injunction ought not to have been denied, because the damage which would be caused to the plaintiff by a consummation of the sale would inflict irreparable injury upon him and his family, and, inasmuch as the question of notice was a contested one, that the injunction should be granted at least until this question was decided by a jury. In reply to this it may be said that, if the plaintiff had no notice, it was his right to sell the house and lot under his agreement; and, having such right, it would work an injustice to him to unduly postpone it. However, these and kindred matters are by law left to the determination of the judge in ruling on the application for injunction. He has ruled in this case. His ruling was amply

supported by evidence, and we, not having the information as to the witnesses who testified in the case that the judge had, would only be indulging in a surmise were we to say that, in our opinion, the truth of the contested question was one way or another. So we do not find that his discretion was abused.

3. The ruling made in the case of *Broome v. Davis*, supra, is in no sense in conflict with anything which we have herein laid down. While this court there ruled that land paid for with homestead land was homestead property, though the deed to it be taken in the name of some one else than the head of the family, and reversed the judgment of the trial judge, who held that the property was subject to the mortgage execution, because of the fact that it was homestead property, yet an examination of the case distinctly discloses that this ruling was made because at the time of the execution of the mortgage the creditor was charged with notice of the homestead character of the land.

The trial judge did not, in our opinion, commit any error in refusing to grant the injunction.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 303)

TICHENOR v. WILLIAMS BLOCK PAVEMENT CO. et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

CORPORATIONS—STOCK SUBSCRIPTIONS—COLLECTION BY RECEIVER.

1. A court of equity will not authorize or direct the receiver of a business corporation to sue for and collect unpaid stock subscriptions, when it appears that there is no existing creditor who has an unsatisfied debt against the corporation, and that the only purpose for which such authority is sought is to provide a fund for meeting obligations, on the part of the corporation, which it is altogether probable will arise in the future, and at a time when the corporation will have no solvent stockholder.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by W. R. Tichenor, receiver, against the Williams Block Pavement Company and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Burton Smith and Geo. Gordon, for plaintiff in error. W. O. Wilson and Jas. L. Mayson, for defendants in error.

LITTLE, J. On the petition of the American Bonding & Trust Company of Baltimore city, the assets of a private corporation using the name of the Williams Block Pavement Company were placed in the hands of Tichenor, as permanent receiver, and all persons were enjoined from interfering with him in his control of the assets of that company. The petition on which the receiver was appointed

alleged that in the fall of 1897 the defendant company paved North avenue from Peachtree to West Peachtree street, and from West Peachtree to Williams street, with wooden blocks; that this work was done for the city of Atlanta, under certain contracts made with the city; that the defendant company was required to give bond, with security, for the execution of said contracts; that petitioner executed for the defendant two bonds, one for \$5,000 and one for \$3,000, to secure the execution of said contracts; that the defendant company proceeded under said contracts, which, when completed, were accepted by the city of Atlanta; that under the terms of these contracts the pavements were to be kept in good condition for ten years; that about three years have elapsed since the work was completed, and the pavement is rapidly getting in bad condition, and is now in need of improvements in the way of a coat of tar or some substance to be put on the wooden blocks, and unless this is done the pavement laid by the defendant company will rapidly rot; that if these blocks should now receive proper attention a comparatively small amount of money would put them in a satisfactory condition, but if the pavements are allowed to remain in the present condition they will rapidly deteriorate, and in a short time will require many thousand dollars to put them in repair; that the city of Atlanta, through its proper officer, has notified both the defendant company and petitioner that immediate steps must be taken to put these pavements in condition, and petitioner has urged the defendant company to do so, but it has done nothing, and is making no effort to do anything; that the company has gone out of business, has no office, and its officers manifest indifference as to the result; that it did not make a business success; that it was understood at the time the bonds were executed that it had a capital stock of \$25,000, and that 10 per cent. of this had been paid in; that, notwithstanding repeated demands on the part of petitioner, the officers and stockholders of defendant have taken no action, but refuse to do anything; that only three of the stockholders are solvent, and one of these claims that he never was a stockholder, and only one of those who is solvent admits that he is a stockholder, and his assets are decreasing rapidly; that the only opportunity to collect any money from defendant will be through a receiver, and a suit by him against the stockholders; that the amounts for which petitioner would be liable on the bonds which it executed are increasing with great rapidity; that petitioner has been unable to find the stockholders' book or any other book of the defendant company, and its officers say they know nothing of the books, records, and papers of defendant. Under these allegations, and in response to proper prayers, a receiver was appointed by consent of the parties after the city of Atlanta had intervened and been made a party plaintiff in the case. Subsequently Tichenor, the re-

ceiver, filed in the superior court of Fulton county a petition in which he alleged that in his opinion, for reasons set out in the petition under which the receiver was appointed, it was necessary to call in all of the unpaid stock subscriptions in order to discharge final obligations and carry out its contracts. Therefore he prayed: First, for an order authorizing and directing him to make a call on each subscriber for the immediate payment of his unpaid subscription, to wit, 90 per cent.; second, that he be authorized to sue such subscribers as fail to comply with such call. A rule nisi was issued and served, and subsequently the receiver amended his petition, and alleged that it would require from \$8,000 to \$10,000 to keep the pavement in repair during the contract; that the company had failed to keep the same in repair, and there was a present demand by the city on the company for repairs to the extent of \$1,000, and defendant company has less than \$500 assets, except its stock subscriptions; that most of the stockholders are insolvent, and the only solvent stockholder who admits himself to be such is wasting his assets, and will in a few years be insolvent; and that the repairs will continue to be necessary during some years. At the hearing the defendant company demurred to the petition, as amended, on the grounds that no liquidated debts due by the defendant company are shown by the petition, for the payment of which the receiver would be authorized to sue and collect unpaid stock subscriptions; that the amount sought to be collected by the receiver was largely in excess of any liability due by the defendant, as shown by the petition; that no liability is shown to have been incurred by the American Bonding & Trust Company which the receiver would be authorized to pay, should he collect the subscriptions as prayed for; and that the petition for receiver was, in effect, one simply to collect and hold funds in contemplation of a debt which might arise in the future. The judge denied the prayer, sustained the demurrer, and dismissed the petition. To these rulings the receiver excepted.

The question thus arises whether the trial judge erred in refusing to grant the prayers of the receiver. We do not think he did. It does not appear that the pavement company was a debtor either to the bonding and trust company or to any other person or corporation. It is true, the pleadings show that the pavement company is practically out of business, that its assets are small, and that in all probability it would be both unwilling and unable to comply with the contracts which it had entered into with the city of Atlanta, and by its failure so to comply the American Bonding & Trust Company would at some time in the future, sooner or later, suffer loss. We do not understand that the subscribers to the capital stock of a corporation are liable for their unpaid subscriptions to any person except (1) the corporation in which the shares are held, and (2) the creditors of such cor-

poration; and, as we understand the rule, no recovery can be had against them by the latter unless two things are made to appear: First, that the corporation is insolvent; and, second, the existence of a debt or debts due by the corporation, which the collection of such subscriptions is intended to liquidate. Mr. Elliott, in his treatise on Private Corporations (section 571), declares that "the right to proceed against a stockholder is dependent upon the existence of a debt due from the corporation to its creditors." Mr. Beach, in the first volume of his work on Private Corporations (section 115), declares, on authority, that "at common law the stockholders in a corporation are not liable individually for the corporate debts." In section 123 of this same work he says: "The personal liability of stockholders for the debts of the company is secondary to that of the company itself, and does not accrue until the corporate assets have been exhausted, or clearly shown to be insufficient to meet the demands of creditors;" in support of which he cites many cases in note 3, p. 233. In their treatise on Private Corporations (volume 3, p. 2428), Clark and Marshall state the rule thus: "Any balance that may be due from the stockholders of a corporation on their stock constitutes a part of the assets of the corporations, and, on the dissolution or insolvency of the corporation, its creditors, having exhausted their legal remedies against the corporation, may sue in equity to compel the stockholders to pay in the same, and have it applied to the satisfaction of their claims." Mr. Cook, in his treatise on Stock and Stockholders (volume 1, § 200), after declaring that while it is settled law in the United States that unpaid subscriptions constitute a trust fund for the benefit of corporate creditors, and that such unpaid balances are not the primary or regular fund for the payment of corporate debts, also says: "When the corporation is in default and embarrassed, or for any reason fails to pay its debts, then its creditors have rights with reference to such unpaid subscriptions. They then have the right to know whether all the subscriptions for stock have been fully paid in, and, if not, the right to compel such payment." He then declares that "the well-established rule upon this point is that a corporate creditor's suit to enforce payment of unpaid subscriptions can be properly brought only after a judgment at law has been obtained against the corporation, and an execution returned unsatisfied." The same author further on states certain exceptions to this rule, which it is not here important to consider, as the facts alleged do not bring the petitioner in this case within any of these exceptions.

Following these rules, which appear to be generally recognized, it is ruled in *Wetherbee v. Baker*, 35 N. J. Eq. 501, that "a creditor, having exhausted his remedy against the corporation by judgment, execution, and a return of nulla bona, may file a bill against

stockholders to compel the payment of unpaid subscriptions to the capital stock." We have referred to these authorities for the purpose of showing the necessity of having an existing debt against the insolvent or embarrassed corporation before a creditor can maintain a suit against an individual stockholder to recover the amount of his unpaid subscription. In the case of *Wing v. Slater* (R. I.) 35 Atl. 302, 33 L. R. A. 506, a very full discussion is had as to the nature of the debt to be shown in order to authorize such a suit. In the case of *King v. Sullivan*, 93 Ga. 626, 20 S. E. 76, following the general rule, it was declared to be well settled that unpaid stock subscriptions are assets of an insolvent corporation, which, when properly reached, may be applied to the benefit of its creditors. The facts of the present case show that neither the city of Atlanta nor the bonding company is a creditor of the defendant corporation. No present debt is shown or even alleged to be owing to either of these corporations by the defendant company; and, giving the allegations of the receiver's petition the full weight they are intended to have, it only appears that the pavement company will at some time in the future, if it has not already done so, probably make a breach of its contract with the city of Atlanta, and it will, after the surety has settled for the damages caused by the breach, then owe the bonding company such an amount as it would have to pay in consequence of the breach. It was the evident purpose of the receiver, had he been permitted to call in the unpaid stock subscriptions, to hold the same, and from time to time apply the fund to the proper execution of the contract between the city and the pavement company according to its terms. Such a course would, as we understand it, extend the rule of the liability of the stockholders further than, as we are informed, it has ever been carried. In the case of *Gulmartin v. Railway Co.*, 101 Ga. 565, 29 S. E. 189, it was ruled that: "When a guarantor has taken from the guarantor no assurance of the guaranty, by mortgage or otherwise, so as to create a lien in his favor upon the property of the latter, the mere existence of the contract of guaranty presents no obstacle, legal or equitable, to such disposition of his property as the guarantor may deem proper; and the fact that a guarantor may become insolvent or may waste his goods before there is a breach of the contract upon the part of the principal, and before such time as the guarantor shall have become answerable upon his undertaking, affords no reason for the intervention of a court of equity, nor any reason for the grant of an injunction, or the appointment of a receiver to seize and hold the guarantor's estate. The assets of a corporation which has contracted as a guarantor are not liable to seizure, either at law or in equity, until after a breach by the principal of the guaranteed agreement; and neither the conveyance of its assets to third persons, nor the

misappropriation of its funds by its stockholders, affords any ground for equitable interference at the suit of the guarantee, when it does not appear either that the principal is insolvent, or that there has been any breach by him of the contract which was guaranteed. The mere possibility of a future breach of such contract, with a resulting liability against it as a guarantor, will not authorize the appointment of a receiver to take its assets out of the hands of its stockholders." Our present Chief Justice, who delivered the opinion in that case, said in conclusion that "equity will not impound the property of a guarantor for thirty years, especially where other creditors have claims against him, in order to ascertain at the end of that time whether the principal will be able to meet the obligation against him, which is the subject of the guaranty." We must therefore rule, both under the authorities generally and the spirit of our own decisions, that the court committed no error in sustaining the demurrer and dismissing the petition of the receiver.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 276)

SOUTHERN RY. CO. v. STATE.

(Supreme Court of Georgia. Aug. 9, 1902.)

USE AND OCCUPATION—TRESPASS—DECLARATORY ACTION.

1. A lessor of real property has no right of action against a third party for the use and occupation of a portion of the leased premises during the duration of the lease and at a time when the lessee was entitled to the possession of the property. Where there is no injury to the freehold, the right of action, if any, is in the lessee.

2. A declaratory action is not maintainable in this state. Accordingly, where a plaintiff files a petition alleging that the defendant is in possession of certain land, and setting up facts which plaintiff claims show that he has title, and that the defendant has no title or right of possession, and invoking no injunction, judgment, or decree save that the court decide the law, and declare the legal rights of the parties, a demurrer to such petition should be sustained. (Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by the state against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell and Shumate & Maddox, for plaintiff in error. Boykin Wright, Atty. Gen., E. T. Brown, and N. M. Randolph, for the State.

SIMMONS, C. J. The state of Georgia brought suit against the Southern Railway Company. The petition alleged that the plaintiff was the owner of a railroad, known as the "Western & Atlantic Railroad," extend-

ing from Atlanta, Ga., to Chattanooga, Tenn.; that this railroad had been operated directly by the plaintiff until 1870, when it was leased to a named corporation for 20 years; that upon the expiration of this lease, December 27, 1890, the railroad was leased for the 20 years next ensuing to the Nashville, Chattanooga & St. Louis Railway, which became under the law a corporation of the state of Georgia under the name and style of the Western & Atlantic Railroad Company, the lease being made pursuant to an act of the general assembly approved November 12, 1889, to which reference was prayed; that at the time of this last lease a certain railway company was using and occupying a portion of the right of way of the Western & Atlantic yards in the city of Dalton to a point on the right of way about seven miles south from the yards; that this use and occupation was maintained by this company until July, 1894, when all of its assets were sold by judicial decree, and purchased by the defendant, since which time the defendant had used and occupied the described portion of the right of way. The petition then set out certain claims which the defendant, as successor of other companies, was alleged to assert to this part of the right of way, and reasons why the plaintiff considered these claims as without merit, and the acts of the defendant as a continuing trespass. Waiving discovery, the petition prayed that the court should determine what rights in the property were acquired by the various predecessors of the defendant, and whether the rights of a named company were acquired by succession by the defendant and the intermediate companies; "that the rights and equities of the parties in and to the subject-matter be ascertained, determined, and declared, and be established and enforced by proper orders and decrees of the court"; that it be decreed that the defendant has no right to the use of the disputed premises, and that the operation of its trains thereon constitutes a continuing trespass; that there be an accounting to ascertain the value of the use by the defendant of the premises, and a money decree rendered for the amount so ascertained; for general relief, and for process. To this petition the defendant filed general and special demurrers, one of the latter based on the ground that the petition showed that whatever compensation was due for the use and occupation of the premises was due, not to the plaintiff, but to its lessee. The demurrers were overruled by the judge, and the defendant excepted.

1. In the first place we are clear that the judge should have sustained the demurrer to that part of the petition which claimed compensation for the use and occupation of the premises. The act of 1889 (Acts 1889, p. 362), to which the petition prayed reference, as well as the petition itself, showed that the state had leased its railroad and all of its appurtenances. If the state had title to the premises described in the petition, then the

¶ 1. See Landlord and Tenant, vol. 22, Cent. Dig. § 124.

right to the possession of those premises passed, under the lease, to the lessee. It necessarily follows that an unauthorized use of the premises by the defendant, without injury to the freehold, could have injured only the lessee, which alone was entitled to the possession and use. The plaintiff, during the continuance of the lease, has no right to the possession or use of the leased property, and, therefore, cannot recover from a third party for compensation for the use and occupation. The right of action would be in the lessee, and by it alone could such a suit be maintained. Nor is the petition aided by the prayers for general relief. There are no allegations on which could be based any sort of remedy against the defendant in favor of the plaintiff. There is no intimation of any injury to the freehold, and therefore, as the occupation of the defendant is alleged to have been entirely during the duration of the lease, the lessor has no right of action. The petition falls utterly to allege any physical injury to the freehold, and we think the case readily distinguishable from those in which it has been held that a lessor may maintain a suit as for an injury, to the reversion, where there is a continuing trespass, under a claim of right which might by time ripen into an adverse title. See *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783. Prescription does not in any case run against the state. *Glaze v. Railroad Co.*, 67 Ga. 761; *Kirschner v. Same*, Id. 760. The defendant's occupancy can, therefore, never ripen into a right adverse to the plaintiff, and cannot be regarded as an injury to the freehold or reversion. For these reasons we think that the plaintiff's petition does not show that the plaintiff is entitled to any judgment or decree against the defendant. If any right of action is shown, it is in the lessee, and not in the plaintiff, and the latter cannot maintain the action.

2. What has been said above disposes of the alleged rights of the plaintiff to any affirmative relief against the defendant. The petition also makes a case similar to what was known to the Scotch law as a declaratory action, wherein the plaintiff craved a determination and declaration of his rights, but did not ask that the defendant be decreed to do or pay anything. No such action is known to our law in matters of this kind. Bills for direction in certain equity cases stand upon a very different footing. Our courts have no jurisdiction to pass upon questions of titles to land at the instance of one of two claimants in a proceeding in which no other judgment or decree is prayed. The object of an action is to redress or prevent a wrong, and it is essential that the plaintiff should seek something more than a mere declaration of his rights. In a suit respecting titles to land, the court does not pass upon all questions suggested, but decides only such questions as are necessary to determine the right of the plaintiff to the relief prayed against the defendant.

Where no relief is prayed, the court cannot undertake to decide such legal questions, however important or interesting, as may be suggested by a plaintiff who is in doubt as to his rights. The present petition was, therefore, insufficient as a basis for relief against the defendant, or for a determination of the rights of the parties and their privies in the premises in dispute. The trial judge should, therefore, have sustained the demurrers to the petition.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 36)

HEARD et al. v. KENNEDY.

(Supreme Court of Georgia. July 23, 1902.)

TRIAL BY JURY—DEMAND—NOTE—ASSIGNMENT.

1. In order for a defendant in a civil action, brought in the city court of Washington, to obtain, as matter of right, a trial by jury, it is essential that he make demand therefor "on or before the call of the docket at the term to which the cause is returnable."

2. Where a promissory note embracing no words of negotiability is payable to several named persons jointly, and one of them, without authority from his co-payees so to do, undertakes to assign such note to a third person, the latter acquires no title to the interests of these co-payees therein, and, if he collects the note, is liable to any one of them for his proportion of the amount so collected.

(Syllabus by the Court.)

Error from city court of Washington; W. H. Toombs, Judge.

Action by Clinton A. Kennedy against Heard & Sutton. Judgment for plaintiff, and defendants bring error. Affirmed.

S. H. Hardeman and J. T. Irwin, Jr., for plaintiffs in error. F. W. Gilbert and Wm. Wynne, for defendant in error.

FISH, J. Clinton A. Kennedy brought an action for \$43.40 against Heard & Sutton, returnable to a monthly term of the city court of Washington. The court tried the case without a jury, and rendered judgment against the defendants. They moved for a new trial, which motion being overruled, they excepted.

1. The only special ground of the motion for a new trial was stated in this language: "Because the court erred as follows: This case was filed to May term, 1901, of said court, and was at that term continued, and was tried at the June term, 1901. When the case was called for trial at said June term, defendants objected to going to trial without a jury, upon the ground that so much of the act establishing the city court of Washington as failed to provide for a trial by jury in said court in cases where the amount involved was under fifty dollars was unconstitutional, and defendants then and there exhibited a demand in writing for a jury in said case. The court overruled the objection,

¶ 1. See *Jury*, vol. 21, Cent. Dig. §§ 155, 159-162.

and proceeded to try said case without a jury, and, after hearing evidence and argument, rendered a judgment for the plaintiff against the defendants; the court ruling that while, in its opinion, so much of the act establishing said court as failed to provide for trial before the court without a jury in cases under fifty dollars was against the constitution of Georgia, in this case the demand for trial came too late, because not made at the term of court to which the case was made returnable." The question presented is, did the court err in refusing defendants a trial by jury on the demand made therefor, and in trying the case without a jury?

So much of the act establishing the city court of Washington (Acts 1899, p. 413) as is material to the consideration of this question is as follows:

"Sec. 17. * * * Suits for not over one hundred dollars principal, and all issues and proceedings, when not over one hundred dollars in value is involved, shall be returnable to the monthly sessions of said court, and stand for trial at the first term by the judge without the intervention of a jury; provided, that in any such case where more than fifty dollars principal is involved, and an issuable defense is filed on oath, and a jury is demanded, such case shall be transferred to the next quarterly term of said court, and shall there stand for trial by a jury."

"Sec. 25. Be it further enacted, that the judge of said city court shall have the power and authority to hear and determine without a jury all civil causes of which the said court has jurisdiction, and to give judgment and execution therein; provided always, that either party in said cause shall be entitled to a trial by jury in said court, upon entering a demand therefor by himself or his attorney in writing, on or before the call of the docket at the term to which the cause is returnable, in all cases where such party is entitled to a trial by jury under the constitution and laws of this state, except as provided in section 17 of this act."

The trial judge did not hold any portion of this act to be unconstitutional, but, in effect, merely ruled that, assuming so much of it as denies the right of jury trial in civil cases when the amount of principal involved is \$50 or less to be unconstitutional, nevertheless the demand for a jury trial made by the defendants came too late, because not made on or before the call of the docket at the term to which the case was returnable. In other words, the judge, in ruling on the question, conceded to be sound the contention of the defendants that the act could not deprive them of their constitutional right to have their case tried by a jury, and that they were entitled to a jury trial notwithstanding the provisions of the act, but held that, in order to obtain it, they should have made a demand therefor as the act provides, and that their failure so to do amounted to a waiver of the right. It follows that, if defendants

were too late in making a demand for trial by a jury, then the case stood for trial by the judge. We do not think there was any error in the rulings complained of in this ground of the motion for a new trial.

2. It appears from the record that W. F. Kennedy, Janie D. Kennedy, Alice I. Kennedy, Clinton A. Kennedy, and Clyate F. Kennedy sold a parcel of land to Buxton for \$900, and took his notes for the purchase money; that the notes were payable jointly, without words of negotiability, to these five vendors; that W. F. Kennedy, being indebted to the defendants, Heard & Sutton, wrote his name on the back of one of these notes, which was for \$217, and delivered the same to them as collateral security for his debt; that he had no authority to do this from any of the other payees; that the defendants collected the amount of the note from Buxton, and appropriated it to the payment of W. F. Kennedy's indebtedness to them. Clinton A. Kennedy, one of the payees, brought this suit to recover of the defendants his one-fifth of the amount so collected. Under these facts, the court did not err in rendering the judgment against the defendants. They acquired no title to the interest of the plaintiff in the note, and, when they collected the amount due on the note, they became liable to him for his proportion thereof. W. F. Kennedy, the only witness who testified in the case, and who was introduced by the plaintiff, swore that two of the notes given by Buxton were indorsed by all five of the payees, and given to a named party in payment of land purchased of him for the payees other than the witness. None of the particulars of this transaction were brought out. The mere fact that, by an arrangement of some kind, W. F. Kennedy had allowed the other payees to get the full benefit of two of the notes given by Buxton, certainly could not relieve the defendants from liability to the plaintiff, as his interest in the note they collected never passed to them by the unauthorized assignment of W. F. Kennedy; and if plaintiff, at some time and in some way, had obtained an interest in the interest of W. F. Kennedy in two of the Buxton notes, it was no concern of the defendants.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 346)

CENTRAL OF GEORGIA RY. CO. v. DUFFY.

(Supreme Court of Georgia. Aug. 9, 1902.)

RAILROADS—INJURY TO LICENSEE—EVIDENCE
—WITNESS—RECALLING.

1. In an action against a railroad company for damages on account of personal injuries sustained by reason of the derailment and overturning of a car which the plaintiff was in, evidence that another car of the defendant was overturned on a nearby but different track, three months prior to the time the plaintiff's injuries were received, was not relevant to

prove negligence on the part of the defendant at the time and place alleged in the petition; but in this case it appears that the failure to rule out such evidence worked no harm to the defendant.

2. It is within the discretion of the trial judge to permit a witness who has been examined, and after conference with counsel, to take the stand a second time, and correct his testimony as originally given; and such discretion will not be controlled unless it has been manifestly abused.

3. A railroad company cannot avoid liability for injuring one who is rightfully upon its train, by showing that its servants notified his employer to have him leave the train by a certain time, and that if the employer had acted upon this notice, and the plaintiff had left the train before that time, the injuries complained of would not have been inflicted.

4. Ignorance by the servants of a railroad company of the presence in one of its cars of one who was rightfully there will not, without more, relieve the company of liability for damage done by reason of its negligence. The circumstances must be such that the servants of the company had no reason to suspect his presence in the car.

5. It is not error for the trial judge upon the trial of an action for damages against a railroad company, in illustrating to the jury the method of using the mortality and annuity tables, to use for example a figure approximating that shown by the evidence to be the plaintiff's age.

6. The requests to charge, so far as legal and pertinent, were covered by the general charge; the amount of damages awarded by the jury was not excessive; and the evidence supported the verdict.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by William Duffy against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Wimberly and J. E. Hall, for plaintiff in error. Guerry & Hall and M. F. Hatcher, for defendant in error.

FISH, J. This was a suit for damages on account of personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The petition alleged that, at the time the injuries complained of were inflicted, the plaintiff was employed by one Sanders as a laborer to sack and load corn in cars of the railroad company, which had been placed for that purpose on a track that was in its possession and under its control; that while he was in a car of the defendant, engaged in the performance of such work, the servants of the company, without warning to him, coupled an engine and cars to the car that he was in, and moved off with the train thus formed; that after going a short distance, and while moving at a moderate speed, the car that the plaintiff was in, owing to its defective condition and to defects in the track and roadway of the defendant, ran off the track and was turned over, as a result of which the plaintiff received the injuries on account of which he sued. The answer of the defendant denied all the material allegations of the petition. On the trial of the case the jury re-

turned a verdict for the plaintiff for \$1,000 damages. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. One ground of the motion for a new trial complained that the court erred in refusing to rule out, on motion of counsel for the defendant below, certain evidence to the effect that, about three months prior to the time the plaintiff received his injuries, another car of the defendant had been overturned on a different track, but in the vicinity of the place where the car in which the plaintiff was at work when injured was derailed. This testimony was given by a witness for the plaintiff on cross-examination. The evidence was not relevant to prove negligence on the part of the defendant at the time and place of the injuries complained of. But in view of the fact that there was ample evidence to support a finding that the railroad company was negligent on the particular occasion when the plaintiff was injured, and that no harm appears to have been done the defendant by the refusal to exclude the objectionable evidence, this ground of the motion furnishes no reason for reversing the judgment of the court below refusing a new trial.

2. It appears from the record that, at the conclusion of the cross-examination of a witness for the plaintiff, counsel for the plaintiff stated to the court that he had no further questions to ask the witness at that time, but that he might desire to recall him later. Subsequently, after a conference with this witness, plaintiff's counsel again placed him on the stand, and the witness changed his testimony as originally given, stating that he had been mistaken in the answers that he had made to certain questions when first asked him. Counsel for the defendant objected to the reintroduction of this witness, on the ground that all the witnesses were under the rule, and that to allow a witness thus to correct his testimony after a conference with counsel would defeat the object of the rule. The court overruled the objection, and allowed the witness to testify a second time. Error was assigned upon this ruling. We are unable to see what bearing the rule of the separation of witnesses has upon the question of the right of a party to recall a witness to the stand after he has been once examined, and after he has conferred with counsel for the party so reintroducing him. There is no law in this state which forbids an attorney to confer with a witness, either before or after his examination in court, and certainly there is no law against recalling a witness to the stand for any legitimate purpose. It is so well settled as to need no citation of authority that matters pertaining to the reopening of a case, and the reintroduction of witnesses, are within the sound discretion of the trial judge, and that, unless such discretion is shown to have been manifestly abused (which was not

done in this case), it will not be controlled by this court.

3. Error was also assigned upon the refusal of the court, upon request of counsel for the defendant, to charge, in effect, that if the jury should believe that the servants of the railroad company had notified Sanders, the plaintiff's employer, that the car in which the plaintiff was working would be moved by a certain time, and to finish sacking the corn by that time; that if the defendant's servants did not move the car until after the time specified; and that if the failure of the plaintiff to leave the car before it was moved was due to the failure of Sanders to notify him to leave it,—they would be authorized to find "that the injury was not caused proximately by the act or negligence of the defendant in not notifying him, and that the plaintiff would not be entitled to recover." This request was very properly refused. If the plaintiff was rightfully in the car, and the servants of the company knew or had reason to suspect his presence there, it was then the duty of the company to notify him that the car was about to be moved, and that duty could not be shifted to Sanders or to any one else not connected with the company. The warning to Sanders that the car would be moved at a certain time could in no sense be considered as a warning to the plaintiff, and the responsibility for the defendant's acts of negligence cannot be placed upon him. If the defendant made Sanders its agent for the purpose of notifying the plaintiff when the car would be moved, it would be liable for his failure to carry out the object of his agency; if he was not its agent, the railroad company cannot escape liability to the plaintiff on account of a warning conveyed to Sanders which should have been communicated directly to the plaintiff.

4. Counsel for the defendant requested the court to charge the jury to the effect that, if the servants of the defendant did not know of the presence of the plaintiff in the car at the time the train was moved, the company would not be liable. The court instead charged, in substance, that if the defendant did not know of the plaintiff's presence in the car at the time mentioned, and was not negligent in failing to know that he was in the car, it would not be liable. The refusal to charge as requested, and the charge as given, are assigned as error. There can be no doubt as to the correctness of the instruction given by the court. To have charged without qualification that mere ignorance, on the part of the defendant, as to the presence of the plaintiff in the car, would have excused the defendant from liability, would have been manifestly erroneous; for it would have taken from the jury the consideration of one of the most important questions in the case, viz., whether the very ignorance behind which the defendant attempted to shield itself was of

itself negligence. The charge as given was correct, and furnished no reason for granting a new trial.

5. Complaint was also made of the instructions given by the court as to the use by the jury of the mortality and annuity tables. The portion of the charge here excepted to is quite lengthy, but the chief objection interposed seems to be that the court, in illustrating to the jury the manner of using the tables, took for example an age differing only by one year from what the evidence showed the plaintiff's age to be. The charge as given was substantially correct, and we think there is no merit in the objection made to the method of illustration employed by the trial judge. We do not perceive how any harm could have been done the defendant simply because the judge, in demonstrating to the jury the use of the tables, used for example the figures 45, while the evidence showed that the plaintiff was 44 years old.

6. The foregoing disposes of all of the grounds of the motion for a new trial which in our opinion require discussion. The requests to charge, so far as legal and pertinent, were fully covered by the general charge. The amount of the verdict, in view of the evidence as to the extent of the plaintiff's injuries, was by no means unreasonable. There was ample evidence to establish the right of the plaintiff to be in the car at the time his injuries were received, and to support a finding that the defendant was negligent as charged in the petition in bringing about those injuries. The judgment of the trial court overruling the motion for a new trial will, therefore, not be disturbed.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 269)

PALMOUR v. STATE.

(Supreme Court of Georgia. Aug. 9, 1902.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. In the trial of a murder case, where the statement of the accused authorized a finding that the slayer at the time of the killing acted under the fears of a reasonable man, it was error to charge the jury, in substance, that before the killing of one who manifestly intends, by violence or surprise, to commit a felony upon the habitation, property, or person of another, is justifiable, it must appear that such killing was absolutely necessary to prevent such attack or invasion. In such a case the killing would be justifiable where the circumstances were such as to excite the fears of a reasonable man that such an attack was intended, even if at the time of the killing there might not have been in fact any real necessity to kill in order to prevent the attack.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Jim Palmour was convicted of murder, and brings error. Reversed.

¶ 1. See *Homicide*, vol. 28, Cent. Dig. §§ 153, 159, 161.

H. H. Dean, Fernior Barrett, and J. W. H. Underwood, for plaintiff in error. W. A. Charters, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

COBB, J. Palmour was convicted of murder, and complains that the judge erred in refusing to grant him a new trial. The judge charged the jury as follows: "If you shall believe from the evidence that the killing was to prevent an injury to himself, his family, or property, or he had reasonable cause to apprehend trouble of that sort, what was the pressing necessity? You see it must appear that such killing was absolutely necessary to prevent such attack or invasion, and that serious injury might occur to the family or property of the person killing." The error assigned upon this charge is that it confused the provisions of section 70 of the Penal Code with those of section 72. The provisions of section 70, so far as applicable to the present case, are as follows: "Justifiable homicide is the killing of a human being * * * in defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise, to commit a felony on either." Section 72 is as follows: "If after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another can not be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person, property, or family of the person killing." While section 71 is not referred to in the assignment of error, it is so connected with the provisions of section 70 as that it must be considered with that section in every case to which it is applicable. The provisions of section 71 are as follows: "A bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." It is contended that it is not necessary for one who seeks to justify the killing under the provisions of section 70, quoted above, to show in all cases that the killing was absolutely necessary to prevent the attack or invasion; that the rule of absolute necessity applies only in those cases where the circumstances are such that there is not only time and opportunity for persuasion, remonstrance, or other gentle measures, but a duty to use such measures before resorting to the extreme recourse of slaying the assailant; and that where the circumstances are such as to excite the fears of a reasonable man that another is endeavoring, by violence or surprise, to commit a

felony on his habitation, his property, or his person, he would be justified in killing such person. We think this contention is correct. The practical effect of the charge of the judge was to instruct the jury that, notwithstanding the circumstances were such as to excite the fears of a reasonable man, there must still be an absolute necessity for the killing. If one approaches the habitation of another at such a time or in such a manner that it is either manifest, or that a reasonable man would infer, that he intended, by violence or surprise, to commit a felony upon his habitation or some person or property therein, he is not required to use persuasion, remonstrance, or other gentle measures, before resorting to extreme force to repel the real or supposed attack, even though subsequent events may show that no actual attack or assault was intended. This distinction between the cases provided for in the two sections of the Penal Code is clearly pointed out by Mr. Chief Justice Lochrane in *Pound v. State*, 43 Ga. 133. We think the court erred in giving the charge complained of, and that under the facts of the case the error was of such a character as to have required a new trial. The motion for a new trial contains numerous assignments of error upon the charge in reference to the law of manslaughter. Some of these charges are not altogether correct, but as the accused was not, under any view of the case, guilty of manslaughter, these errors alone would not authorize a reversal of the judgment refusing a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 351)

HUNTRESS v. PORTWOOD et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

RES JUDICATA—CLAIM CASE DEED—INSUFFICIENT DESCRIPTION.

1. A judgment of the supreme court reversing one rendered by a trial court in a claim case, whereby it was adjudicated that the property levied on was not subject, does not, either actually or in effect, adjudicate between the parties that the property is subject, when the judgment of reversal is based exclusively upon the ground that a single ruling of the trial judge on a legal question which was not decisive of the entire case was erroneous.

2. An order allowing the withdrawal of a claim is, unless set aside, binding and conclusive upon the parties to the case; and if, in pursuance of such order, the claim be in fact withdrawn, it cannot be correctly said that there has been an adjudication of the same upon its merits.

3. Where the owner of an irregularly shaped tract of land, embracing approximately 307½ acres, undertakes to convey a portion thereof by executing an instrument in the form of a deed, which designates such portion as a parcel of land "containing two hundred acres, more or less," but does not with sufficient definiteness set forth or indicate how it shall be cut off from the entire tract, or otherwise describe such portion so that its identity can be ascertained without resort to extrinsic proof as to the secret and undisclosed intention of the maker with regard thereto, no title to any part of such

tract of land passes to the person named in the instrument as grantee.

(Syllabus by the Court.)

"The description of the property conveyed in a deed is sufficiently certain when it shows the intention of the grantor as to what property is conveyed, and makes its identification practicable." *Andrews v. Murphy*, 12 Ga. 431. "If a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient. A deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed." 2 *Devl. Deeds*, § 1012 et seq. Accordingly, where the owner of an irregularly shaped tract of land, containing 307 acres, conveyed 200 acres, more or less, to a grantee, and bounded it on the north by land of A., on the east by land of B., on the south by land of C., and on the west by land of D. (the grantor), the description is not, as matter of law, so vague and uncertain as to render the deed void. (a) The deed conveys all the land from the point where the land of A. touches the land of the grantor to the land of B., and thence to the land of C. The starting point is either at the land of A. or that of C. A line drawn from either of these points to the other point will show the line between the grantor and the grantee on the west. (b) The fact that the deed calls for 200 acres, more or less, will make no difference. If the boundaries described in the deed take in the entire 307 acres, the whole will pass to the grantee. *Ray v. Pease*, 22 S. E. 190, 95 Ga. 153; 4 *Am. & Eng. Enc. Law* (2d Ed.) 763. (c) Such a deed having been properly recorded, and a mortgage given by the grantee to a third person to secure borrowed money also properly recorded, the sale by the administrator of the grantor of this land conveyed no title to the purchaser, and it was error in the court to refuse to grant a new trial.

Where a levy had been made by virtue of a mortgage *fi. fa.*, and a claim filed, and the claimant in aid of his claim filed an equitable petition setting up his right of subrogation for reasons alleged in the petition, and on demurrer his equitable right was stricken, which was the only equity alleged, it was error over objection of the plaintiff in *fi. fa.*, to try this alleged equitable petition in preference to the claim case, although it was marked "Filed" a day in advance of the claim case. Such a proceeding deprived the plaintiff in *fi. fa.* of his legal right to the opening and conclusion in the trial of the merits of the claim.

(Per Simmons, C. J., dissenting.)

Error from superior court, Tallahassee county; F. H. Colley, Judge pro hac.

Action by Jesse Portwood and others against C. W. Huntress, guardian. From the judgment, both parties bring error. Judgment on the main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

A. H. Davis and W. O. Mitchell, for C. W. Huntress. Hawes Cloud and S. H. Sibley, for Jesse Portwood and others.

LUMPKIN, P. J. This case was here at the March term, 1901, when a judgment of the superior court of Tallahassee county denying an interlocutory injunction to Portwood and Anderson, who were then the plaintiffs in error, was affirmed. See 113 Ga. 815, 39 S. E. 299. The general nature of the case being disclosed by the statement of facts embraced in the opinion then filed, it is unnecessary to here repeat the same. At the

August term, 1901, of the court below, after the plaintiffs' pleadings had been so amended as to eliminate all issues save those in controversy between themselves and C. W. Huntress as guardian of Ellen Huntress, the case came on for trial before a jury, and a verdict was returned in favor of the plaintiffs. Huntress, as guardian, made a motion for a new trial, to the overruling of which he excepted. Portwood and Anderson thereupon filed a cross-bill of exceptions. As the case is absolutely controlled adversely to the defendant below by the rulings announced in the headnotes, we shall discuss only those grounds of his motion for a new trial to which these rulings relate; the other grounds thereof being, for the reason just indicated, wholly immaterial, as are also the questions raised by the cross-bill of exceptions.

1, 2. The defendant offered at the trial certain documentary evidence, consisting of certified transcripts from the records of this court and of the court below, for the purpose of showing that it had been adjudicated that the portion of the land in controversy to which Anderson was setting up title was subject to the execution held by Huntress as guardian; and in this connection his counsel offered to prove that this alleged adjudication was also binding upon Portwood, because of an agreement on his part to abide by the judgment rendered in the claim case of Anderson. If these documents had been introduced, they would merely have shown (1) that at the February term, 1899, of the superior court of Tallahassee county, that case had been submitted to the presiding judge upon an agreed statement of facts; (2) that he rendered a judgment holding the land not subject, basing his decision upon the ground that a deed made by the head of a family, and purporting to convey property which had been set apart as a homestead under the constitution of 1868, did not, if executed while the homestead estate was still in existence, pass to the grantee any interest whatever in any land embraced in the homestead; (3) that this decision was set aside by the supreme court, and its judgment was, by a proper order, made the judgment of the court below; and (4) that subsequently an order was passed allowing both Anderson and Portwood to withdraw the claims filed by them, which they accordingly did. Complaint is made of the rejection of this evidence. We are quite sure it was not admissible, for the reason that it would not, if admitted, have established the plea of *res adjudicata* interposed by the defendant. All that this court decided when the claim case of Anderson came before it was that the trial judge ruled erroneously upon the legal question on which he based his judgment. See 110 Ga. 424, 35 S. E. 671, 78 *Am. St. Rep.* 105. Neither this court nor the superior court of Tallahassee county undertook to pass upon the sufficiency of the descriptive words employed in the deed under consideration.

The effect, therefore, of the judgment rendered here was simply to leave the case open for another trial in the court below, with the legal question then presented for decision finally settled adversely to the claimant. On the argument of the case as now presented, counsel for the defendant below relied upon the decision announced by this court in *Bradshaw v. Gormerly*, 54 Ga. 557. A casual examination of that case will, however, show that it has no bearing on the question under discussion. It there appears that a judgment of the superior court subjecting the property claimed was affirmed by this court, and thus the claim case was brought to a final determination. The effect of the judgment of affirmance was, therefore, to conclude the claimant, not only as to all issues actually made and passed on in the lower court, but as to all issues which he might have raised therein. To the foregoing we may add that the documentary evidence upon which the defendant in this case relied showed that, in point of fact, Anderson's claim never went to final trial in the court below, but was voluntarily withdrawn by him; and therefore no adjudication in favor of Huntress, as guardian, has ever been rendered in that court. So far as appears, he assented to the withdrawal of that claim, thus leaving Anderson at liberty to renew it at any time he might choose, and thereby resist, upon any ground other than that as to which he was concluded by the above-mentioned decision of this court, the enforcement of the execution held by Huntress in his representative capacity. If the latter did not in fact consent to this disposition of that case, but the court, over his protest, allowed the claim to be withdrawn, he should, if he considered himself in any way aggrieved by this action on the part of the court, have duly excepted thereto.

3. The main and controlling question now before us for determination is whether or not the instrument signed by Absalom G. Evans and his wife in 1882, purporting to be a deed from them to their son, R. O. Evans, was, as to description, sufficiently definite and certain to pass title to any portion of the land therein referred to. It appears that one of the makers, Absalom G. Evans, owned a tract of land containing 307½ acres, more or less, which had been set apart as a homestead. A plat of the same, appearing in the record before us, discloses that this tract had many boundaries, and was quite irregular in shape. By the above-mentioned instrument, Evans and his wife undertook to convey to their son a portion of this homestead estate containing 200 acres, more or less. Subsequently the son signed and delivered to Huntress, as guardian, a paper purporting to be a mortgage covering all the interest of the former in the land. The execution issued upon a foreclosure of this paper is that which Huntress, as guardian, is now seeking to enforce. The descriptive words employed in the instrument which he

relies on as a deed from Absalom G. Evans and his wife to R. O. Evans were as follows: "All that tract or parcel of land situated, lying, and being in said state and county [Tallapoosa], containing two hundred acres, more or less, bounded as follows: On north by land of E. I. Anderson; on east by lands of Daniel Evans, colored; on south by land of Addison Ogletree; on west land said Absalom G. Evans and Mary E. Evans." We are of the opinion that, in view of the facts above stated, this instrument passed nothing to R. O. Evans. Our reason for so holding is that it does not identify any particular portion of the entire tract of 307½ acres, more or less, owned by Absalom G. Evans. It is, of course, inferable that he and his wife intended to convey to their son, R. O. Evans, a parcel of land approximating in quantity 200 acres, and constituting a portion of the homestead estate. The difficulty is that they did not specify any boundary line or lines between the land they intended to convey and that which they intended to reserve. The words "on west" certainly cannot be said to indicate a boundary line, or enable any one to locate such a line. It would not do to say it was the purpose of Absalom G. Evans and his wife to cut off from the whole tract exactly 200 acres, or that the portion they intended to convey can be ascertained and separated from the balance of the tract by running a line due north and south. It is obvious that a parcel of land containing about 200 acres, and bounded on the "north by land of E. I. Anderson; on east by lands of Daniel Evans, colored; [and] on south by land of Addison Ogletree,"—might be cut off from the entire tract by running divers straight lines across it. With a given starting point on either the northern or the southern boundary of this tract, it would be practicable to run a line cutting off precisely 200 acres. Without such a starting point, even this could not be done; and, given such a starting point, the line drawn would necessarily vary according to the significance which different persons undertaking to run the line might attach to the words, "containing two hundred acres, more or less," appearing in the instrument under discussion. This description as to quantity might easily be understood as referring to a parcel of land embracing any number of acres from 175 to 225. Accordingly, we affirm, without doubt or misgiving, that no surveyor, however expert, could take the description contained in the instrument just mentioned, and, by the aid of any proper extrinsic evidence, locate the precise body of land which the makers of that instrument intended to convey. Even if they and R. O. Evans had agreed upon a dividing line, and understood perfectly how the same should run, this would not suffice; for a deed must itself contain descriptive words with respect to its subject-matter, such as will enable a third person to apply the same to the locus in quo without resorting to any secret and

undisclosed intention on the part of the parties thereto. Whilst a deed wanting in this essential is susceptible of reformation, so as to effectuate the unexpressed intention of the parties, it cannot, without such reformation, stand as a muniment of title. If Absalom G. Evans and his wife actually agreed with R. O. Evans upon a boundary line cutting off from the entire tract the particular portion thereof they desired he should have, the instrument signed by them should itself have disclosed that such was the fact, and also have contained such a reference to this line as would enable third persons to find and locate it. No authority need be cited in support of the proposition that parol evidence is inadmissible to add to or vary the terms of a deed or other written instrument. Such evidence is admissible only for the purpose of applying language used in a deed to the subject-matter thereof. Where it can be gathered from the words employed in a deed that the intention of the grantor was to convey the whole of a tract of land owned by him, even a vague description of the same will suffice, if, by the aid of competent parol evidence, its precise location is capable of ascertainment, and its identity can thus be established. See *Shore v. Miller*, 80 Ga. 93, 4 S. E. 561, 12 Am. St. Rep. 239; *Beardsley v. Hillson*, 94 Ga. 51, 20 S. E. 272 (6); *Broach v. O'Neal*, 94 Ga. 475, 20 S. E. 113; *Derrick v. Sams*, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309; *Elwell v. Security Co.*, 101 Ga. 496, 28 S. E. 833. The most extreme case on this line is that of *Shore v. Miller*. The opinion delivered by Mr. Justice Blandford does not fully set forth the facts upon which the decision in that case was based. An examination of the original record therein, which is of file in the office of the clerk of this court, discloses that the descriptive words employed in the deed then under consideration were: "All those tracts or parcels of land situate, lying, and being in the 9th district of Hall county, known by the numbers (being parts of lots) 22 and 23, and containing one hundred and seventy-two acres, more or less." This language warranted the inference that it was the intention of the maker of the deed to convey all of his interest in the lands embraced in lots known as numbers 22 and 23 in the Ninth district of Hall county; and it is clear that he did not claim to own all of the territory included in those land lots, or undertake to convey any portion thereof which did not belong to him. It was recited in the motion for a new trial in that case that the party tendering this deed in evidence offered "to prove by parol testimony the identity of the land described in said deed as parts of lots Nos. 22 and 23 in the Ninth district of Hall county, and that it was all of those lots owned and possessed by the [grantor] at the time he executed said deed." That, then, was a case

where the grantor undertook to convey one entire tract of land lying in one land lot, and another entire tract situated in a different land lot. The present case is easily distinguishable from all of those just cited; for, as we have endeavored to point out, the effort in this instance was to convey a part only of an entire tract of land owned by Absalom G. Evans, without sufficiently designating one of the essentially important boundaries of that part. So it only remains to notice two cases (*Lumber Co. v. Coody*, 94 Ga. 519, 21 S. E. 217, and *Vaughn v. Fitzgerald*, 112 Ga. 517, 37 S. E. 752) in which descriptions of parts of specified land lots were held to be sufficient. In the former of these cases the land sought to be conveyed was described as "one hundred and thirty-four acres of land on the north side of lot number one hundred and seventy-four in the twentieth district of Dodge county." In the other case the description dealt with was, "65 acres of land lot No. 37 in the 8th district of Wilcox county; price, \$5.00 per acre; being the west side." The land lots referred to in these cases were, by statute, square lots, containing each a definite number of acres; and it was held that, as the portions to be separated therefrom also consisted of a stated number of acres, it was possible to ascertain in each instance the precise fractional part referred to by drawing across the lot a straight line in such manner as to form a parallelogram containing the number of acres indicated. The decisions in these cases certainly go far enough in holding descriptions of this nature adequate. The Evans tract of land was not only not a square, but, as has been seen, was very irregular in shape; and, besides, the proof showed that he claimed title, not to any specified number of acres as being embraced within the boundaries of this tract, but to 307½ acres, more or less. Furthermore, he and his wife did not undertake to cut off from the entire tract, as the portion thereof which they desired their son to have, precisely 200 acres, but a parcel of the same "containing two hundred acres, more or less."

It necessarily follows from what is said above that a verdict for the plaintiffs was demanded by the evidence, and there was no error in denying the defendant a new trial. This being so, we are not, as we have already intimated, called upon to pass on the merits of the questions presented by the cross-bill of exceptions sued out at the instance of Portwood and Anderson, in which complaint is made of certain interlocutory rulings by the trial judge which were adverse to them.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the justices concurring, except LEWIS, J., absent on account of sickness, and SIMMONS, C. J., dissenting

(116 Ga. 250)

TILLMAN v. BANKS et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

TRUST DEED—CONSTRUCTION—LIFE ESTATE—REMAINDER.

1. A deed executed in 1875 conveyed property to the grantee, "in trust, nevertheless, for the sole and separate use of [a named person], wife of [the grantor], for and during her natural life, and after her death to such children she may leave living at the time of her death, having been begotten by the said [grantor], share and share alike; with power to the said [wife] to empower the said [trustee], by writing under her hand, to sell any part or the whole of the trust estate, and to reinvest the proceeds in such other property, subject to the above-described trust, as he shall deem most beneficial for the interest of the trust estate." *Held*: (1) That the trust created was for the life estate only; (2) that the remainder created was a legal remainder; (3) that, under the operation of the married woman's act of 1866, the trust became executed immediately upon the delivery of the deed, and the legal title to the life estate vested in the wife of the grantor; (4) that the person named in the conveyance as trustee had no right to bring a suit to recover any interest in the property; (5) that when, in the trial of a suit brought by the named trustee as such, the evidence relied upon for a recovery was the deed referred to, and possession by the trustee for more than seven years under the deed, a nonsuit was properly granted, for the reason that the trustee had no title upon which he could recover, and his possession would not have the effect to vest the title in him, but would inure to the benefit of the wife; (6) that an amendment to such a suit, in effect striking the name of the trustee, and substituting therefor the names of the wife and children, was properly disallowed; there being no law in this state authorizing a new party to be added in such a case.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by James Tillman, trustee, against J. C. Banks and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. T. Burkhalter and C. L. Morgan, for plaintiff in error. John P. Moore and Jas. K. Hines, for defendants in error.

COBB, J. This was an action brought by James Tillman, as trustee for Rhody Carter, against Banks and his wife, to recover possession of a tract of land. The abstract of title attached to the petition referred to numerous deeds, and simply stated the names of the grantors and grantees and the dates of such deeds; the abstract concluding with these words: "Deed from Tim Carter to James Tillman, in trust for Rhody Carter, dated Jan. 1st, 1875. All of the deeds aforesaid conveying the lands in question." At the conclusion of the plaintiff's evidence the defendants made a motion for a nonsuit, and, to avoid the effect of this motion, the plaintiff offered to amend the petition by making Rhody Carter and her children (naming them) begotten by her husband, Tim Carter, parties plaintiff in the case, so that the suit would proceed in their names; it being alleged that Rhody Carter and her

children, as well as Tillman, consented to this amendment in open court. The court refused to allow the amendment, and passed an order granting a nonsuit. To the rulings just referred to the plaintiff excepted. The conveyance under which the plaintiff claimed the right to recover was a deed from Tim Carter to James Tillman, trustee, which conveyed the premises in dispute to Tillman, "in trust, nevertheless, for the sole and separate use of the said Rhody Carter, wife of the said Tim Carter, for and during her natural life, and after her death to such children she may leave living at the time of her death, having been begotten by the said Tim Carter, share and share alike; with power to the said Rhody Carter to empower the said Jim Tillman, by writing under her hand, to sell any part or the whole of the trust estate, and to reinvest the proceeds in such other property, subject to the above-described trust, as he shall deem most beneficial for the interest of the trust estate." This deed was dated January 1, 1875. The trust created under this deed was for the life estate of Rhody Carter only, and there was no trust created for the remaindermen. The deed created a legal estate in remainder for the benefit of such of the children of Rhody Carter and her husband, Tim Carter, as were in life at the time of her death. *Bull v. Walker*, 71 Ga. 195; *Wilbur v. McNulty*, 75 Ga. 458; *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866; *Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *McDonald v. McCall*, 91 Ga. 304, 18 S. E. 157; *Baxter v. Wolfe*, 93 Ga. 334, 20 S. E. 325; *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791. In *Sutton v. Aiken*, 62 Ga. 733, it was held that a conveyance in trust for a married woman of full age and sound mind, with no remainder to protect, and nothing prescribed for the trustee to do, operates to pass the legal title immediately into the beneficiary, when the conveyance was made since the act of 1866, which secured to married women all their property as a separate estate. This ruling was followed in *Association v. Gann*, 101 Ga. 678, 29 S. E. 15, and in *City of Rome v. Shropshire*, 112 Ga. 93, 37 S. E. 168. It has been held that where a conveyance, executed or taking effect since the passage of the married woman's act of 1866, and which created a trust estate for life for a married woman of sound mind and laboring under no disability, and a legal estate in remainder for her children or others, vested the legal title to the life estate, immediately upon the conveyance taking effect, in the married woman; the trust attempted to be created being, under the operation of the married woman's act, an executed trust, so far as the life estate was concerned. *Kile v. Fleming*, 78 Ga. 1; *Harrold v. Westbrook*, 78 Ga. 5, 2 S. E. 695; *Woodward v. Stubbs*, 102 Ga. 187, 29 S. E. 119; *Allen v. Hughes*, 106 Ga. 775, 32 S. E. 927; *Brantley v. Porter*, 111 Ga.

886, 36 S. E. 970; *Overstreet v. Sullivan*, 113 Ga. 891, 39 S. E. 431. Immediately upon the execution of the deed from Tim Carter to Tillman the trust therein attempted to be created for the benefit of Rhody Carter during her life became an executed trust, and the legal title to the life estate vested immediately in her. The deed did not create any trust for the benefit of the remaindermen. Hence no title to the remainder, without regard to what the character of that remainder may be, whether vested or contingent, ever passed to Tillman. It follows that Tillman had no authority to bring a suit in relation to the land, either in behalf of Rhody Carter or her children. So far as the life estate is concerned, the right to sue for the possession of the property is in Rhody Carter; and, so far as the remainder is concerned, the right to sue will be in the children of Rhody and Tim Carter who may be living at her death. Under no view of the case was Tillman, the person named in the deed as trustee, authorized to bring a suit. The court did not err, therefore, in holding that the plaintiff had failed to make out his case.

It was argued by counsel for the plaintiff in error that the case made in the petition had been proved strictly as laid, and that, therefore, under the ruling in *Fleming v. Roberts*, 114 Ga. 634, 40 S. E. 792, and the cases which that followed, the grant of a nonsuit was erroneous. The plaintiff did not prove his case as laid. The substance of his allegations, as will be seen from what is said above in reference to the petition, was, in effect, that James Tillman, as trustee for Rhody Carter, was entitled to recover the land. The evidence offered to support these allegations—that is, the deed which attempted to create the trust in James Tillman—did not, in law, have the effect of creating such a trust, and therefore the proof did not support the allegation. The petition and the abstract of title attached thereto, when taken as a whole, cannot be construed in any other way than as a claim by James Tillman to recover the land as the holder of the legal title, although he admits in the petition that he holds it for the benefit of Rhody Carter. As the evidence failed to establish that he was the holder of the legal title, he failed to prove the case laid in the petition. The amendment offered, which was, in effect, to strike the name of Tillman, trustee, as plaintiff, and substitute the names of Rhody Carter and her children, was properly refused. There is no law in Georgia authorizing, in a case like this, the substitution of new parties. In addition to this, so far as the children were concerned, they acquired under the deed no present right to sue, the remainder interest being conveyed to such of them only as were living at the date of their mother's death. It is contended by counsel for the plaintiff in error that, even if the court did not err in refusing the amendment, and did not err in

construing the deed, the suit was a suit by James Tillman, and there was evidence which would authorize a jury to find that he had been in adverse possession of the property for more than seven years, and that he was entitled to recover upon this prescriptive title. It might be a sufficient answer to this contention to say that the plaintiff's suit was not predicated upon a prescriptive title. In the abstract of title attached to the petition there appears no reference whatever to a prescriptive title, the abstract relating entirely to a legal title acquired through a series of conveyances therein referred to. But, even if the case be treated as one in which the plaintiff would be allowed to recover upon a prescriptive title if the evidence was of a character to authorize a finding in his favor, and even if the evidence warranted a finding that Tillman had been in adverse possession for more than seven years, he would still not be entitled to recover. He did not claim title in himself. If he was in possession at all, it was not in his own right, but in the right of Rhody Carter, whom he claimed to represent; and his possession, if it ever ripened into a prescriptive title, inured to the benefit of Rhody Carter, and did not authorize a suit by him in any capacity, but would have authorized a suit by Rhody Carter only. There was no error in any of the rulings complained of.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 285)

SEYMOUR et al. v. NATIONAL BUILDING & LOAN ASS'N OF MONTGOMERY, ALA.

(Supreme Court of Georgia. Aug. 9, 1902.)
MORTGAGE FORECLOSURE—PUBLIC SALE—
MEMORANDUM—JUDICIAL SALE.

1. A sale of real estate at public outcry by a mortgagee, under a power in the mortgage authorizing him to sell at public or private sale, is not binding upon the purchaser or the mortgagee unless a memorandum is made as prescribed by the statute of frauds.

2. While such sale is, for some purposes, equivalent to a sale, under a foreclosure, of the mortgage by a court of competent jurisdiction, it is not such a judicial sale, under the Code, as not to require such a memorandum.

(Syllabus by the Court.)

Error from superior court, Dooley county; Z. A. Littlejohn, Judge.

Action by W. B. Seymour against the National Building & Loan Association of Montgomery, Ala., and one Varnedoe. Judgment for the loan association, and Seymour and Varnedoe bring error. Affirmed.

J. T. Hill, for plaintiffs in error. Thomson & Whipple, for defendant in error.

SIMMONS, C. J. An equitable petition for specific performance was filed by Seymour against the National Building & Loan Association of Montgomery, Ala. The de-

defendant filed an answer in the nature of a cross bill, to which Varnedoe was made a party. It was admitted that the case made by this answer was controlled by the result of the main case. From the evidence it appeared that the defendant, acting under a power of sale contained in a security deed to it from Varnedoe, had advertised certain property of Varnedoe's for sale. At the appointed time and place an agent of the defendant appeared, and sold the property at public outcry, the plaintiff being the highest bidder. The property was knocked off to plaintiff, but no deed or written memorandum was made. Subsequently the defendant refused to consummate the sale by making deeds, and the plaintiff filed his equitable petition to enforce the sale. The defendant filed several pleas, one of which was that the sale could not be enforced, because no memorandum had been given as required by the statute of frauds. On the trial the court, on motion of the defendant, granted a nonsuit. The defendant was then permitted to withdraw its motion for a nonsuit, and ask the direction of a verdict. The court then directed a verdict in favor of the defendant. Exception is taken to the direction of the verdict, and to the judge's allowing the motion for a nonsuit to be withdrawn.

The question is made, therefore, whether this sale was within the statute of frauds. The plaintiffs in error contended that it was not, for the reason that this sale was equivalent to a strictly judicial sale, and that such a sale was effectual and enforceable without a written memorandum. After a careful consideration of the case, we have come to a contrary conclusion. That sales by auction are within the statute of frauds is settled in this state. *White v. Crew*, 16 Ga. 416; Civ. Code, § 3527.

It has, however, been expressly provided that "no note or memorandum in writing shall be necessary to charge any person at a judicial sale." Civ. Code, § 5448. The present case does not come within this provision; for the sale was not a judicial sale within the meaning of the statute. In this state the term "judicial sale" is used to denote more than what are known in the textbooks as such, and includes execution sales. It does not, however, include a sale of the character now in question. In *Banking Co. v. Haas*, 100 Ga. 111, 27 S. E. 980, 62 Am. St. Rep. 317, it was held that a sale under a power given in a mortgage was equivalent to a sale under a foreclosure of the mortgage by a court of competent jurisdiction, and had the same effect as to cutting off liens junior to the mortgage. It would be an extension of this decision to hold that this was a judicial sale within the meaning of the Code section cited above. A sale under the power, or a sale under a proper foreclosure, would, either of them, have the effect of cutting off junior liens. Either meth-

od, so pursued as to result in a valid and binding sale, would have this result. But this is no reason for omitting an essential part of the method pursued, merely because such part would have been essential had the mortgagee elected to pursue the other method. Where a power of sale in a mortgage is coupled with an interest, it is irrevocable, and junior liens are taken subject to the lien of the mortgage. A purchaser under a sale, by virtue of the power is as much protected from junior liens as though the sale had been under a foreclosure proceeding in a proper court. Such purchaser must, however, see to it that the sale is so conducted as to be valid and binding. There must be a valid and binding sale before it can have the effect of a foreclosure sale, or, indeed, any effect at all. Had a proper memorandum been made, and this sale been binding, it would have had the force and effect of a foreclosure sale. As the memorandum required by the statute of frauds was not made, the sale was not enforceable at all. It was also contended that the contract had been executed. This contention was based on the fact that Seymour, by an arrangement with Varnedoe, had gone into possession of the land, and had tendered the purchase price to the defendant. There is nothing in these facts to constitute the sale an executed one, so as to take it out of the statute. The power of sale had been given to the defendant, and Varnedoe had no authority by any act of his to execute an unenforceable sale made by the defendant under the power. Nor does the tender of the money avail, for it appears that the tender was refused by the defendant on the ground that the sale was not valid or binding. For these reasons the court properly held that the sale was not enforceable.

There was no error in allowing the defendant to withdraw its motion for a nonsuit. It appears that the court had orally announced that it would sustain the motion, but no order had been taken. It was accordingly within the discretion of the court to allow the motion to be withdrawn. Then, as the evidence was such as to demand a finding for the defendant, there was no error in directing a verdict accordingly.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 211)

SCOTT et al. v. WHIPPLE et al.

(Supreme Court of Georgia. Aug. 8, 1902.)

WRIT OF ERROR—BILL OF EXCEPTIONS—DISMISSAL—CONTINUANCE—ABSENCE OF CLIENT.

1. A bill of exceptions, which recites that upon the call of a case, and before announcing "Ready," a party moved for a continuance upon stated grounds, sets forth the evidence which was relied upon in support of the motion, alleges that the motion was overruled, and then recites that to this judgment the defendants

"then and there excepted and now except, and assign the same as error," contains a sufficiently specific assignment of error upon the overruling of the motion to continue.

2. Since the passage of the supreme court practice act of 1893, a writ of error will not be dismissed merely because the certificate to the bill of exceptions contains recitals of fact which are not in the bill of exceptions or the record, the certificate being in all other respects in the form prescribed by law, and verifying all of the statements made in the bill of exceptions.

3. The showing for a continuance, in so far as it related to the application made by counsel for one of the several defendants, and which was based on the absence of their client, being in all respects regular and complete, and there being no counter showing, and it not appearing from the bill of exceptions or the record that any previous continuance had been granted the defendant, or that the case could proceed to trial against the other defendants alone, it was error to overrule the motion to continue, made by counsel on the ground of their client's absence.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Felton, Jr., Judge.

Action by U. V. Whipple, receiver, and others, against J. B. Scott and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Guerry & Hall, J. G. Jones, and De Lacy & Bishop, for plaintiffs in error. Pearson Ellis, Bacon, Miller & Brunson and Thomson & Whipple, for defendants in error.

COBB, J. Whipple, as receiver, brought suit against the Naval Store & Lumberman's Bank as principal, and Scott and four others as securities. Scott, Matthews, and Bullock filed a defense to the action, the three uniting in one answer. When the case was called for trial, a motion for a continuance was made by the defendants. This motion was overruled, and the defendants assign this ruling as error. The case then proceeded to trial, and a verdict was directed in favor of the plaintiff, to which the defendants have also excepted.

1. A motion was made to dismiss the writ of error upon the ground that there was no sufficient assignment of error upon any ruling of the trial court. The bill of exceptions recites that upon the call of the case and before announcing "Ready," counsel for Scott moved for a continuance upon certain grounds, and introduced in support of the motion certain evidence, which is set forth in the bill of exceptions, and that this motion was overruled. Following this recital is this language: "To which judgment overruling said motion for continuance the said J. B. Scott and W. B. Matthews and E. W. Bullock then and there excepted, and now except, and assign the same as error." We think this assignment of error sufficiently brings before us the question as to whether the motion for a continuance was properly overruled. The bill of exceptions recites that the motion was made and that it was overruled, sets forth the evidence offered in

support of the motion, and alleges that the ruling of the court was erroneous. This was a specific assignment of error within the meaning of the law regulating the practice in this court. It was further insisted that the assignment of error upon the direction of the verdict was not sufficiently specific. Inasmuch as we do not decide whether the direction of the verdict was proper or not, it is unnecessary to pass upon the sufficiency of the assignment of error thereon. It has, however, been held in several cases that a general complaint that the direction of a verdict was improper is sufficient to present for decision the question whether, under the pleadings and the evidence, the verdict directed was demanded. See *Phillips v. Railway Co.*, 112 Ga. 197, 37 S. E. 418; *Dickson v. Burwell*, 113 Ga. 93, 38 S. E. 319; *Waller v. Hogan*, 114 Ga. 384, 40 S. E. 254; *Anderson v. Walker*, 114 Ga. 505, 40 S. E. 705.

2. The motion to dismiss was upon the further ground that the certificate of the judge to the bill of exceptions was not in the form prescribed by the statute, consisting in part of recitals of fact which should have been in the bill of exceptions. The certificate of the judge was in the exact form prescribed by the statute, except that it contained the following additional recitals: "I do further certify that the docket of Dooly superior court showed that there had been one continuance of this case by the defendants. I do further certify that this bill of exceptions was presented to me on the 18th day of October, 1901, and that the same has been held by me until this time for examination and correction. October 28, 1901." The criticism of this certificate is directed to the first sentence thereof, as it was certainly competent for the judge to certify that the delay in filing the bill of exceptions was due to his retention of it, and thus relieve the plaintiff in error from the imputation of negligent delay in tendering the bill of exceptions. The act of 1889 (Civ. Code, § 5532) prescribed a form for certificates to bills of exceptions. It has been held that the certificate of the judge should conform to the requirements of the statute; and that, where it is not in the form provided thereby, the writ of error will be dismissed. See *Williams v. State*, 88 Ga. 460, 14 S. E. 706; *Holland v. Van Bell*, 89 Ga. 223, 15 S. E. 302; *Lovingood v. Roberts*, 89 Ga. 417, 15 S. E. 495. It has also been held that it is the duty of counsel to prepare the certificate to a bill of exceptions, and that the judge has no authority, under the act of 1889, to make any change in the certificate, but must either sign the same as presented to him, or decline to sign it altogether. *Pendley v. State*, 87 Ga. 186, 13 S. E. 443; *Gresham v. Turner*, 88 Ga. 160, 13 S. E. 946. It has also been distinctly decided that under this statute the judge has no authority to incorporate in his certificate facts necessary to a determination of the case, which should have been

brought up in the bill of exceptions. *Lovingood v. Roberts*, *supra*. Inasmuch as this is exactly what the certificate in the present case undertakes to do, it is necessary to determine whether the rule laid down in the case cited is applicable since the passage of the supreme court practice act of 1893. Civ. Code, § 5534, which section was codified from the act of 1893, provides: "It shall be the duty of the judge to whom any bill of exceptions is presented to see that the certificate is in legal form before signing the same; and no failure of any judge to discharge his duty in this respect shall prejudice the rights of the parties by dismissal or otherwise." The act further provides that the supreme court shall not dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to that court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein. Civ. Code, § 5569. Since the passage of the act of 1893 it has been held that, where the certificate is in substantial compliance with the form prescribed by the act of 1889, the writ of error will not be dismissed. *Pusey v. Sweat*, 92 Ga. 809, 19 S. E. 816; *Gregory v. Daniel*, 93 Ga. 795, 20 S. E. 656. The office of a certificate to a bill of exceptions is to certify to the truth of the recitals contained in the bill of exceptions, and hence, where the certificate fails to do this, or where the judge certifies that the bill of exceptions is in whole or in part untrue, a dismissal of the writ of error would necessarily result. See *Jarriel v. Jarriel*, 115 Ga. 23, 41 S. E. 262, and cases cited. The legislative policy, as indicated in the act of 1893, is that the judge should revise the certificate presented to him, and make it conform to the law; and that no case shall be dismissed on account of the failure of the judge to do this, where the certificate verifies the recitals made in the bill of exceptions. It is true that the proper place for the judge to add any facts which have been omitted by the plaintiff in error is in the bill of exceptions, and that such facts incorporated in the judge's certificate should be disregarded. But it does not follow that such a certificate should work a dismissal of the case. If the facts added to the certificate are matter of record in the trial court, the judge may add a specification thereof in the bill of exceptions, or the defendant in error may apply to the judge to have the clerk transmit such record with the bill of exceptions. Civ. Code, § 5536. And so, if the added facts are a part of the evidence of file in the clerk's office, the same course may be pursued. And, further than this, if upon a consideration of the case it should appear to the supreme court that any portion of the record has not been transmitted, whether specified or not, it is expressly made the duty

of the court to order the clerk of the trial court to certify and transmit such record. Civ. Code, § 5536 (4). As no bill of exceptions can be dismissed on account of the negligence of the plaintiff in error in failing to incorporate or specify evidence of record which is material to his case, and as his failure to prepare and present to the judge a certificate which complies with the form prescribed by law will likewise not result in a dismissal of his case, it would seem to follow that, where a certificate verifies unequivocally every recital in the bill of exceptions, but undertakes to add omitted facts, whether they are matters of record or of evidence, this court should not dismiss the writ of error, but should decide the questions made in the bill of exceptions, if enough appears therein or in the transcript of the record, or in both together, or if, by order to the clerk of the trial court, it can procure enough facts upon which to base a decision of such questions. We think it is in keeping with the spirit of the act of 1893 and the recent legislative policy as manifested in that act as well as in others not to dismiss a case solely because the judge fails to eliminate from the certificate presented to him recitals of fact which do not appear in the bill of exceptions. The proper course for us to pursue in such a case is to treat these recitals as surplusage, and disregard them.

3. Counsel for the defendant Scott made a motion for continuance on account of the absence of their client. They introduced evidence showing that he was at the time of the trial physically unable to leave home and attend court. Counsel stated in their places that they could not safely go to trial in the absence of their client. The defendants Matthews and Bullock also insisted upon a continuance on the ground of the absence of Scott, it being claimed that he was a material witness in their behalf. The showing, so far as it related to the absence of Scott as a party, was complete in all respects, and the court erred in overruling the motion for a continuance based on his absence. The showing made by Matthews and Bullock was incomplete, for the reason that it did not appear therefrom that Scott had been subpoenaed, or what they expected to prove by him. Although he was a co-defendant, they were not entitled to a continuance on account of his absence, unless they complied with the law as to the showing to be made for a continuance on account of the absence of a witness. As to them he was only a witness. The showing made in favor of Scott was sufficient, and entitled him to a continuance; and, as there was no suggestion that the case was of such a character that it could proceed to trial and judgment against the other defendants in the absence of Scott, the case should have been continued in its entirety. It is said, though, that the motion to continue was properly overruled, for the reason that the defendants

had exhausted their continuances; it being claimed that it appeared from the docket entries that the case had been once before continued at their instance, and that under Civ. Code, § 5136, the judge had no authority to grant another continuance. Upon the application of the defendant in error, the judge directed the clerk to transmit to this court the docket entries in question, and this has been done. From these entries the following appears: "Passed for week's sickness Lee B. Jones, Feb. 26th, 1901." Manifestly, this entry does not support the claim of the defendant in error. It does not appear who Lee B. Jones is, whether a witness or not; nor does the entry show whether there was a continuance for the term, or merely a postponement to another date during the term, nor at whose instance the case was passed. This being so, it is unnecessary to determine whether the docket entry in question was a part of the record in the case, and could be transmitted to this court as such, or whether it is evidence, and must have been introduced before the judge at the trial, and incorporated in an approved brief of the evidence, before it could be sent to this court with the record in the case. Inasmuch as we are not at liberty to look to the certificate of the judge for any fact not appearing in the bill of exceptions or the record, there is nothing to show that the case had once before been continued at the instance of the defendants; and, as the showing made by the defendant Scott was complete in all respects, the judge erred in refusing to grant his motion for a continuance.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 264)

TRAVELERS' INS. CO. v. AUSTIN.

(Supreme Court of Georgia. Aug. 8, 1902.)

ACCIDENT INSURANCE—INJURY TO PASSENGER—PAY CAR.

1. A paymaster of a railroad company traveling upon business of the company from station to station on the line of the company, and stopping between stations for the purpose of paying off employés of the company wherever they may be, is not, while so doing, a "passenger," within the meaning of a clause in a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power.

2. A coach specially equipped and used as a pay car, and not a vehicle for the transportation of passengers, is not, in contemplation of the contract alluded to in the preceding headnote, a passenger car; and this is so although it had formerly been used as a passenger car, and was capable of being so used again.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by A. V. Austin against the Travelers' Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dessan, Harris & Harris, for plaintiff in error. Roland Ellis and Robt. Hodges, for defendant in error.

FISH, J. The plaintiff in error issued to Austin, the deceased husband of the defendant in error, an accident insurance policy, which provided for the payment of certain indemnities in the event of accidental injuries to the insured, and of \$5,000 to his widow in case of his death as a result of such injuries. The policy contained a stipulation that, "if such injuries are sustained while riding as a passenger, and being actually in or upon any railway passenger car using steam, cable, or electricity as a motive power, * * * the amount to be paid shall be double the sum specified in the clause under which claim is made." Austin was paymaster and cashier of a railroad company. It was his duty to pay the salaries of the employés of the company, and to that end he made periodical trips over the line of the railroad in what was known as a "pay car." This car had originally been one of the regular sleeping cars in use on the railroad, but had been altered so as to make it serve the purpose before indicated. It was described by one of the witnesses as follows: "In the front end there was a cooking stove, and all of the things for cooking. In the center of the car there were regular Pullman berths to sleep twelve people; and in the observation end, which we used for paying off, it had two large windows and a settee, and some nice chairs, and a table that we used for a dining table. In the part exclusive of the kitchen and observation end, where the money was paid out, there were regular seats, the same that any other passenger or sleeping car has." It was also equipped with an iron safe in which money was kept, and with guns and ammunition for the protection of the property in the car. On occasions the equipment of the car was changed, and it was put into service as a regular sleeping car. The pay train did not run on a regular schedule, but stopped at any station or between stations, wherever it was necessary to pay out money. Austin would frequently count out money between stations, preparatory to paying it at the next stop. While on one of these trips the pay car was derailed and overturned, and a rifle hanging in a rack in the car was thrown to the floor and discharged, killing Austin. His widow demanded double indemnity under the clause of the policy before quoted. This was refused, and she brought suit for \$10,000. The insurance company, in its answer, admitted liability for \$5,000, and made a tender of that amount in full of all claims against it, which was refused, and the case went to trial. There was practically no conflict in the testimony of the witnesses, the material portions of which have been substantially set out above; the only evidence introduced

by the insurance company being an extract from the proof of death submitted by Mrs. Austin, to the effect that the injury which caused her husband's death was received while he was engaged in discharging his duties as cashier and paymaster of the Georgia Southern & Florida Railroad Company. At the conclusion of the evidence, counsel for the defendant made a written motion to direct a verdict in its favor on the controlling issue in the case, viz., the right of the plaintiff, under the evidence, to recover double indemnity. This motion was denied, and the case went to the jury, who found for the plaintiff the full amount sued for. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. From the foregoing it will be seen that the single question presented for determination by this case is whether or not, under the admitted facts, Austin was, at the time of receiving the injuries which caused his death, riding as a passenger upon a railway passenger car, within the meaning of that clause of his policy of insurance, which provided that he should receive double indemnity in the event that he should be accidentally injured or killed while so riding. This question may be subdivided into two branches: First, was he a passenger? and second, was the car in which he was riding a passenger car? "A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor." 5 Am. & Eng. Enc. Law (2d Ed.) 486. "One may be both a passenger and an employé of a railroad company,—an employé when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged, but riding from one place to another, even though continuing all the while, in a popular sense, in the employ of the company." Id. 516. It is not denied that Austin was an employé of the railroad company at the time he was killed. The question is, was he also a passenger? The mere fact that he was not a part of the operating force or train crew engaged in the act of propelling the train does not, as seems to be contended by counsel for the defendant in error, invest him with that character. He was certainly "passing over the road at a time when actually engaged in performing duties for the company." His case cannot be analogized to that of an official or an attorney who travels over the road for the purpose of reaching a point where duties are to be performed for the company, and who, while so traveling, is engaged in the performance of no duty whatever. While the pay train was going from one station or point to another, the paymaster was as much on duty as is the flagman of a passenger or freight train, whose sole duty it is to keep a lookout for other trains when the train on

which he is riding has stopped between stations. In the case of *Prather v. Railroad Co.*, 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263, the deceased husband of the plaintiff was one of a gang employed on the defendant's material train to load and unload cars, and it was his duty "to do anything to insure the careful working of the train." He was killed while the train was moving from one point to another, and at a time when he had no active duty to perform. The question arose whether or not he was a co-employé of those who were actually operating the train. This question was decided in the affirmative, our present chief justice, who delivered the opinion, using the following language, which we think is directly applicable to the case at bar: "The fact that he had no active duty to perform while riding from one point of work to another did not make him any the less an employé during those times. He could not be an employé whilst at work at one mile post, and, having finished there, get on the car to go to the next mile post, and while riding the mile become a passenger, and at the end of the mile become an employé again." If the reasoning there employed be correct, the case cited settles beyond all question that Austin was not, in legal contemplation, a passenger; and hence that his widow is not entitled to recover the double indemnity for which she sues. This view is not in conflict with any of the cases cited in the brief of counsel for the defendant in error. A case upon which special stress seems to be laid is that of *Berliner v. Insurance Co.*, 121 Cal. 458, 53 Pac. 922, where the supreme court of California held that the plaintiff was entitled to recover double indemnity under a clause in a policy of accident insurance almost identical with the one now under consideration, although the insured, at the time of the accident, by invitation of an officer of the railroad company, was riding upon the engine of the train on which he was traveling; it being ruled that the fact of his riding upon the engine did not deprive him of his character of passenger. That case, however, cannot properly be compared to the one now under consideration, because the relationship of the insured to the railroad company in the two cases was widely different. *Berliner*, so far as appears from the published report, was not employed by or connected with the railroad. Apparently he had paid his fare before beginning his journey. The court in that case takes special occasion to say, on page 465, 121 Cal., and page 921, 53 Pac., that, if he had been riding on the train as an employé of the railroad company, the insurance company would not be liable under the clause providing for double indemnity. In the case of *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514, it was held that the porter of a Pullman sleeping car occupied the position of a passenger of the

railroad company in respect to the careful running and management of the train; but in that case the porter was not employed by the railroad company, as was the paymaster in this case. On the other hand, in the well-considered case of *McQueen v. Railway Co.*, 30 Kan. 689, 1 Pac. 139, it was held that a plaintiff in the employment of a railroad company, painting depots, bridges, tanks, and switches along the line of the road, and who was transported over the road, to discharge the duties of his employment, in a small steam car used only by officers and employes of the railroad company, was not a passenger within the true sense of that term, nor entitled to the rights of a passenger. That case is in principle directly parallel with the case now before us, and, while not binding on us, its reasoning is satisfactory to us as authority for the position that we take. To the same effect, see *Railway Co. v. Salmon*, 11 Kan. 83. The reason for making a distinction in the contract of insurance between passengers riding as such and employes of a railroad company in the discharge of their duties is not far to seek. The law throws greater protection around passengers than employes, and requires of railroad companies greater diligence in providing for their safety. Consequently the risk of insuring a passenger is not so great as that of insuring an employe. With this in view, the true test to be applied to determine whether one injured in a railroad accident can recover from an insurance company double indemnity is to inquire whether, presuming that a right of action exists against the railroad company, the plaintiff would be entitled to sue that company in the capacity of a passenger or an employe. In *Austin's Case* to ask that question is to answer it, for it is clear that the railroad company owed him no other duty than that of employer to employe, and, if liable to his widow, is only so on the ground of that relationship.

2. The evidence shows that the car in which Austin was riding at the time of the accident was a coach specially equipped for use by the officers and employes of the railroad company as a pay car. It was not in any sense a passenger car, within the meaning of the contract of insurance, any more than a mail or baggage car could be so considered. It was used for a particular purpose, and that purpose was not the transportation of passengers. That it had formerly been used as a passenger car, and was capable of being so used again, can make no difference, in view of the fact that at the time of the accident it was used for an altogether different object. The testimony of a witness that it was a passenger car was improperly admitted, being merely his conclusion from a given state of facts, and is unavailing in the face of other evidence, which described the car in detail, and negatived such a conclusion.

The foregoing disposes of the case on its

merits favorably to the contentions of the plaintiff in error. It follows that the charges of the court which were not in consonance with the principles here laid down were erroneous; that the trial judge should have directed a verdict in favor of the insurance company as to the double indemnity; and that the verdict returned for the plaintiff for the full amount sued for was contrary to law and the evidence, and should have been set aside on motion for new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 273)

GUNTER v. STATE.

(Supreme Court of Georgia. Aug. 9, 1902.)

CRIMINAL LAW—INSTRUCTIONS—EVIDENCE.

1. The charges complained of were not erroneous. The requests to charge, so far as legal and pertinent, were fully covered by the general charge, which was in all respects full and fair. The evidence authorized the verdict, and there is no reason for reversing the judgment refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

Guilford Gunter was convicted of crime, and brings error. Affirmed.

J. G. Jones, J. M. Dupree, and Hall & George, for plaintiff in error. F. A. Hooper, Sol. Gen., and D. A. R. Crum, for the State.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 369)

ATLANTA CONSOL. ST. RY. CO. v. JONES.

(Supreme Court of Georgia. Oct. 3, 1902.)

TRIAL—INSTRUCTIONS—CONFLICTING EVIDENCE—REVIEW.

1. It does not appear that the court in its charge unduly emphasized the contentions of the plaintiff to the prejudice of the defendant.

2. One of the instructions complained of being in and of itself correct and pertinent, the same cannot be properly treated as erroneous because of a failure to give in the same connection some other instruction appropriate to the case.

3. Whether the instructions given to the jury with respect to the law of presumptions were or were not in all respects correct, the charge, taken all together, was not, either with regard to this particular branch of the law, or otherwise, prejudicial to the defendant, but as a whole fairly and sufficiently presented to the jury the law of the case.

4. The evidence, though decidedly conflicting, was sufficient to warrant the verdict, and, the same having been approved by the trial judge, the supreme court will allow it to stand.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reld, Judge.

Action by F. M. Jones, by next friend, against the Atlanta Consolidated Street Rail-

way Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Payne & Tye and J. A. Noyes, for plaintiff in error. Burton Smith and J. T. Pendleton, for defendant in error.

PER CURIAM. Judgment affirmed.

(116 Ga. 309)

WIKLE v. LOUISVILLE & N. R. CO.

(Supreme Court of Georgia. Aug. 9, 1902.)

AGENT—AUTHORITY—EVIDENCE—MALICIOUS PROSECUTION.

1. Where agency is shown by proof of the relative situation of the parties, the agency is established no further than is necessary for the discharge of the duties ordinarily belonging to it. 2 Greenl. Ev. §§ 64, 64a.

2. Accordingly, where a railroad company is sued for malicious prosecution, and it appears that one who had charge of the defendant's business at a certain station, and sold its tickets there, missed certain money of the company from the cash drawer, suspected a man who had been loitering about, and, going into another county, procured the arrest of the plaintiff because of a resemblance to such loiterer, and had a warrant issued against him for larceny, there is not sufficient evidence to authorize a jury to find that the institution of the prosecution was within the scope of the agent's authority, and there is, therefore, no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, De Kalb county; John S. Candler, Judge.

Action by Harry Wikle against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith, for plaintiff in error. Jos. B. & Bryan Cumming and M. A. Candler, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 60)

BREWER et al. v. GROGAN.

(Supreme Court of Georgia. July 24, 1902.)

NOTE—CONSIDERATION—PAROL EVIDENCE—SET-OFF—LIMITATIONS.

1. While the consideration of a promissory note expressed in the words, "for value received," is always open to inquiry, it is not competent by parol evidence to change the character of such an instrument in so far as it expresses a promise to pay.

2. Where, in defense to an action upon a promissory note, the defendant sets up, by way of set-off (though denominating his defense a "plea of payment"), open accounts against the plaintiff, which are on their face barred by the statute of limitations, it is erroneous to overrule a demurrer to such a defense, presenting the point that the same shows on its face that the defendant's alleged cross-action is barred.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by J. E. and S. B. Brewer against George C. Grogan. Judgment for defendant, and plaintiffs bring error. Reversed.

Z. B. Rogers and J. N. Worley, for plaintiffs in error. Geo. C. Grogan, in pro. per.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

(116 Ga. 297)

SAVANNAH, F. & W. RY. CO. v. POLLARD.

(Supreme Court of Georgia. Aug. 9, 1902.)

PLEADING—AMENDMENT—SECOND ACTION—BAD FAITH—LIMITATIONS—ACCORD AND SATISFACTION.

1. The fact that the petition in an action against a railway company affirmatively alleged negligence on the part of the defendant does not estop the plaintiff from so amending a second petition, brought, in renewal of that action, within six months of its dismissal, as to make the same allege that, in point of fact, the plaintiff did not know that such negligence existed until after the bringing of the first action, and that because of ignorance of such negligence the plaintiff had been fraudulently induced by an agent of the company to enter into an accord and satisfaction with it.

2. A petition thus amended, and in other respects good, is not demurrable because of the plaintiff's apparent want of good faith in alleging a fact without knowledge of its existence, nor as setting forth a new cause of action, nor as being barred by the statute of limitations; the first action having been brought in due time.

3. The petition in the present case as amended is not open to demurrer on the ground that the facts alleged showed want of diligence on the part of the plaintiff in discovering the alleged fraud by which she was induced to enter into the accord and satisfaction; nor did the plaintiff's allegations show undue delay in offering to rescind; nor are any of the special grounds of demurrer to the petition, as amended, not covered by the rulings announced above, meritorious.

(Syllabus by the Court.)

Error from superior court, Ware county; Jos. W. Bennet, Judge.

Action by C. A. Pollard against the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Kay and S. W. Hitch, for plaintiff in error. Toomer & Reynolds and Leon A. Wilson, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 297)

HANCOCK v. McNATT.

(Supreme Court of Georgia. Aug. 9, 1902.)

WRIT OF ERROR—TRANSCRIPT—BRIEF OF EVIDENCE—BILL OF EXCEPTIONS.

1. Documents and records introduced in evidence, but not incorporated in a brief of evidence so as to become a part of the record, cannot be properly specified as such, so as to authorize a transcript thereof to be transmitted to this court. Where there is no brief of evi-

dence at all, and documentary evidence is merely referred to in the bill of exceptions, this court can consider the same only so far as the contents of the documents are disclosed by the recitals in the bill of exceptions. *Elwell v. Security Co.*, 28 S. E. 833, 101 Ga. 496; *Parks v. Normau*, 33 S. E. 1005, 108 Ga. 373; *Braswell v. Brown*, 38 S. E. 51, 112 Ga. 740.

2. Applying this rule to the case in hand, the bill of exceptions does not sufficiently show the character of the documentary evidence introduced on the trial below to enable this court to determine whether or not the judgment excepted to was erroneous.

(Syllabus by the Court.)

Error from superior court, Montgomery county; D. M. Roberts, Judge.

Action between E. W. Hancock and James McNatt. From the judgment, Hancock brings error. Affirmed.

C. D. Loud, for plaintiff in error. J. B. Geiger and E. D. Graham, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 350)

CENTRAL OF GEORGIA RY. CO. v. MOSELEY.

(Supreme Court of Georgia. Aug. 9, 1902.)
APPEAL—REVIEW.

1. There was no material error in any of the several charges to which exception is taken, nor in admitting testimony; none of the numerous special grounds of the motion for a new trial not covered by the foregoing are meritorious; the verdict was warranted by the evidence, and was not excessive in amount; the case was tried in substantial accord with the rulings made therein by this court at the October term, 1900 (38 S. E. 350, 112 Ga. 914), and does not present any new question of law or practice for determination.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by S. R. Moseley against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Wimberly and J. E. Hall, for plaintiff in error. John R. Cooper and Steed & Ryals, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 63)

MAXWELL v. INMAN et al.

(Supreme Court of Georgia. July 24, 1902.)
NEW TRIAL.

1. There being no complaint of any error at the trial, and the evidence being sufficient to warrant the verdict, the trial judge did not abuse his discretion in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; H. M. Holden, Judge.

Action between Edgar Maxwell and Inman & Co. From a judgment, Maxwell brings error. Affirmed.

Strickland & Green, Wm. M. Howard and E. P. Shull, for plaintiff in error. S. H. Sibley, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

(116 Ga. 233)

WILLIS et al. v. SUTTON.

(Supreme Court of Georgia. Aug. 9, 1902.)

AUDITOR'S REPORT—EXCEPTIONS—HARMLESS ERROR—LIMITATIONS—DEATH OF PARTNER—DEMANDS OF SURVIVOR—ACTION ON ADMINISTRATOR'S BOND—CLAIM AGAINST ESTATE.

1. A judgment striking exceptions filed to an auditor's report as exceptions of law upon the ground that they were exceptions of fact will not, even if erroneous, be reversed, when it appears that the exceptions, even if treated as exceptions of law, were without merit.

2. When a partnership is dissolved by the death of one of the partners, the statute of limitations will begin to run in favor of the estate of the deceased partner, certainly after the expiration of 12 months from the date of the grant of administration upon the estate, as to all demands which the surviving partner may have against the estate, growing out of transactions occurring during the existence of the partnership.

3. When an action is brought upon an administrator's bond, and the administrator files a plea setting up that there was existing, at the time of the death of the intestate, a partnership between him and the defendant, and seeking to discharge himself as administrator from liability on account of demands which he has as surviving partner against the estate of the deceased partner, the plaintiff may reply to the claim so set up that the items thereof are barred by the statute of limitations, without filing a written pleading to that effect, when there is no order requiring such reply to be in writing.

4. Even if an administrator who has permitted a claim which he had against his intestate to become barred pending his administration may waive, in favor of himself, the right to plead the statute of limitations against the claim, and, in pursuance of this waiver, retain the amount due him from the assets of the estate, slight circumstances will be sufficient to overcome the presumption that his return setting up such retainer is correct, and that the claim against the estate was a just one, where there has been no return setting up the exercise of the right of retainer until long after the statutory period of limitations had expired; and especially would this be true where the return exercising the right of retainer was made pending a suit against the administrator for an accounting.

5. Applying the principles above laid down to the facts of the present case, there is nothing in the assignments of error requiring a reversal of the judgment.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by J. D. Sutton, guardian, against J. S. Willis and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Persons & McGehee, for plaintiffs in error. A. J. Perryman and H. W. Hill, for defendant in error.

COBB, J. This was an action upon an administrator's bond, brought by a guardian whose ward was the grandchild of the defendant's intestate. The defendant sought to relieve himself from liability by showing that there was a partnership existing between his intestate and himself at the date of the former's death, and that he was entitled to credit, as against the claim of the plaintiff, for certain items growing out of the conduct of this partnership business, and an agreement which had been entered into between the heirs of the intestate and himself; the mother of the plaintiff's ward being one of the parties to this agreement. The case was referred to an auditor, and, after certain exceptions, which had been filed as exceptions of law to his report, were stricken, the exceptions of fact were submitted to a jury, who found against all such exceptions. The court entered a judgment in favor of the plaintiff for the amount specified in the auditor's report. The case is here upon a bill of exceptions assigning error upon different rulings made at the trial. All of the questions made in the record are, we think, ruled in the headnotes, and we do not deem it necessary or advisable to go further into the details of this somewhat complicated record. If any error was committed by the trial judge, it was not of such a character as to require a reversal of the judgment. From an inspection of the record we are satisfied that the auditor reached the right result. He did not assign, as reasons for his conclusion, some of the principles laid down in the foregoing headnotes, but these may be taken simply as reasons additional to those which he did assign for his findings.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

(116 Ga. 337)

FARRAR et al. v. SOUTHWESTERN R. CO.

SOUTHWESTERN R. CO. v. FARRAR et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

RAILROADS—INSOLVENCY—ABROGATION OF
LEASE—RIGHTS OF STOCKHOLDERS
OF LEASED ROAD.

1. The federal court which administered the assets of the Central Railroad & Banking Company through a receivership thereof did not treat its lease of the property of the Southwestern Railroad Company as being of force and effectual during the entire period of the litigation.

2. The lease contract of 1869 between the Central Railroad & Banking Company and the Southwestern Railroad Company was, in effect, practically abrogated during at least a portion of the time that litigation was in progress.

3. If the stockholders of the latter company were in their own right entitled to any portion of the fund paid by the Central of Georgia Railway Company to it in settlement of its demand for "back rentals," no stockholder's claim on this account in any event exceeded 5 per cent. upon the amount of his capital stock, and a stockholder who received this

much of that fund cannot maintain against his company an action for more of it.

4. Even if a stockholder who had received none of this fund had a right of action against the company, the same became barred under the four-years statute of limitations.

(Syllabus by the Court.)

Error from superior court, Bibb county; Dupont Guerry, Judge pro hac.

Action by R. M. Farrar and others against the Southwestern Railroad Company. From the judgment, both parties bring error. Judgment on the main bill of exceptions affirmed; on cross bill, dismissed.

Henry A. Alexander, for plaintiffs. Harde-
man, Davis & Turner and Adams, Freeman,
Denmark & Adams, for defendant.

LUMPKIN, P. J. In the year 1869, the Southwestern Railroad Company, hereinafter called the "Southwestern Company," under legislative authority leased its railroad to the Central Railroad & Banking Company, hereinafter called the "Central Company." By the terms of the contract, the lessee was to pay to the stockholders of the lessor a semi-annual dividend upon their stock of 3½ per cent., these dividends being due in June and December of each year. They were regularly paid up to and including the month of June, 1892. Previously, on the 3d day of March, 1892, the property of the Central Company had, upon a bill filed against it and others in the United States court by Rowena M. Clarke and others, been placed in the hands of E. P. Alexander as temporary receiver. Later, what is termed a dependent bill was filed by this company against the Farmers' Loan & Trust Company and others; and, finally, all of the property of the Central Company passed into the hands of H. M. Comer and R. Somers Hayes as permanent receivers, to be administered under the bill last mentioned. The latter was appointed receiver in October, 1893. This receivership terminated on the 31st day of October, 1895. No payments of dividends were made by the receivers to the stockholders of the Southwestern Company after June, 1892.

On January 19, 1893, H. M. Comer as receiver, under an order of court and for the purpose of securing the payment of a certain sum of money which he was authorized to borrow in order to carry on the business with which he had been intrusted, pledged to the Mercantile Trust Company various assets of the Central Company, including the leasehold interest it had held in the property of the Southwestern Company. On June 30, 1893, the court passed an order of which the following is a copy: "Ordered, that the receiver of this court shall, as soon as practical, make a report on the following corporations whose properties are under lease to the Central Railroad and Banking Company of Georgia, to wit: The Southwestern Railroad Company, the Augusta & Savannah Railroad Company, the Mobile & Girard Railroad Company, the Eaton-ton Branch Railroad; which report shall show

the amount of earnings which have come into the hands of the receiver from the operation of the said leased lines from March 4th, 1892, to date, or as near thereto as practicable, and shall also show the amount of expenses incurred by him in the operation of the same, and the amount of the disbursements for their account during the same period. The receiver shall also furnish to the said corporations a copy of this order. Within thirty days from the receipt of the said communication by the respective corporations, the said corporations shall make known to the receiver, and to this court, whether they desire to permit said properties to remain in the hands of the said receiver as representing the lessee company, with the right on the part of the said corporations, or either of them, to claim the net results of the operation of their respective properties, up to the rental contract, but not beyond, or whether the said respective corporations shall receive from the receiver the surrender of the leasehold interests held by him as receiver of the Central Railroad and Banking Company of Georgia. Should any of the said companies make known their option to receive the surrender of the leasehold interest as aforesaid, the said receiver shall immediately apply to this court, or to any one of the judges thereof, for an order authorizing and directing him to surrender the same. Should any of the said companies elect to permit the leasehold interest to remain in the hands of the receiver, said companies shall have the right to claim from this court the net results of the operation of their properties by the receiver, up to the rental contract price, and no more, unless the receiver should, under order of the court, elect to retain the leasehold interest, and to pay therefor the rental contract price." The action taken by the directors of the Southwestern Company with respect to this order will be gathered from the following extract from a report made by its president to the stockholders: "In view of the fact that the surrender of the road without shops or rolling stock would involve an immediate large expenditure that the company was not prepared to make, it was deemed advisable to permit the receiver of the Central to continue, for the present, to operate the road for account of the company, not because we desired it, but because we were practically helpless to do otherwise, and the so-called option was, or at least had all the force of, a mandate."

Comer, the receiver, and his associate, Hayes, continued to operate the railroad of the Southwestern Company until, under a plan of reorganization approved by the court, the Central of Georgia Railway Company, hereinafter referred to as the "New Central Company," became the owner of the lines of railroad and other properties of the Central Company. Before the reorganization took place, the receivers, under the order and approval of the court, sold the assets pledged as above stated. The Mercantile

Trust Company was the purchaser, and the proceeds of this sale were credited upon the debt which these assets had been pledged to secure. The plan of reorganization, to which the Southwestern Company was a party, embraced the following stipulation: "The new company will obtain new leases of the Southwestern and Augusta & Savannah railroads at a rental of 5% upon their respective capital stocks. Any arrears of rental due to these railroad companies, respectively, shall be adjusted on this basis." In a contract between the Southwestern Company and Samuel Thomas and Thomas F. Ryan, it was, among other things, agreed that these men were to purchase all the "railroads and property" of the Central Company, organize the new company, and deliver to it all that was so purchased; and that to this company the Southwestern Company would lease its railroad under a contract similar to that made in 1869 with the Central Company, except that the rental was to be upon the basis of 5 per cent. per annum instead of 7, and was to be payable to the Southwestern Company as a corporation, and not directly to its stockholders. In the contract between this company and Thomas and Ryan was a stipulation in these words: "Said purchasers will cause to be paid to the said Southwestern Railroad Company, through R. T. Wilson, its president, the rentals in arrears due the Southwestern Railroad Company, under the existing lease, from July first, eighteen hundred and ninety-two, up to the date of the execution and delivery of the new lease herein provided for, at the rate of five per cent. per annum, such rental to be paid in cash out of the proceeds of the issue of sixteen million, five hundred thousand dollars consolidated 50-year gold bonds, but it being agreed that there shall be credited on account of such rental whatever the Southwestern Railroad Company shall have received, or may hereafter receive, from the receivers on account of the rental or operation of said road accruing from and after July first, eighteen hundred and ninety-two, not including any amount spent upon the road or in its operations or improvements." These arrangements were all carried into effect, and on November 1, 1895, the court passed an order containing the following: "The Central of Georgia Railway Company hereby agrees and binds itself, on or before December 15, 1895, to fully pay and discharge any balance due of the arrears of rental, calculated on the basis of five per cent. on the capital stock of said Southwestern Railroad Company, deducting the payment herein stated, made and to be made; and, upon the failure to make such payment on or before the date last aforesaid, the Southwestern Railroad Company shall be at liberty to apply to the court, on five days' notice, for such summary order requiring the said Central of Georgia Railway Company to pay over such balance due prior to

January 1, 1896." Immediately following the words just quoted, the order ran thus: "It is further ordered, that the receivers of this court are hereby directed and authorized to turn over and deliver to the said Central of Georgia Railway Company, at midnight on October 31st, 1895, the possession of all the railroad and property of said Southwestern Railroad Company now in their possession as officers of this court; the said Central of Georgia Railway Company accepting such possession subject to the orders of this court requiring it to complete the payment of such back-due rental on or before the date hereinbefore stated." Subsequently, the New Central Company paid over to the Southwestern Company the sum of \$865,183.34, this being 5 per cent. per annum upon the capital stock of the Southwestern Company during the period of default herein indicated. This company, out of this sum, paid about \$265,000 in settlement of various charges and expenses incident to the litigation, and on December 24, 1895, declared a dividend of 10 per cent. payable to the stockholders of record on that date. The gross sum received was thus reduced to about \$600,000, which was set apart as a "sinking" fund, and so invested that it now amounts to something more than \$100,000.

On July 18, 1899, R. M. Farrar filed against the Southwestern Company, in the superior court of Bibb county, a petition in which it is alleged that he "is the holder of an instrument of assignment by which the present owner of" specified certificates of stock issued by the Southwestern Company, "heretofore transferred, set over, and assigned to petitioner all his right, title, and interest in and to whatever sums of money he might be entitled to by virtue of his ownership of said shares of stock in the Southwestern Railroad Company, and not collected by him up to the date of assignment, except such dividends as might be declared on said stock after June 1st, 1899." To this petition there were several amendments, and the whole set forth, in substance, the facts above stated. The plaintiff in his original petition prayed for a judgment declaring that the fund received by the Southwestern Company from the New Central Company belonged to the stockholders of the former "at the time said fund should have been received by them under the terms of the lease of 1869," and for a distribution thereof accordingly. One of the amendments contained a prayer in these words: "That the execution of the decree for the return to its true owners of all that part of the fund received in compromise of defaulted rentals, except the sinking fund and the income subsequently received from it, which is now in the possession of the defendant company, be suspended and stayed by the court until such time when the said company shall have had a full opportunity to recoup itself against those whose conduct subjected it to this liability;

it being the desire and purpose of petitioner to hold this action, except so far as it concerns the sinking fund and the income derived therefrom, in subjection to the wishes of the present stockholders of the defendant." Practically, then, the action was for the distribution of the sinking fund, and for the recovery of Farrar's alleged interest therein. Several other persons were, upon their own application, made parties plaintiff. The petition was on demurrer dismissed as to all of them, and they are here excepting to this action of the court.

1. As will have been perceived, the theory of the original plaintiff was that the large fund received from the New Central Company all belonged to the persons who were stockholders of the Southwestern Company at the end of each six months when the dividends would have been payable under the old lease; that the Southwestern Company had no right to one dollar of this fund; that it accordingly received the money in trust for the alleged owners, and was therefore liable to them for the same. It was urged in the argument here that: "The lease contract of 1869 was continuously in existence during the receivership of the Central Railroad; and ceased to exist only upon the execution of the amended lease of 1895." In support of this contention it was insisted that the hypothecation and sale of the "leasehold interest," under the order of the United States court, to the Mercantile Trust Company, necessarily showed that the court regarded the lease contract as being in existence and of force all the while. In this view we do not concur. The assets of the Central Company were pledged before the order of June 30, 1893, of which we shall presently have more to say. The pledgee, in so far as the "leasehold interest" was concerned, took no more than a bare equity, subject to the chances of the pending litigation; and, before the sale of that interest occurred, the character of that equity had been fixed by the order last mentioned, and it was, because of that order, either valueless in the hands of the purchaser, the Mercantile Trust Company, or else that company and its final successor in ownership, the New Central Company, acquired the right to whatever the owner of the equity was entitled to receive. Neither of these alternatives would be helpful to the plaintiffs in error. There are, it must be admitted, expressions in several of the documents copied above, and in others appearing in the record, which tend strongly to support the contention that the "leasehold interest" was continuously of force throughout the litigation; but these expressions cannot, in our judgment, do away with the positive terms of the order of June 30, 1893.

2. The effect of that order was to practically abrogate the original lease, at least from the time the Southwestern Company elected to allow its property to remain in

the hands of Comer as receiver. Certainly, from that time to the end, neither the Southwestern Company nor its stockholders could demand the 7 per cent. per annum, or, indeed, anything under the old lease contract. Undoubtedly, we think, it was no longer operative or effectual, but the company, by allowing its property to remain in the hands of the receiver, did obtain "the right to claim from [the] court the net results of the operation" of its property. This right was clearly given to the company, and not the stockholders.

3. In so far, then, as that portion of the \$865,183.34 which sprang from the "net results" of the operation of the railroad of the Southwestern Company after the order of June 30, 1893, became effective, is concerned, we are quite clear that the same was properly paid to the company, and that it had the right to dispose of it as a corporate fund. If the amount of the two dividends which would have accrued in December, 1892, and June, 1893, under the old lease (making, both together, by the terms of the contract, 7 per cent., and which amount was by the settlement adjusted upon the basis of 5 per cent.), does in equity belong to those who were stockholders during these months, no person who was such a stockholder can claim his share of that amount if he has already received out of the gross fund a sum equal to or greater than 5 per cent. upon his stock. Counsel for Farrar conceded that his petition, properly interpreted, showed that his assignor did receive the 10 per cent. dividend declared December 24, 1895. This being so, that petition, in our judgment, utterly failed to set forth any cause of action against the defendant. His counsel relied earnestly upon the decision of this court in the case of *Meldrim v. Trustees*, 100 Ga. 479, 28 S. E. 431. That decision is by no means controlling in the case before us, for the reason that the court did not, in rendering it, pass upon the main question upon which Farrar's alleged right of action depends. While some of the expressions used by the chief justice, who delivered the opinion, indicate the contrary, it is nevertheless true that the court was not called upon to construe the order of June 30, 1893, and did not undertake to decide what effect should be given to it. On the other hand, that case was decided upon the agreed statement of facts which the parties thereto submitted to the court below. Neither side contended that the receiver did not, in point of fact, continue to operate the railroad of the Southwestern Company under the original lease of 1869; but in the agreed statement of facts just referred to, which constituted a part of the transcript of the record of that case of file in this court, it was conceded "that the consideration money under said lease was due from July 1st, 1892, to November 1st, 1895, the date when the lease contract between the Southwestern Railroad Company and the

Central of Georgia Railway Company became effective, a period of three [3] years and four [4] months." In other words, the lease of 1869 was treated as being operative during the entire period of the receivership. The order of June 30, 1893, was not mentioned in this agreed statement of facts, or alluded to in the pleadings; nor did it constitute a part of the record transmitted to this court. Indeed, we are by the record in the present case, for the first time, informed as to the contents of that order and its effect; which was, as above pointed out, to practically abrogate the original contract of lease made in 1869, at least from the time the Southwestern Company elected to allow its property to remain in the hands of Comer, as receiver, under the terms and conditions in that order specified.

4. As to the persons who were made parties plaintiff while the case was pending, it is sufficient to say that their right of action, if any they had, was barred by the statute of limitations. They were not made parties till November 14, 1901, which date is, of course, that upon which the action as to them began; and it was about six years after the Southwestern Company received the fund in controversy. The four-years bar applies. The written contract of lease between the Central Company and the Southwestern Company was in no sense a contract between the latter company and its stockholders, and it certainly embraced no promise by that company to pay them anything. The fact that this contract provided that the Southwestern Company should maintain, during the lease, its corporate organization "to the fullest extent necessary to preserve its charter, and protect the rights of its stockholders," does not, as contended, amount to a covenant under seal which brings this case within the twenty-years limitation. The ten-years limitation provided for in the Civil Code (section 3772) applies to technical trusts, and not to a case like the present. *Lightning Rod Co. v. Cleghorn*, 59 Ga. 782; *Schofield v. Woolley*, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315; *Tiedman v. Fertilizer Co.*, 109 Ga. 661, 35 S. E. 999; *Teasley v. Bradley*, 110 Ga. 498, 504, 35 S. E. 782, 78 Am. St. Rep. 113. Moreover, the Southwestern Company was not undertaking to act as trustee for the stockholders with respect to the fund it received from the New Central Company for the "back rentals." According to the petition, the defendant immediately set up the claim that the money was its own, and from the beginning held it adversely to the stockholders. If this fund really belonged to them, it was simply the case of an agent collecting money for his principal and keeping it. This being so, the suit should have been begun within four years from the time the adverse claim was, with the knowledge of the stockholders, set up. The petition does not show that any of the plaintiffs were ignorant of the position which the company

took with reference to this fund at the very beginning. Taking their allegations all together, it is quite clear that they fully understood the situation. The ground of the demurrer presenting the point that all of the plaintiffs except Farrar were barred was, therefore, well taken.

Judgment on main bill of exceptions affirmed; cross bill of exceptions dismissed. All the justices concurring, except LEWIS, J., absent on account of sickness, and FISH, J., disqualified.

(131 N. C. 26)

PARKER v. COBB et al.

(Supreme Court of North Carolina. Sept. 23, 1902.)

WILLS—CONSTRUCTION—LEGACIES—WHEN PAYABLE—PARTIES.

1. Testator devised realty to his elder son, in trust for the support of his wife and younger son. On their death the elder son was to have the land for his own use during life. Afterward it was to go to his children, and, in case but one child survived him, then charged with two legacies. The elder son died before the younger, leaving one child. *Held*, that the legacies did not become payable until after the death of the younger son.

2. In an action to enforce the payment of one of two legacies the other legatee should have been made a party.

Appeal from superior court, Edgecombe county; Bryan, Judge.

Action by R. L. Parker against J. E. Cobb, administrator, and others, to enforce the payment of a legacy. From a dismissal of the action, plaintiff appeals. Affirmed.

John L. Bridgers, for appellant.

CLARK, J. By the will of Bennett P. Pitt, probated and recorded October 7, 1880, it is provided as follows: "(6) Item. I give and devise to my son B. C. Pitt and his heirs, forever, all my plantation in the county of Edgecombe and state of North Carolina, whereon I now reside, known as the 'Home Tract,' and containing 604 acres, in trust for the following uses: That my wife, Keturah Pitt, may have the absolute use and control of the dwelling house, garden, kitchen, and all necessary outhouses, and that she shall be provided by my son B. C. Pitt with everything necessary for her comfortable support and maintenance as she has lived in my lifetime; the control of these buildings and the farming of such necessities to continue till the death or marriage of my said wife. That my son Hassell Pitt shall have the privilege of living on the premises, and out of the rents and profits of the plantation he also shall be comfortably supported during his life, and that my son B. C. Pitt shall, as far as possible, stand in my place to the said Hassell, and be to him both guardian and trustee. That the management of the said plantation shall be under the control of my

son B. C. Pitt, unless he fails to perform the duties that have been hereinbefore imposed upon him in reference to my said wife and my son Hassell, and, in the event of such failure, his control over the plantation shall cease and determine during their lives and during the life of the survivor, and my wife shall have power to manage the farm, and receive the rents and profits. But if my son B. C. Pitt faithfully discharges the duties imposed upon him as aforesaid, then he may appropriate to his own use the rents and profits of the farm over and above what is necessary for the support and maintenance of my wife and my son Hassell. From and after the death of my wife and my son Hassell the said B. C. Pitt shall hold said plantation for his own use and benefit for and during the term of his natural life. From and after his death I give and devise said plantation to the children of him, the said B. C. Pitt, and their heirs, forever, without any charge or incumbrance, provided the said B. C. Pitt leaves him surviving more than one child or lineal descendant; but, if he leaves him surviving only one child or lineal descendant, then I give and devise said plantation to such child or lineal descendant, to him and his heirs, forever, but charged with five hundred dollars, to be paid by the said child or descendant to Robert Lee Parker, son of Weeks B. Parker and my daughter Leah F. Parker, and also with the same sum payable by the said child or descendant to George T. Singletary, son of R. W. Singletary and my daughter Mary Jane Singletary, his wife; and, if the said B. C. Pitt shall leave him surviving no child or lineal descendant, then, and in that event, I give and devise said plantation to my own right heirs." Said B. C. Pitt undertook the trust reposed in him by the terms of said paragraph, and faithfully performed the same until his death, which occurred in March, 1897. Keturah Pitt, wife of Bennett P. Pitt, and mother of B. C. Pitt, died before the death of said B. C. Pitt. The defendant John E. Cobb is administrator of B. C. Pitt. Said B. C. Pitt left him surviving but one child, being his only lineal descendant, which said child is the defendant W. B. Pitt, who is a minor under the age of 21 years, and has no general guardian, and appears by his guardian ad litem. The plaintiff contends that on the death of B. C. Pitt the lands described in said clause 6 descended to W. B. Pitt, charged with the sum of \$1,000, of which \$500 belongs to the plaintiff, and bears interest from the death of B. C. Pitt in March, 1897, and asks that the charge be declared for said sum and interest from March, 1897, and that, unless payment thereof is made, the land be sold, and said charge be paid out of the proceeds. This last the plaintiff afterwards modified by asking judgment that the land be sold subject to the right of said Hassell to retain possession of said farm and have his support out of the

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1784.

proceeds of same, or, if that cannot be done, that a receiver be appointed to take possession of the farm, permitting said Hassell to occupy the dwelling, and out of the rents and profits furnish him a comfortable support, and apply the balance to the payment of the aforesaid legacy and interest and the costs and expenses of this action.

There is no question that the legacies have now become a charge upon the land (*Hunt v. Wheeler*, 116 N. C. 422, 21 S. E. 915), but the plaintiff is premature in asking to enforce it. The testator placed the support of his wife and Hassell in the first class, his son Bennett in the second class, and when the charge, in favor of his wife and Hassell shall cease by the death of both, then the land is devised to his son B. C. Pitt for life (and now, since his death, to B. C. Pitt's son, W. B. Pitt, absolutely), charged with payment of the \$1,000. Pitt is only made a trustee and guardian during the life of the testator's wife and Hassell, who are given the occupancy of the premises, and out of rents and profits was to support them, taking the surplus, if any, for the faithful discharge of his duties. "From and after the death of my wife and my son Hassell" B. C. Pitt was to have the land "for his own use" for life, and after his death it was to go to his children, and, if only one child, then subject to the above-recited charge in favor of plaintiff and another for \$500 each. That B. C. Pitt predeceased Hassell does not alter the fact that said B. C. Pitt was to hold as trustee and guardian (with right to pernamancy of surplus), and was not to hold for his own use till "from and after the death" of both his wife and Hassell. Upon the death of Hassell, and not till then, would the land descend freed of the above trust to B. C. Pitt, and now to his son, and then the charge in favor of the legatees will become payable, and until that event happens said legacies will not bear interest. On the death of B. C. Pitt the pernamancy of the profits over and above the support of Hassell go to the son, W. B. Pitt, as the testator's will makes B. C. Pitt and his children the sole beneficiaries as to this tract, subject to the occupancy of the premises by, and the support of, his wife and Hassell, and after the death of both these and of B. C. Pitt himself, then, in the event the latter should leave only one child, a charge for \$1,000 in favor of plaintiff and another grandchild. But both the death of the cestui que trust, Hassell, and of B. C. Pitt, leaving only one child, must occur before the legacies are demandable. It was not intended that the lands should be charged at one and the same time with the support of the testator's wife and Hassell (or the survivor of them) and the payment of the \$1,000 also. The land, if sold as requested by plaintiff, subject to the occupancy of the dwelling by Hassell and a charge for his support, would bring a very inadequate price, and the \$1,000 legacy and interest as asked

from March, 1897, would seriously impair the interest of B. C. Pitt (and now of his son, W. B.), who were evidently intended to be preferred to the plaintiff and the other legatee.

We have not adverted to the defect of parties in that the other legatee of \$500 is not made a party, which should have been done. In dismissing the action there was no error.

(131 N. C. 90)

KERR et ux. v. HICKS.

(Supreme Court of North Carolina. Sept. 30, 1902.)

RECORD—AMENDMENT NUNC PRO TUNC—REFERENCE—APPEAL—EXCEPTION.

1. The amendment by the court of the record nunc pro tunc to speak the truth, on conflicting evidence as to the facts, is conclusive.

2. Where an order of reference was made where there were no pleadings, and consequently no plea in bar, an appeal would not lie therefrom, so that plaintiff's exception to the order was enough to entitle him thereafter to insist on his right to a jury trial.

3. The court, in its discretion, may at any time before judgment permit the filing of exceptions to a report of the referee.

Furches, C. J., dissenting.

On rehearing. Former opinion reversed, and judgment below affirmed.

For former report, see 39 S. E. 797.

• Shepherd & Shepherd and J. L. Stewart, for petitioners. Stevens, Beasley & Weeks, for defendant.

CLARK, J. This was an action begun in 1891 by husband and wife, mortgagors, against the mortgagee, alleging overcharges, usury, and overpayment, asking for a statement of the account, judgment for balance due plaintiffs, and a cancellation of the mortgage, and for a restraining order against the sale of the mortgaged property pending the action. The defendant averred in his answer, among other things, that the plaintiffs were estopped by accounts rendered, which they had accepted without objection. At the return term time was given to file complaint and answer, and at the same term a reference was ordered, no pleadings having been filed. At February term, 1894, the plaintiffs having demanded a trial by jury of the issues of fact raised by the pleadings on the ground that the reference had been compulsory, Judge Brown, after hearing affidavits on both sides, found as a fact that the reference was compulsory, and not by consent, and that "the plaintiffs excepted to any order purporting to be a consent reference," and directed that the record and order of reference be amended nunc pro tunc to show these facts, and the parties were ordered to prepare such issues of fact as each claimed arose upon the pleadings before next term of the court. The defendant excepted to this order, but the authority and duty of the court to amend the record to speak the truth

are beyond question, and, there being conflicting evidence, his finding of fact is conclusive. See cases cited in Clark's Code (3d Ed.) pp. 305, 306. At October term, 1897, the issues were submitted to the jury, and found in favor of the plaintiffs, and thereupon the cause was recommitted to the referee, with directions to reform and revise his account to conform to the verdict of the jury. An appeal was taken by the defendant from the order committing the report, but the appeal was dismissed because premature. *Kerr v. Hicks*, 122 N. C. 409, 29 S. E. 370. At February term, 1901, upon exceptions filed to the amended report, Judge Hoke rendered the judgment set out in the record. The defendant filed 14 exceptions thereto, which repeated and included all the exceptions taken by him during the progress of the cause, including, of course, those set out in the appeal which was dismissed as premature. When this last appeal was heard at August term, 1901 (*Kerr v. Hicks*, 129 N. C. 141, 39 S. E. 797), the court held that, the reference in 1891 having been compulsory, the plaintiffs were entitled to appeal, because there was a plea in bar, and, not having appealed, they had no right thereafter to insist on their right to a jury trial. We are now called on by this rehearing to reconsider that ruling. This point was raised by the court *ex mero motu* upon examination of the record, and we did not have the benefit of argument by counsel. Indeed, one of the defendant's exceptions (2) on appeal is that this order of reference was invalid, because made before any pleadings were in. We were inadvertent to this fact that when the reference was ordered and exception noted (as the judge finds was done) there were no pleadings, and consequently no plea in bar. The order of reference on its face recites that the plaintiffs should have 15 days after the adjournment of the court to file complaint, and the defendant 15 days thereafter to file answer. The exception, therefore, to the order of reference then entered, was all that was required, and an appeal, if prosecuted, would have been dismissed as premature. The plea of an estoppel in pais is rather a defense than a plea in bar, which must be disposed of before a trial on the issue. But, if it were a plea in bar, it was not on file when the order of reference was made, and the plaintiffs could not appeal for failure to dispose of it. An appeal from an interlocutory order is usually ground for an exception, and not an appeal. When an appeal is permissible from such order, it is never compulsory, and the party entitled thereto can, if he prefers, note his exception, and have the point reviewed on appeal from the final hearing, because (as in this case) he may be satisfied with the future action of the court, and not wish to appeal. Why should the plaintiffs have appealed here, when their exception to the reference was in, and they knew this preserved their right to a jury

trial, and they would only wish to appeal when that was denied them? Besides, the alleged estoppel could not be a plea in bar in this action to surcharge an account for usury. If a plea in bar, the defendant waived it by not excepting to the order of reference. *Grant v. Hughes*, 96 N. C. 177, 2 S. E. 339; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707. The plaintiffs had nothing to object to, except that the reference was compulsory, and that was matter for exception, and not for appeal. When the report came in, the plaintiffs did insist that, the reference having been compulsory, and an exception duly noted, they were entitled to a trial by jury; and the judge so held, and the defendant did not appeal. Had he done so, his appeal must have been dismissed as premature. On reconsideration, therefore, we think that there was inadvertence in our opinion at fall term, 1901, and we reinstate the case as it stood at that hearing.

This brings us to the 14 exceptions brought up by the defendant in that appeal, which are:

1. That Judge Brown erred in amending the record to show that the reference was compulsory, and that exception was taken thereto at the time. This point we have already passed on above.

2. That it was error in Judge Boykin, at December term, 1891, to make the order of reference before any pleadings were filed that could raise issues. This is true (*Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248), but, as it was the plaintiffs who excepted (and defendant did not) at the time, and the plaintiffs afterwards secured a jury trial because of the invalidity of the reference, it cannot be seen how the defendant can either present or be benefited by this exception. The plaintiffs had nothing to except to, except that the reference was compulsory, and made before pleadings filed; and these were matters of exception, and not of appeal.

3. That Judge Brown erred in permitting the plaintiffs to file exception to the referee's report at February term, 1894. We presume that this is on the ground that the exceptions should have been filed at October term, 1893, when the report was filed; but the judge had the discretion to permit them to be filed at any time before judgment. See cases cited in Clark's Code (3d Ed.) p. 569.

4. That Judge Allen erred at October term, 1897, in refusing to submit the third and fourth issues tendered by the defendant. These matters could be and were presented to the jury upon the issues settled by the court, and the refusal to submit the issues was not error. *Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 147, 20 S. E. 367; *Allen v. Allen*, 114 N. C. 121, 19 S. E. 269.

5. That Judge Allen erred in overruling defendant's objections to the deposition of R. P. Paddison. These objections were: (1) That the deposition was not before the referee, nor embraced in his report. But this was a trial

before the jury, and evidence on the issues was not restricted to that heard by the referee. (2) That the commissioner taking the deposition was father-in-law of John D. Kerr. This objection was not taken before the clerk by whom the deposition had been regularly opened, examined, and allowed as evidence to be read in this trial without objection; and, besides, said commissioner was father of John D. Kerr's first wife, and not of his present wife, who is plaintiff in this action.

6. That it was error to go to trial before the jury when there was an issue in bar (the estoppel by furnishing accounts stated); but the reference was invalid, according to the defendant's second exception, and the ground of the alleged plea in bar was one of the matters submitted to the jury, and was embraced in the issues passed on by them.

7. That for the above reason it was error to recommit the report to the referee to make it conform to the verdict. The defendant had not excepted to the reference, and had, therefore, waived any exception to it. Besides, the recommitment was simply, in effect, a reference to state the account in accordance with the facts settled by the verdict.

8. That Judge Hoke, at February term, 1901, overruled an exception to the same purport as the second exception above stated, which we have also overruled supra.

9. That Judge Hoke erred in not allowing an exception to the manner of computing interest. The judge finds that that method of computing the interest was tendered the referee by the defendant in a calculation of interest made by him, and was adopted at his suggestion by the referee, as fully appears by the referee's report, and, besides, is a method which usually makes in favor of the debtor.

10. That Judge Hoke erred in overruling the defendant's exception that the referee failed to charge in his account certain items of leakage. His honor finds that said items were fully considered and passed upon by the referee, and are embraced in his account.

11. That Judge Hoke erred in finding any facts regarding the order of reference. His honor simply recited the matters of record, and as we have found them to be on inspection of the record.

12. That Judge Hoke erred in not striking out all previous proceedings, and ordering a new trial upon the issues raised by the pleadings, and especially by the plea in bar. A trial upon those issues had been had before Judge Allen at October term, 1897, and Judge Hoke had no power to set aside the action of his predecessor, which we have just reviewed above, and in which we find no error.

13. That Judge Hoke erred in not rendering judgment for plaintiffs upon the account filed by the referee as reformed by him. But the second re-reference was made at the instance of the defendant, who submitted his statement of the accounts, which was adopt-

ed by the referee. See referee's report October term, 1900.

14. That Judge Hoke erred in not rendering judgment for the defendant upon the first report filed. This has already been disposed of by what we have said.

We have carefully gone through the entire record, and each and every of above 14 exceptions brought up by the appeal, and find no error. The petition is allowed, and the judgment below is affirmed.

Petition allowed.

FURCHES, C. J., dissents, and refers to his opinion in 129 N. C. 141, 39 S. E. 797.

(131 N. C. 73)

MEADOWS v. WESTERN UNION TEL. CO.
(Supreme Court of North Carolina. Sept. 30, 1902.)

TELEGRAPHS—NEGLIGENCE—DELAY OF MESSAGE—INSTRUCTION.

1. Code, § 413, provides that no judge, in giving a charge, shall give an opinion whether a fact is fully or sufficiently proven, but that he shall state the evidence in the case, and declare the law thereon. In an action against a telegraph company for delay in delivering a message by a messenger boy the court charged that it was the duty of the telegraph company to use reasonable diligence in the transmission of messages, and that by the term "reasonable diligence" was not meant the speed of the lightning, except in the transmission of the message over the wire, on the one hand, "nor the proverbial slowness of the messenger boy on the other." *Held*, that the quoted portion of the instruction was error.

Clark, J., dissenting.

Appeal from superior court, Craven county; Winston, Judge.

Action by W. D. Meadows against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. W. Clark and F. H. Busbee, for appellant. D. L. Ward, for appellee.

MONTGOMERY, J. This action was brought to recover of the Western Union Telegraph Company, the defendant, damages on account of alleged mental anguish suffered by the plaintiff on account of an alleged negligent failure to deliver to him a telegraphic message. The telegram was in these words: "Newbern, N. C., October 3rd, 1901. To Bill Meadows, Pollockville, N. C.: Will Phillips' wife at point of death. Will Phillips." The language of the telegram differs from that of any in our reported cases, but, as a new trial is to be had for matters hereinafter mentioned, it might not be of any benefit to discuss now the legal effect of the language of the dispatch. In his instructions to the jury, his honor, among other things, said "that it was the duty of the telegraph company to use reasonable diligence in the transmission of all messages committed to it, and that by the term 'reasonable' or 'due' diligence was not

meant the speed of the lightning, except in the transmission of the message over the wire, on the one hand, nor the proverbial slowness of the messenger boy on the other." There was an exception to the latter part of that instruction, and the same was assigned by the defendant as error, and we are of the opinion that the position of the defendant is a correct one. Whether the defendant had exercised due diligence in the delivery of the message was the question of fact before the jury. Telegraphic messages are usually delivered by boys, called "messenger boys," and the plaintiff had testified that: "R. R. White's boy worked in the telegraph office. He knows me. Knew where I lived. Could stand in the office and see my house. The boy signed the receipt for the message himself. After my name was signed, I said: 'This thing has been delayed. What is the matter?' It seems to us that his honor, in the language used, took as a criterion of negligent delay the agency employed by the defendant to deliver its messages. 'No judge in giving a charge to the petit jury either in a civil or criminal action shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law thereon.' Code, § 413. It is true that his honor did not, in precise and exact words, tell the jury that, in his opinion, the fact of a negligent delay had been fully proved; but it seems to us 'that his language, when fairly interpreted in connection with so much of the context as is set out in the record, was likely to convey to the jury his opinion of the weight of the evidence.' That is the construction of the statute adopted in *State v. Jones*, 67 N. C. 285, and approved in *State v. Laxton*, 78 N. C. 564.

New trial.

DOUGLAS, J. I concur in the result of the opinion of the court, because it appears to me, not that harm has been done, but that harm may have been done. Had I been a juror, the objectionable words would probably have made no such impression on my mind, but that fact alone does not authorize me to say that they could not have such effect upon the minds of other reasonable men, in view of the evident effect that they have had upon the minds of a majority of this court. The words themselves do not contain the slightest intimation that any fact in controversy has been proved or disproved. The most that can be said is that they may have been understood by the jury as meaning that the defendant's messenger boys were proverbially slow, and that such intimation may have operated to the prejudice of the defendant. If this is so, the defendant should have a new trial. My views as to the absolute right of the citizen to a fair and impartial verdict upon the facts, free from the slightest influence of the court, have been too fully and too recently expressed in *State*

v. Howard, 129 N. C. 584, 663, 40 S. E. 71, to require any further expression in the present case.

CLARK, J. (dissenting). The uncontradicted evidence is that, the sister of plaintiff being at the point of death in Newbern, her husband, at her request, and in consequence of her prior promise to plaintiff in such contingency, on October 3, 1901, at 4:15 p. m., sent a message, which the company's agent wrote for him, to the plaintiff at Pollokville: "Will Phillips' wife at point of death." The husband prepaid the message, which was written by defendant's agent, who testified that he knew it was an important message. The train passed Pollokville coming to Newbern at 5:04 p. m. The plaintiff was at work a little more than half a mile from the station in Pollokville, but in plain view of the office, as was also his house near by, and the message could have been delivered in less than 15 minutes. The defendant made no effort to deliver the message, but kept it till 6:55 p. m., and then wired back to Newbern for 50 cents more to deliver the message, the residence of plaintiff being just outside of free delivery limits. The 50 cents was promptly sent, but the message was not delivered to plaintiff till 8:30 p. m., 4 hours and 15 minutes after its receipt by the defendant. The plaintiff contends that it was negligence not to have at once wired back for money to pay for extra service, and that, if this had been done, plaintiff could have come to Newbern on the 5:04 train, before his sister became unconscious. The court, in its charge to the jury, incidentally said: "The company is required to use due diligence in the delivery of a message. By this is not meant the speed of the lightning, except in the transmission of the message over its wires, nor the proverbial slowness of a messenger boy, but it is required to use reasonable diligence, and nothing more." The defendant excepts because of the use of the words "proverbial slowness of a messenger boy." This could not possibly have harmed the defendant, nor have been any expression of opinion whatever upon the controversy in this case. There was no contention by plaintiff that the messenger boy was slow. The jury did not have to consider that matter in any possible view of the case. It was not controverted that defendant received the message at 4:15 p. m., that the only train on which plaintiff could have gone to Newbern passed Pollokville at 5:04, and that defendant took no steps to deliver the message at that time, and did not telegraph to Newbern for money to send the message out till 6:55. This was the ground relied upon to show defendant's negligence. *Hendricks v. Telegraph Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658. When at last at 6:55 defendant wired for money to send the message, the damage had been done, the train had passed; and there is no allegation that when the message was finally delivered to the

messenger boy, after 8 p. m., that he lingered or delayed. The fault was wholly and entirely with the operator at Pollokville, and the incidental remark by the court in regard to the slowness of messenger boys could not possibly be an expression of opinion "upon those facts respecting which the parties take issue or dispute, and upon whose existence depends the liability of the defendant." *State v. Angel*, 29 N. C. 27; *State v. Jones*, 67 N. C. 285; *State v. Debnam*, 98 N. C. 712, 3 S. E. 742; *State v. Jacobs*, 106 N. C. 696, 10 S. E. 1031, and cases there cited. In *Stillely v. McCox*, 88 N. C. 18, the judge laid down some moral observations, and the court said: "We know of no law which prohibits a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as may be suggested by the incidents of a trial, provided it be innocent, and work no prejudice to either of the parties." And in *State v. Gay*, 94 N. C. 814, the court says: "It cannot be error to state a proposition to the jury which is universally admitted." What can be more undoubtedly admitted from common observation than the "proverbial slowness of a messenger boy," and how could the expression of that truism be harmful to defendant when the conduct of no messenger boy was called in question? From plaintiff's contention, the liability of defendant accrued solely from the neglect of the operator at Pollokville, long prior to the delivery by him of the message to the messenger boy. In the trial of *Warren Hastings*, to a criticism of a rhetorical flourish in his opening speech, *Sheridan* replied that it was a novelty in legal proceedings "to take a bill of exceptions to a metaphor, or enter a special pleading against a trope"; but the appellant seems to have repeated that precedent. It is the function of this court to pass upon alleged errors of law of the trial judges, but it has not been deemed part of our duties to pass upon matters which should be left to their individual tastes. Some judges are terse, others are florid; some may refer incidentally to matters of common knowledge, and others restrict themselves to narrower limits; but, unless what is said is an expression of opinion "upon the facts in controversy," the appellate court has not felt that it was called upon to criticise the style or tenor of the charge as reversible error.

(131 N. C. 707)

STATE v. WILCOX.

(Supreme Court of North Carolina. Sept. 30, 1902.)

HOMICIDE—TRIAL—DISTURBANCE BY SPECTATORS—LAW OF THE LAND.

1. On trial for murder, while defendant's counsel was addressing the jury, about 100 people, being one-fourth of those in the courtroom, simultaneously, and as if by agreement, left the room. Soon thereafter a fire alarm was given near the courthouse, which caused a number of other persons to leave. The trial judge, in his statement of the case, found that

these demonstrations were for the purpose of breaking the force of counsel's argument, but did not find that the jury were influenced. Held that, though there was no such finding, the disorderly proceedings were such as to warrant the court in declaring that the trial was not conducted according to the law of the land, as guaranteed by the constitutional provision that no person ought to be deprived of life, liberty, or property but by the law of the land.

Appeal from superior court, Pasquotank county; *Jones*, Judge.

James Wilcox was convicted of murder, and appeals. Reversed.

E. F. Aydlett and *W. M. Bond*, for appellant. *Geo. W. Ward* and the Attorney General, for the State.

MONTGOMERY, J. "No person ought to be taken or dispossessed of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land." And that provision of our state constitution applies as well to the procedure and manner of trial in our courts of justice as it does to the great principles of law which underlie our society. Under the law of the land, all persons charged with crime are as much entitled to a fair and unprejudiced trial as they are to the protection of their persons, their property, or their reputation. They have the right, under the same constitution, to have counsel for their defense; and any willful interruption of such counsel while conducting such defense, intended to disconcert and embarrass, is not only unlawful as obstructing and preventing a fair trial, but is deserving of the condemnation of all good citizens. In this case the prisoner was arraigned on an indictment for murder, and was convicted of that crime in the first degree. The evidence was entirely circumstantial, and, while that character of evidence may, in its very nature, produce a high degree of moral certainty in its application, yet it is never to be forgotten that it requires the greatest degree of caution and vigilance in its application. In reading the record in this case, it hardly seems possible that the jury could have given that cautious and vigilant attention to the evidence which the law required of them, or to the presentation of the prisoner's case to them by his counsel that thought which the importance of the case demanded. In their immediate presence 100 people, in their deliberate purpose to prejudice the rights of the prisoner, committed a great wrong against the commonwealth, and a contempt of the court. On the outside of the courthouse greater improprieties took place for the purpose of prejudicing the prisoner with the jury. No such demonstrations were ever witnessed in our state before, and, for the honor of the commonwealth, such ought never to be repeated. In the statement of the case by his honor he said: "After the evidence was all in, and while one of the counsel was making the

closing argument for the prisoner, about one hundred people, being about a fourth of those present in the court room, as if by concert, left the room. Soon thereafter, while the same counsel was addressing the jury, a fire alarm was given near the courthouse, which caused a number of other persons to leave the courtroom. The court is of opinion, and so finds the fact, that these demonstrations were made for the purpose of breaking the force of the counsel's argument. But the court does not find that the jury were influenced thereby. There is no motion made by the prisoner to set aside the verdict in consequence of said conduct." Sufficient excuse was made here by the counsel for the prisoner for the failure to make the motion for a new trial in the court below to justify the attorney general in consenting to an agreement to consider the motion as having been entered at the proper time, which he did. In such a case as this it was not indispensable that a finding by his honor that the jury had been influenced by the conduct of the offenders should have been made. The disorderly proceedings assumed such proportions as to warrant this court in declaring that the trial was not conducted according to the law of the land. The propriety of our ruling is strengthened by the circumstances that contempt proceedings were not commenced against those offending, and that no motion was made to set the verdict aside and for a new trial after such unheard of demonstrations. The counsel for the prisoner, in his argument here, in response to a question stated that, if the verdict had been set aside, the prisoner would have met a violent death on the instant. The prisoner must not only be tried according to the forms of law, these forms being included in the expression "the law of the land," but his trial must be unattended by such influences and such demonstrations of lawlessness and intimidation as were present on the former occasion. The courts must stand for civilization, for the proper administration of the law in orderly proceedings. There must be a new trial of this case.

New trial.

CLARK, J. (concurring). The judge having found as a fact that the demonstrations within and without the courtroom were made "for the purpose of breaking the force of the counsel's argument," the magnitude and nature of those demonstrations were such as to require a new trial. The administration of justice must not only be fair and unbiased, but it must be above any just suspicion of any influence, save that credit which the jury shall give to the evidence before them. It is of vital importance to the public welfare that the decisions of courts of justice shall command respect, but this will be impossible if there is ground to believe that extraneous influence of any kind whatever has been brought to bear.

(131 N. C. 84)

KNIGHT v. TAYLOR et al.

(Supreme Court of North Carolina. Sept. 30, 1902.)

JUSTICES OF THE PEACE—JURISDICTION—SUM DEMANDED—STATUTES—VERIFIED ACCOUNT—ADMISSIBILITY.

1. Const. art. 4, § 27, gives a justice jurisdiction of actions on contract when the "sum demanded" does not exceed \$200. Code, § 835, provides that when, in an action before a justice, it appears that the sum demanded exceeds \$200, the action shall be dismissed, unless the plaintiff remit the excess of principal and interest on the excess. *Held*, that where the sum demanded was \$200, and it appeared from the evidence that the account sued on was more than \$200, it was not necessary that plaintiff formally remit the excess, the jurisdiction being determined by the sum demanded.

2. Act 1897, c. 480, makes an itemized account properly verified prima facie evidence of its correctness. Plaintiff introduced a verified account, which read, "T., W., and F., to one-third interest in stock of goods known as J. C. Taylor & Co., \$1,000." The verification stated that the account was the property of plaintiff having been transferred to her, and on the back of the account appeared an assignment to plaintiff by the writer, which assignment was in the handwriting of F. *Held* inadmissible, as the account did not profess to show the relation of debtor and creditor between any one.

Appeal from superior court, Pitt county; Winston, Judge.

Action by M. E. Knight against J. C. Taylor and others. From a judgment for plaintiff, defendants appeal. *Reversed*.

Skinner & Whedbee, for appellants. F. G. James and Jas. H. Pou, for appellee.

DOUGLAS, J. This was a civil action begun before a justice of the peace, from whose return on appeal we take the following statement: "The plaintiff complained for balance due on an account for \$1,000 for one-third interest in the stock of goods owned by J. C. Taylor & Co., which account was on the 29th day of March, 1899, transferred to and assigned to this plaintiff for full value, subject to a credit of \$800, paid on said account December 16, 1899; amount now claimed in this action being \$200, interest, and cost. The defendant denied the justice of the claim, and pleaded to the jurisdiction of the court the general issue, payment and satisfaction, offsets, and counterclaim." The plea to the jurisdiction of the court was apparently based upon the fact that, owing to the accumulation of interest before the payment of the \$800 credit, the principal of the account still remained over \$200, exclusive of the interest thereon. The constitution of this state (article 4, § 27) says: "The several justices of the peace shall have jurisdiction, under such regulations as the general assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars." Also, Code, § 834; *Martin v. Goode*, 111 N. C. 238, 16 S. E. 232, 32 Am. St. Rep. 799. It is the sum

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. §§ 157, 162, 170.

demanded in good faith that determines the jurisdiction, and if that sum, exclusive of interest thereon, does not exceed \$200, in an action on contract, the jurisdiction of the justice attaches, because the plaintiff cannot recover more than he has demanded. If, however, the principal sum demanded exceeds \$200, the action can be brought within the jurisdiction of the justice, under the provisions of section 835 of the Code, by the plaintiff formally remitting all in excess thereof. This is, in effect, simply a reduction by the plaintiff of the sum demanded down to the jurisdictional limitation. However, the defendants contend that the justice had no jurisdiction, because the evidence disclosed that the account sued on was more than \$200, and that the plaintiff did not formally remit the excess. This contention cannot be sustained. It is not what the plaintiff might be entitled to recover if he were suing in another court, but the amount he is demanding, that determines the jurisdiction by the express words of the statute as well as of the constitution. By his own action he has limited his possible recovery to the sum demanded, and has, in legal effect, certainly as far as this action is concerned, remitted the excess by necessary implication. The cases of *Brantley v. Finch*, 97 N. C. 91, 1 S. E. 535, and *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836, are directly in point.

Upon the trial the first evidence introduced by the plaintiff was a verified account, which is as follows:

"J. C. Taylor, W. A. Taylor, and F. B. Knight. March 28, 1899. To $\frac{1}{2}$ interest in stock of goods known as J. C. Taylor & Co., \$1,000. Interest @ 8% from date, Dec. 16, 1899, by cash, \$800."

"M. E. Knight, being duly sworn, says that the above account is correct and just, and that no part has been paid, except \$800, paid Dec. 16, 1899, and that there is still due and unpaid \$200, and interest; that the said account is her property, and was transferred to her and delivered to her on March 29, 1899. [Signed] M. E. Knight."

"Sworn to before me. S. T. Carson, J. P."

On the back of this account were written the following words in the handwriting of F. B. Knight: "March 29, 1899, I transfer all my right and title to this claim to M. E. Knight, without recourse on me."

To the introduction of this evidence the defendant objected. We think the objection should have been sustained. The act of 1897 (chapter 480, Pub. Laws) makes an itemized statement of an account, properly verified, prima facie evidence of its correctness. This clearly can apply only where accounts are not only properly verified, but are properly stated so as to show an indebtedness. The act simply makes such an account prima facie evidence of what it professes to show; but, if it shows nothing, then it is irrelevant. That before us does not profess to show the relation of debtor

and creditor between any one. J. C. Taylor, W. A. Taylor, and F. B. Knight are all placed in one class as debtors, but to whom does not appear. M. E. Knight now claims to own the account, not as original creditor, but by assignment from F. B. Knight, one of the apparent debtors. We may infer from the evidence, which is by no means clear, that the Taylors bought Knight's interest in the common stock of goods at the price named in the account, but it does not say so. We think that, for an account to be introduced as substantive evidence, it must, upon its face, tend to prove some material fact at issue. We doubt whether this account can be brought under the act of 1897, because it is neither "itemized" nor is it "for goods sold and delivered"; but, in any event, we think that it was irrelevant, and therefore should have been excluded.

New trial.

(131 N. C. 87)

GILL v. DIXON et al.

(Supreme Court of North Carolina. Sept. 30, 1902.)

ASSIGNMENT OF FUTURE PENSION—"CLAIM" OF PENSIONER.

1. Under Code, § 177, providing that every action must be brought in the name of the real party in interest, but such section shall not be deemed to authorize the assignment of a thing in action not arising out of contract, a pension to become payable in the future is not assignable, as the legislative provision for a pension is not a contract between the state and the pensioner until the warrant has been issued.

2. Laws 1889, c. 198, providing that any person who shall speculate or purchase for a less sum than that to which each may be entitled the claim of any pensioner shall be guilty of a misdemeanor, does not recognize the right to assign a future pension, as the word "claim" refers alone to a warrant issued for a pension.

Appeal from superior court, Vance county; Bryan, Judge.

Action by D. H. Gill against Wm. Dixon and another. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

T. T. Hicks, for appellant. W. B. Shaw, for appellee.

MONTGOMERY, J. The defendants in this action executed and delivered to the plaintiff a paper writing, a copy of which is as follows: "I, William Dixon, am now indebted unto D. H. Gill in the sum of one hundred and twenty-five dollars after a full and complete statement of all matters between us. For this he holds a mortgage on my horse and other personal property, which I am desirous that he shall indulge. I am in receipt of a pension annually from the state of North Carolina on account of services in the late war of the Confederacy. This pension, and all sums to be due me thereon from year to year hereafter, I assign to said D. H. Gill, and hereby give him full power and

authority to collect the same, and receipt for it in my name, until the proceeds therefrom shall pay this debt and interest. This assignment of my said pension is made upon the further consideration that he now permits me to have and remove from his land my crop of corn, about 25 barrels, made this year, which is liable to him for the rent and supplies which compose the debt due by me to him, and mentioned above. In the event of my death, or the cessation of said pension in any way for any cause, he shall not be obliged to indulge his said mortgage any longer, and may foreclose the mortgage at once. Bettie Dixon, wife of said William Dixon, hereby assents to the assignment of this pension, and agrees that in the event of the death of her said husband prior to her death, this shall operate to pass and assign to said D. H. Gill any pension that may accrue to her as his widow until this debt is paid and satisfied. This 31st December, 1896." Pursuant to the above agreement, the pensioner, William Dixon, delivered to the plaintiff, or permitted him to receive, pension warrants for the years 1897, 1898, and 1899, but since that time has refused to have applied to the debt the warrants for pensions. They are held by some one to await the result of this action. The object of this suit is to have the pension warrants which have been issued to defendant Dixon since 1899 subjected to the payment of the balance due on his debt to the plaintiff. The defendants filed a demurrer to the complaint, in which they assign various grounds, upon which it is contended that the assignment was invalid. The demurrer was sustained. The question is, were the future pensions undertaken to be conveyed in the agreement assignable at law? It is not denied that a warrant for a pension is assignable. It is the state's obligation and promise to pay. But legislative provision for a pension until the warrant has been issued is not a contract between the state and the pensioner. Pension legislation is largely founded on charitable considerations,—on the idea of a gift to the pensioner for his future support. In *re Smith*, 130 N. C. 638, 41 S. E. 802. It would seem, therefore, that under section 177 of the Code, a pension, to become payable in the future, would not be assignable. The language of the Code is: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." The plaintiff, however, contends that section 11 of the pension act (chapter 198, Laws 1889) recognizes the right and promise of the pensioner to assign or sell a future pension. That section is in the following words: "Any person who shall speculate or purchase for a less sum than that to which each may be entitled, the claim of any soldier or sailor, or widow of a deceased soldier or sailor, allowed under the provisions of this

act, shall be guilty of a misdemeanor," etc. The word "claim," it is insisted, embraces more than the warrant for the pension. We do not concur in that interpretation. The legal meaning of the word "claim," without other qualifying language, is a demand for something as a right,—something that could be in law the subject of a demand. There are no words in the section quoted that extend or enlarge the legal meaning of "claim," and we must hold that it refers to a warrant issued for the pension. It therefore follows that the paper writing executed by the defendants to the plaintiff is inoperative, and the demurrer was properly sustained.

No error.

(131 N. C. 711)

STATE v. TAYLOR.

(Supreme Court of North Carolina. Sept. 30, 1902.)

OBTAINING GOODS UNDER FALSE PRETENSES
—INDICTMENT—REPRESENTATIONS TO AGENT
—PASSING OF TITLE—ALLEGATION OF FELONIOUS INTENT.

1. Under Code, § 1025, providing that a person who shall knowingly and designedly, by means of any false pretense whatsoever, obtain things of value with intent to cheat or defraud any person, shall be guilty of a misdemeanor for fraud and deceit, it is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent.

2. Under Code, § 1025, providing that it is sufficient, in an indictment for obtaining goods under false pretenses, to allege that the accused did the act, "without alleging any ownership of the chattel," the fact that the false representations were made to the agent of the owner, who had no authority to pass title to the property, did not make the offense larceny, instead of obtaining goods under false pretenses.

3. Under Acts 1891, c. 205, providing that a felony is a crime which is or may be punishable by either death or imprisonment in a state's prison, an indictment for obtaining goods under false pretenses, which did not charge that the offense was done feloniously, should have been quashed.

Appeal from superior court, Craven county; Brown, Judge.

L. D. Taylor was indicted for obtaining goods under false pretenses. From an order sustaining a motion to quash the indictment, the state appeals. Affirmed.

At August term, 1902, of the superior court of the county of Craven the defendant, D. L. Taylor, was tried before his honor Geo. H. Brown, Jr., on the following bill of indictment: "The jurors for the state upon their oath present that D. L. Taylor, late of the county of Craven, on the — day of May, 1899, at and in the county of Craven and state aforesaid, unlawfully and knowingly designing and intending to cheat and defraud Emma Wynne of her goods, moneys, chattels, and property, did then and there unlawfully and designedly falsely pretend to one Mike Fisher, the agent of the said Emma Wynne,

¶ 2. See *False Pretenses*, vol. 23, Cent. Dig. §§ 1, 16, 28.

knowingly, that a certain cow then in the possession of said Mike Fisher, agent of said Emma Wynne, the property of the said Emma Wynne, was his cow; that said Emma Wynne had sold the said cow to him, D. L. Taylor, for a debt of \$10, due him by the mother of the said Emma Wynne; whereas, in truth and fact the said Emma Wynne had not sold or transferred the said cow to him, the said D. L. Taylor, as he, the said D. L. Taylor, then and there knew to be false,—by color and means of which said pretense and pretenses he, the said D. L. Taylor, did then and there unlawfully, knowingly, and designedly obtain from the said Mike Fisher, agent of said Emma Wynne, the said cow, being then and there the property of the said Emma Wynne, with intent to cheat and defraud the said Emma Wynne, to the great damage of the said Emma Wynne; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.” Upon the trial of the case in the court below, W. D. McIver, attorney for the said D. L. Taylor, moved to quash the bill of indictment upon the ground that the facts set forth in the said bill do not constitute the offense of obtaining goods under false pretense. This motion was sustained, and the state appealed. From the record in the case the following appeared to be the facts: That the defendant, D. L. Taylor, falsely represented to one Mike Fisher, who then had in his possession the cow belonging to Emma Wynne, that the said Emma Wynne had sold the said cow to D. L. Taylor for a debt of \$10 due him by the mother of the said Emma Wynne, which in truth and fact was not the case.

D. L. Ward, and The Attorney General, for the State. W. D. McIver, for appellee.

COOK, J. Counsel for the defendant moved to quash the bill of indictment on the ground that the facts stated therein did not constitute an indictable offense and for defects apparent on the bill. His honor sustained the motion to quash upon the ground that the facts set out in the bill did not constitute the offense of obtaining goods under false pretenses, and then offered to grant leave to the solicitor to send a new bill to the grand jury. The solicitor declined to send a new bill upon the ground that the bill stated facts relied on, and excepted and appealed.

The bill of indictment was as follows: “The jurors for the state upon their oaths present that D. L. Taylor, late of the county of Craven, on the — day of May, 1899, at and in the county of Craven and state aforesaid, unlawfully and knowingly, designing and intending to cheat and defraud Emma Wynne of her goods, moneys, chattels, and property, did then and there unlawfully and designedly falsely pretend to one Mike Fisher, the agent of the said Emma Wynne, knowingly, that a certain cow then in the possession of said Mike Fisher, agent of said Emma

Wynne, the property of the said Emma Wynne, was his cow; that said Emma Wynne had sold the said cow to him, D. L. Taylor, for a debt of \$10, due him by the mother of the said Emma Wynne; whereas, in truth and fact she had not sold or transferred the said cow to him, the said D. L. Taylor, as he, the said D. L. Taylor, then and there knew to be false,—by color and means of which said pretense and pretenses he, the said D. L. Taylor, did then and there unlawfully, knowingly, and designedly obtain from the said Mike Fisher, agent of said Emma Wynne, the said cow, being then and there the property of the said Emma Wynne, with intent to cheat and defraud the said Emma Wynne, to the great damage of the said Emma Wynne; contrary to the form of the statute of such case made and provided, and against the peace and dignity of the state.” Section 1025 of the Code, under which this bill is drawn, prescribes “that if any person shall knowingly and designedly by means of * * * or other false pretense whatsoever, obtain from any person * * * any money, goods or property or other thing of value * * * with intent to cheat or defraud any person, * * * such person shall be guilty of a misdemeanor for fraud and deceit, and imprisoned in the penitentiary: * * * provided further that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with the intent to defraud.” Counsel for defendant contends that the bill cannot be sustained, because the false representations are charged to have been made to the agent, and not to the principal. This contention cannot be sustained, for it is well settled that it is not necessary that the pretense should be made to the principal, but, if made to an agent, by means of which the property of the principal is obtained, it is sufficient. 1 McLain, Cr. Law, § 683; State v. Crowley, 39 N. J. Law, 264; Whart. Cr. Law, § 2145. Counsel further argued that, if the above contention is not sound, then the agent was intrusted with the possession only of the property, and had no authority to pass the title of the principal to the defendant; and, if so, then, inasmuch as only the possession passed, and the owner, his principal, did not part or intend to part with her title, a bill for false pretense will not lie. Upon general principle this is so, for that, if the possession was obtained by fraud, with intent, at the time of receiving it, to convert to his own use, and the owner intended to part with the possession only, and not with the title to the property, the offense would be lar-

deny; while, if the owner intended (though upon the fraudulent representation) to part with the title as well as possession, it would be a case of obtaining goods under false pretense. This position is well sustained by the authorities. *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Reg. v. Robins*, 6 Cox, Cr. Cas. 420; *Kelly v. People*, 6 Hun, 509; *Reg. v. Kilhan*, 11 Cox, Cr. Cas. 561; *State v. Vickery*, 19 Tex. 326; *Pitts v. State*, 5 Tex. App. 122; *Com. v. Barry*, 124 Mass. 325. But our statute so modifies the general principle that the question of title or ownership is not material. It provides that it shall be sufficient to allege that the party accused did the act, "without alleging any ownership of the chattel," and on the trial it shall be sufficient to prove that the party accused did the act charged with an intent to defraud, without alleging an intent to defraud any particular person. So the gravamen of our statutory offense is the fraudulent obtaining possession of the property with the intent to cheat and defraud, and it is not necessary to allege or prove that any particular person was cheated, or who owned the property. The intent of the legislature, with reference to the principle involved, is expressly stated in the statute itself, and is as follows: "Provided that if on the trial of any one indicted for such misdemeanor it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not by reason thereof be entitled to be acquitted of the misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." His honor erred in quashing the bill upon the ground, stated, to wit, that the facts set out in the bill do not constitute the offense of obtaining property under false pretense under our statute.

But counsel further contends that the bill is insufficient, in that it fails to charge that the offense was done feloniously. This exception to the bill is sustained, and for this reason it should have been quashed. *Acts 1891, c. 205*; *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63.

Affirmed.

(131 N. C. 78)

WEEKS v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. Sept. 30, 1902.)

RAILROADS—NEGLIGENCE—JUMPING FROM TRESTLE THROUGH FRIGHT—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff, who was a lady, and two female companions were walking on the track of defendant railway company, and as they passed the station heard the agent say that the mail train was expected in 17 minutes. They continued walking on the track, and went out on a trestle a distance of 120 feet, beyond which was a bridge 117 feet long. Plaintiff testified that they knew when they went on the trestle that they had not time to get across the bridge and trestle before the train came. On reaching the edge of the bridge proper, they

looked back, saw a train coming, and tried to return over the trestle. The train was not going to cross the bridge, but plaintiff, not knowing this, and fearing she would not be able to get off the trestle before the train reached her, jumped from the trestle, and was injured. *Held*, that in going on the trestle plaintiff was guilty of negligence as a matter of law, making her responsible for her imprudent method of avoiding the threatened injury. 2. If the train stopped before plaintiff jumped, and did not go on the trestle until afterward, defendant was not guilty of negligence, under the doctrine of discovered peril.

Appeal from superior court, Jones county; Winston, Judge.

Action by Mamie Weeks against the Wilmington & Weldon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Junius Davis, for appellant. Simmons & Ward and P. M. Pearsall, for appellee.

COOK, J. On October 3, 1899, plaintiff and two other ladies, Misses Simmons and Emmett, were out walking, and as they passed by defendant's depot heard the agent say that the mail train, due from the north, was expected in 17 minutes. They then walked along the railroad track towards the Trent river, some 400 feet distant, which is spanned by a railroad bridge. Before reaching the river, the track is upon an embankment about 12 feet high, then follows a trestle 120 feet to the river, and 12 or 14 feet above the ground, then the bridge 117 feet across, and then the trestle on the north side 31 feet long. The bridge and trestle are not provided with any conveniences as a passway for people, nor is there any place of safety provided for people to protect themselves from a passing train. When they came to the trestle, they did not intend to go across, for, testifies the plaintiff, "we knew we could not get across before the train came," but continued their walk upon the trestle (120 feet, nearly half way across), until they reached the bridge, just over the water, when one of them suggested, "Suppose the train would come, what should we do?" Just then they looked back, and saw a train coming (this was a log train, coming up from Maysville to Pollocksville to take siding and let the passenger train pass), and turned back, meeting it, which was then a "little way from the depot." Miss Emmett ran and got off the trestle, and ran down the embankment some 25 or 50 yards ahead of the engine, and the other two might have done likewise, but Miss Simmons would not run and leave Miss Weeks, the plaintiff, who was weak and feeble, caused by an accident which had happened to her two months previous, rendering her unable to run fast. But such weakness and feebleness were not known to defendant's employees on the train. The train was not going to cross the bridge, but this was not known to plaintiff and her companions. Miss Simmons had plaintiff by the hand, and they were trying to get off, but plaintiff, being weak, and thinking that she

could not get off, pushed Miss Simmons aside, and seeing the engine coming near the trestle, Miss Simmons swung down by the capsill her length, and jumped, landing upon the ground unhurt, and plaintiff jumped from the top of the trestle to the ground, 14 feet beneath, and was injured in the ankle and back. Plaintiff and Miss Emmett and one of defendant's witnesses testified that when she jumped, the engine was close upon and moving towards her, and did not stop until it had passed beyond the place from which she jumped; and while upon the ground, plaintiff and Miss Simmons looked up, and saw log cars above them, and the cinders from the engine fell down upon them. Eight witnesses (three of whom were employes upon the train, and five not connected with defendant) testified on behalf of defendant that the train stopped at the clear post, 12 or 16 feet from the trestle, and did not go upon the trestle until after the ladies had jumped off. There was also evidence that one of the employes of defendant company (Brandt) hallooed to the ladies not to jump, and that it was heard by the witness Lec, 125 yards away. Witness Harriott testified that plaintiff was about two bents (about 24 feet) from the south end of the trestle when she jumped.

Of the eight assignments of error, we deem it necessary to consider only the third. Defendant requested the court to charge the jury that "If the jury shall believe from the evidence that the engine of the defendant stopped upon the embankment on the south end of the trestle, and did not go upon the trestle until after the plaintiff had jumped from the trestle, then the jury should answer the first issue 'No.'" The first issue was, "Was plaintiff injured by the negligence of the defendant?" His honor refused to give this instruction, and in this there is error. This railroad bridge and trestle were constructed solely for the use of the defendant company, and no invitation was extended to the public to go upon them, so no place of safety was provided against the passing of trains. Plaintiff knew of its danger, for that was apparent. She also knew that a train was expected to cross it within 17 minutes after she left the depot, 400 feet away, and knew that she could not get across before the train came, and in the face of such knowledge went nearly half way (120 feet) across it, without stopping to consider the danger. Being uninvited, and without even showing a license to enter upon it, she voluntarily put herself in a dangerous and perilous condition, and became a trespasser.

There is no conflict in the evidence concerning the trestle and bridge, and of the plaintiff's being on it, and of her conduct while there, and that the trestle was from 12 to 14 feet high, and a place of danger; so negligence becomes a question of law, and this court has decided that such entry upon a trestle under similar circumstances is contributory negligence. Therefore, upon the uncontradicted evidence of plaintiff and defendant, plaintiff

was guilty of negligence in going upon the trestle. In *Little v. Railroad Co.*, 119 N. C., on page 776, 26 S. E. 110, the court says: "It was decided in *Clark v. Railroad Co.*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749, that a person who places himself on a railroad trestle so high as to make it perilous for him to jump to the ground is negligent, and that he is guilty of contributory negligence if he is injured by a passing train." In this case plaintiff was not injured by a passing train, but was injured by her own act, which is alleged and insisted upon as having been forced upon her by the negligence of defendant in not stopping its train, and by failing to do so, forced her, as a dernier ressort, to accept the lesser of two apparent dangers. If the train was stopped at or near the clear post, as testified to by defendant's witnesses, then defendant discharged its duty, and would not be liable; but if it was not stopped, but continued its course, as testified to by plaintiff and her witnesses, it would be. When did it become the duty of defendant to stop the train? When the engineer first saw the ladies on the trestle? Certainly not, for he saw one run forward, and get off, 25 or 50 yards ahead of the engine. The other two remained upon the trestle, and were in no danger of the engine, if it was to be stopped at the clear post, as testified to by the employes on the train. They had the same opportunity, and apparently a like physical power, to come forward and get off that Miss Emmett had, had they so desired. Why they remained was not known to the engineer. He did not know of the feeble condition of plaintiff, but had a right to presume that she was able to take care of herself, and that she and her companion would do so. If, being conscious of her feeble condition, she became frightened, and in her excitement imprudently and unnecessarily jumped over and was injured, that was her misfortune, and not defendant's fault. She was not placed or induced to go upon the trestle by any negligence of defendant company, but, being there, she could have remained or gone in the direction of the bridge with perfect safety, if unable to head off the train, as Miss Emmett did. Therefore, if she adopted a perilous mode in endeavoring to escape an apprehended danger under excitement, defendant would not be responsible for the result. *Beach, Contrib. Neg.* (3d Ed.) § 40; *Jones v. Boyce*, 1 *Starkle*, 493. Had plaintiff gone upon the trestle through the negligence of defendant, and acted negligently or wildly under the excitement in adopting a means of escape, and been injured, then it would not be considered negligence or contributory negligence, although there may have been at her command a safer and more certain means of escape, "for the reason that persons in great peril are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." *Beach, supra*. But "no such allow-

ance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment." 1 Shear. & R. Neg. § 89. So, plaintiff having voluntarily gone upon this dangerous place, which is deemed negligence by our court (*Little v. Railroad*, supra), she would be required to guaranty her own judgment when confronted with peril, and the emergency arose. But plaintiff alleges, and so testifies, together with two other witnesses, that the train did not stop, and had she remained on the trestle she would have been killed; wherefore she acted prudently, and escaped with an injured ankle and back rather than lose her life. Whether this was so or not was most material to the issue. If it be true, as she testifies, then defendant company, having had the last clear chance, and having failed to exercise it, would be guilty of negligence, and plaintiff would be entitled to recover, notwithstanding her negligence. But if it be not true, and be as testified to by eight witnesses on behalf of defendant, and the engine was stopped some 35 or 40 feet from her, then she was not in peril from the approaching train, and no allowance would be made by the unwise, negligent, and imprudent method of escape adopted by her under excitement and apprehension, and defendant company would not be guilty of negligence, and his honor should have instructed the jury as prayed for in the third prayer.

New trial.

DOUGLAS, J., concurs only in result.

(131 N. C. 111)

THOMPSON v. EXUM.

(Supreme Court of North Carolina. Oct. 7, 1902.)

LANDLORD AND TENANT—SHARE OF CROPS—CONTRACT—EVIDENCE—LANDLORD'S CUSTOM.

1. Where plaintiff, as a cropper on defendant's land under a special contract, claimed a share of the cotton seed raised, and defendant testified that "it was his invariable rule, in renting land, to stipulate that no cotton seed are to be carried away by the tenants, that he said so to the plaintiff, and that he never made a contract, in renting land, different as to the cotton seed in his life," testimony of another tenant that the contract made with him by defendant required the cotton seed to be left on the land was not admissible either to corroborate defendant, or to show his custom.

Appeal from superior court, Wayne county; Allen, Judge.

Action by Levi Thompson against W. P. Exum. From a judgment for the plaintiff, defendant appeals. Affirmed.

Isaac F. Dortch, for appellant. Allen & Dortch, for appellee.

MONTGOMERY, J. The plaintiff was a cropper on the lands of the defendant under a special contract during the year 1900.

[1. See Customs and Usages, vol. 15, Cent. Dig. § 4. 11, 20, 24.

When the season was over, the plaintiff claimed a part of the cotton seed under the contract, which claim the defendant disputed. The defendant was introduced as a witness in his own behalf, and testified as to the contract between him and the plaintiff, and further said: "It is my invariable rule in renting land to stipulate that no cotton seed are to be carried away by the tenants, and I so said to the plaintiff. I never made a contract, in renting land, different as to cotton seed in all my life." For the purpose of corroborating the defendant as to his alleged invariable rule concerning the renting of land as to cotton seed, the defendant proposed to ask a witness for the plaintiff, on his cross-examination, "What was your contract of renting in 1900?" The question was not allowed, and the defendant excepted and appealed, and that is the only exception in the case. We think the court properly sustained the objection to the question. The avowed purpose of the question was to show the custom of the defendant in reference to the renting of his land as to the cotton seed grown by his croppers. But the answer could have had no tendency toward establishing an invariable rule. If it had been answered in a manner most favorable to the plaintiff, only the terms of the contract with the witness would have been shown, and that would not have been competent. Besides, the defendant, by his own statement, had a contract with the plaintiff in which it was stipulated that no cotton seed was to be carried off the lands cultivated by the plaintiff. A contract between the defendant and every man in his county containing a like provision as that which he contended was embraced in his contract with the plaintiff could not be admitted to affect the terms of the particular contract between him and the plaintiff. It is permissible to introduce evidence to show a custom or usage of a place, the home of a contract, for the purpose of explaining the meaning of terms used in it, or for the purpose of annexing incidents to it which do not contradict the terms of the contract. *Moore v. Eason*, 33 N. C. 568; *Chemical Co. v. Atkinson*, 91 N. C. 389. But this rule has never been extended, so far as we know, to apply to the business rules or customs of individuals.

No error.

(131 N. C. 115)

PAGE v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina. Oct. 7, 1902.)

LIFE INSURANCE—BURDEN OF PROOF—PAYMENT OF PREMIUM—PRIMA FACIE EVIDENCE—APPOINTMENT OF ADMINISTRATOR—ADMISSIONS IN ANSWER.

1. A defendant in an action on a life policy, who admits the execution of the policy and the death of the assured before the falling due of the first renewal premium, has the burden of proving that the policy was not in force, that no premium had been paid, and that the policy was procured by fraud.

2. The possession of a life policy reciting that it should not be delivered till the first premium was paid is *prima facie* evidence of payment, subject to be rebutted by proof.

3. Where plaintiff in an action on a life policy introduced the policy, which recited that it should not be delivered till the first premium was paid, and defendant admitted that the insured died before the first renewal premium was due, and offered no evidence, the court properly instructed the jury that, if they believed the evidence, they should find that the policy was in force.

4. A party having the possession of a policy on the life of his intestate has a right to take out administration and sue on the policy, though his intestate was a nonresident, and did not die in the state, nor leave any property therein.

5. Though the answer in an action on a life policy, which admitted the execution of the policy and death of the assured before the falling due of the first renewal premium, was not put in evidence, the admissions could be considered; it being for the court to determine whether the pleadings raised an issue.

Appeal from superior court, Harnett county; Robinson, Judge.

Action by George Page, as administrator of the estate of John Page, deceased, against the Life Insurance Company of Virginia. Judgment for plaintiff, and defendant appeals. Affirmed.

Stewart & Godwin, for appellant. McLean & Clifford, for appellee.

CLARK, J. This is an action upon a policy of life insurance. The answer admitted the execution of the policy and death of the assured prior to the falling due of the first renewal premium, but averred that the policy was not in force at his death; that no premium had been paid, and that the policy was procured by fraud and misrepresentation; that the assured was a nonresident of the state, and owned no property here, and hence that administration had not been legally taken out here. But all these were matters of defense, the burden of which was upon the defense.

The plaintiff introduced the policy, which recited on its face that it was not to be delivered till the first premium was paid. Its possession by the plaintiff was *prima facie* evidence of payment, like a receipt (Whitley v. Insurance Co., 71 N. C. 480), subject to proof, if offered, to the contrary (Ormond v. Association, 96 N. C. 163, 1 S. E. 796).

The defendant demurred to the evidence, which being overruled it offered no evidence, and his honor properly instructed the jury that, if they believed the evidence, to respond "Yes" to the issue, "Was the policy sued on in force at the death of the testator?"

As to the last defense set up by the answer, the policy described the assured as a resident of the District of Columbia, but there was no evidence that the assured did not die in this state, and leave property here; but, if there had been, the possession

of the policy authorized the plaintiff to take out administration here. *Shields v. Insurance Co.*, 119 N. C. 380, 25 S. E. 951; *Morefield v. Harris*, 126 N. C., at page 628, 36 S. E. 125.

The defendant insists that, the answer not having been put in evidence, the admissions therein could not be considered, and relies upon *Smith v. Nimocks*, 94 N. C. 243, *Greenville v. Steamship Co.*, 104 N. C. 93, 10 S. E. 147, and cases there cited, and *Smith v. Smith*, 106 N. C. 504, 11 S. E. 188. Those cases hold that, when issues are raised by allegation and denial in the pleadings, any other statements in the pleadings, which might shake or controvert the allegations or denials of the party making such statements, are matters for the jury, like other declarations against interest, when put in evidence by the opposite party. But whether the pleadings raise an issue or not (Code, § 268) is a matter of law for the court, and the court rightly held that the answer admitted the execution of the policy. The jury did not have to pass upon that. The recitals in the policy put in evidence being *prima facie* evidence of payment of the premium, and there being no evidence in support of the defenses set up in the answer, there was no error in the instructions given.

No error.

(131 N. C. 99)

NORFLEET et al. v. BAKER et al.

(Supreme Court of North Carolina. Oct. 7, 1902.)

CHattel Mortgage—LIEN ON CROP MADE BY MORTGAGOR—CROP MADE BY SUBTENANT.

1. Where the lessee of a farm sublets a portion thereof for a fixed number of pounds of cotton to be raised on such portion, and gives an order for such cotton to a third person, and thereafter gives a mortgage on the crops made by himself on the farm to secure advances to be expended by him in the cultivation of such crops, the mortgage covers only the crop made by him, and does not give the mortgagee a lien on the cotton paid by such sublessee to such third person as rent for the portion of the premises so sublet.

Appeal from superior court, Bertie county; Brown, Judge.

Action by G. S. Norfleet and another against G. W. Baker and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

St. Leon Scull, for appellants. Shepherd & Shepherd, for appellees.

COOK, J. This action was heard upon facts agreed, upon which his honor rendered judgment in favor of defendants, and plaintiffs appealed. The facts agreed are as follows, to wit:

"For the year 1901 Claudius Hyman rented of Freeman Hardy a part of the tract of land in Bertie county known as the 'Snow Field Tract,' it also being known as 'Robert Thompson Old Place.' On or about January 1, 1901, said Hyman rented to Miles Pugh for said

¶ 2. See *Insurance*, vol. 23, Cent. Dig. §§ 1657, 1706.

year twenty acres of said land, and was to receive as rent therefor 875 pounds of lint cotton. On January 19, 1901, said Claudius Hyman, for full value received, sold, transferred, and assigned to defendants the said 875 pounds of lint cotton, and gave to defendant a written order for same on Miles Pugh, a copy of which is attached, marked 'Exhibit B.' In pursuance of said order, Miles Pugh delivered to defendants the said 875 pounds of lint cotton in the fall of the year 1901, which was worth \$61.25. Said cotton was raised on the 20 acres of land, as aforesaid, by Miles Pugh, and was cultivated by said Pugh, and not by said Claudius Hyman. On January 25, 1901, said Hyman executed to plaintiffs a crop lien, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this statement of agreed facts. That after January 25, 1901, plaintiffs, in pursuance of said crop lien, advanced to said Claudius Hyman over \$300, and there is now due them over \$200. That prior to and on the 25th day of January, 1901, Miles Pugh was living on and in possession of the 20 acres of land rented as aforesaid. Plaintiffs had no actual knowledge of said fact that any part of said land was rented to Pugh when they took the lien."

Exhibit A: "Whereas, G. S. Norfleet & Co. have this day agreed to make advances of supplies and money to Claudius Hyman from time to time as required, during the year 1901, to an amount not to exceed \$265, to be by him expended in the cultivation of a crop during said year upon the following described lands: A tract known as 'Snow Field,' owned by Godwin Cotten, and any other land that he may cultivate during said year: Now, therefore, in consideration of the premises, I do promise to pay the full amount advanced to me on or before the first day of November, 1901, and do hereby give to the said G. S. Norfleet & Co. a lien upon all the crops which may be made by me upon said land during said year to the extent of such advances, in accordance with the statute in such case made and provided; and, if I fail to pay the amount so advanced by the time specified, said G. S. Norfleet & Co. shall have power to take possession of said crop, and sell the same, the proceeds to be applied to the payment of said advances, and the surplus, if any, to me. Now, also to further secure the payment of the advances to be made as before mentioned, the said Claudius Hyman does hereby sell and convey to the said G. S. Norfleet & Co. all the crops which may be made by him during the said year 1901 upon the above-described lands, and also the following described articles of personal property, to wit, one dark bay horse named 'Jim'; one gray mare named 'Hector'; one farm cart and wheels, with iron axle; two sows. All the above property is now in my possession."

The question presented is, does the lien cover the crops made upon the entire tract of lands, being those made by Hyman himself

and also those made by his tenants, or does it cover only those made by Hyman? From the context of the deed it seems clear to us that his honor was right in holding that it only covered the crops made by Hyman himself. The advances were made to him "to be by him expended in the cultivation of a crop upon the following described land * * * and any other land that he may cultivate." He "placed the lien upon all the crops which may be made by me" (him). And to "further secure the payment of the advances * * * the said Hyman does hereby sell and convey * * * all the crops which may be made by him * * * upon the above-described land, and also * * * one dark bay horse," etc. (The italics are ours.) Was it intended by the parties that any crop, other than that which Hyman would cultivate, should be incumbered for the advances? The particular crop incumbered is specially mentioned, and therefore any other is excluded. "*Expressio unius est exclusio alterius.*" The presumption is that, having expressed some, they have expressed all, the conditions by which they intend to be bound under the instrument. The language used is simple, definite, and unequivocal, about the meaning of which there can be no doubt. Had the parties intended that the rents from such land as might be rented by him to others should be also conveyed, they could and should have so stated in the deed; but they did not. But it is argued that the crops made upon that entire tract of land are necessarily included in the deed. How can this be so? When Pugh rented the land from Hyman, there was no incumbrance upon the land or the crops to be grown thereon, except the lien of the landlord from whom Hyman rented, and that is not involved in this question. The tenancy of Pugh gave him an estate in the land he rented, and Hyman had no interest in the crops to be grown thereon, except his landlord's lien securing his rent. Hyman could not mortgage Pugh's crop. It is true the statute vests the constructive possession of the crop in Hyman, Pugh's landlord, but it is limited to the payment of the rent. The rent being paid, the lien and constructive possession vanish. The rent is a species of incorporeal hereditament, and became the property of Hyman as soon as the land was rented by Pugh, which he had a right to sell, transfer, and assign free from all liens, except that of his landlord; which he did sell, assign, and transfer to defendants six days before he executed the deed relied upon.

But it is further argued that, if plaintiffs' deed did not cover all the crops made upon that entire tract of land, then Hyman could have rented out all of the land (cultivated none himself), and transferred the rents, and defrauded plaintiffs of the entire amount. That might be so, but the deed provides that the advances were agreed to be made "from time to time as required during the year," and it seems that this provision was made to prevent such an imposition. However, that

condition does not exist in this case, for it appears that Hyman did make a crop himself, and utilized all of the land except the 20 acres rented to Pugh. Nevertheless, it is the province of the courts to construe deeds and contracts so as to give effect to the intention of the parties at the time the contract is made. The terms are made by the parties, by which they are bound, and we cannot construe them with reference to a possible breach.

Affirmed.

(131 N. C. 140)

HOUSE v. HOUSE.

(Supreme Court of North Carolina. Oct. 14, 1902.)

DIVORCE—ADULTERY—RECRIMINATION.

1. Under Code, § 1285 (2), providing that adultery by the wife shall be ground for divorce, and section 1285 (1), declaring that if either party shall separate from the other, and live in adultery, it shall be ground for divorce, adultery by the husband on but two occasions is not ground for divorce, and hence does not constitute the defense of recrimination, preventing his obtaining a divorce from the wife on proof of adultery.

Appeal from superior court, Wake county; Winston, Judge.

Action by W. M. House against Minnie House. From a refusal to sign judgment for plaintiff on a verdict in his favor, plaintiff appeals. Reversed.

Busbee & Busbee, for appellant. J. W. Hinsdale, Jr., and W. B. Jones, for appellee.

CLARK, J. This is an action by the husband against the wife for divorce. The jury found, on the issues duly submitted, that the parties were married; that the plaintiff had been a continuous resident of the state for two years next preceding the filing the complaint; that the defendant had committed the adulteries alleged in the complaint, and that the plaintiff had not, with knowledge thereof, condoned such adulteries. And to a further issue: "(5) Has William House committed adultery, as alleged in the amendment to the answer?" the jury responded, "Yes; only two acts, and no more." Thereupon his honor refused to sign judgment in favor of plaintiff, and dismissed the action. Plaintiff excepted and appealed.

The complaint averred that the defendant had separated from the plaintiff in July, 1901, four years after marriage, and had not lived with him since, and had committed adulteries with divers parties, naming two, and averring that the others were unknown to the plaintiff. The answer denied each allegation of the complaint, except those of marriage and residence for the statutory period. The amended answer alleged adultery by plaintiff with sundry parties, naming two of them, and sexual intercourse by her with plaintiff since July, 1901. By our statute—

Code, § 1285 (2)—it is ground for divorce "if the wife shall commit adultery." But such conduct is not ground for divorce against the husband, who comes under section 1285 (1).—"If either party shall separate from the other and live in adultery." The legislature has made the distinction for reasons satisfactory to them, and the courts must administer the law as it is written. So the single question presented is whether the husband, who has established his legal grounds for divorce by the verdict of a jury, can be defeated thereof by matter in recrimination which would not have entitled the wife to have brought an action for divorce against him. "The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce." Tiff. Dom. Rel. pp. 203, 204, § 108; Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 683, and cases there cited. The contrary doctrine is held in Astley v. Astley, 3 Eng. Ecc. R. 303, but the English ecclesiastical law of divorce has not been followed in this country. In Horne v. Horne, 72 N. C. 530, habitual adultery, night after night, by the husband, was shown by the evidence and established by the verdict, and the same was true in Haines v. Haines, 62 Tex. 216. Here the two acts of adultery found by the verdict were committed by the husband after his wife abandoned him, and are not ground of defense or recrimination for her. Setzer v. Setzer, 128 N. C., at page 172, 38 S. E. 731, 83 Am. St. Rep. 666; Foy v. Foy, 35 N. C. 90; Whittington v. Whittington, 19 N. C. 64. In Tew v. Tew, 80 N. C. 316, 30 Am. Rep. 84, it is held: "No husband can have the bonds of matrimony dissolved by reason of the adultery of the wife, committed through his allowance, his exposure of her to lewd company, or brought about by the husband's default in any of the essential duties of the married life, or supervenient on his separation without just cause,"—which holding plainly rests upon such conduct being fraud on the part of the husband, who will not be allowed to take advantage of his own wrong, and procure a release by reason of conduct of his wife instigated by himself. For, as is said in Steel v. Steel, 104 N. C., at page 636, 10 S. E. 707, citing Tew v. Tew, supra, the divorce can, in the words of Code, § 1285, be granted only "on application of the party injured," which the husband would not be if he were the cause of the misconduct of the wife. But such conduct is not here pleaded in the answer, nor found by the jury, nor any issue offered, nor any prayers for instruction on that aspect; nor is it clear that the evidence would have justified the submission of such issue, if such matter had been pleaded. The issues found make out a good cause for divorce against the wife, and not against the husband, as our statute is framed, and it was error to refuse to render the judgment upon the verdict, tendered by the plaintiff.

1. See Divorce, vol. 17, Cent. Dig. §§ 122, 123, 121-124.

The cause must be remanded, to the end that judgment be signed for the plaintiff in accordance with the verdict.

Reversed.

(131 N. C. 155)

FLANNER v. BUTLER et al.

(Supreme Court of North Carolina. Oct. 14, 1902.)

HUSBAND AND WIFE—RESULTING TRUSTS—PURCHASE OF LAND WITH HUSBAND'S FUNDS—PRESUMPTION—LIMITATIONS.

1. Evidence in a suit to establish a resulting trust in plaintiff's favor considered, and held to support a finding that plaintiff's father-in-law purchased certain realty with plaintiff's money, and had deeds made in the name of plaintiff's wife without plaintiff's knowledge or consent.

2. The rule that where land is purchased with a husband's money, and title taken in the name of the wife, the transaction was intended as a gift, is merely a rebuttable presumption of fact; and where the jury has found that title was so taken without the husband's knowledge or consent, a resulting trust in the husband's favor arises despite the rule.

3. Land was purchased by plaintiff's father-in-law with money belonging to plaintiff, and title taken in the name of plaintiff's wife, without his knowledge or consent. The property was occupied by tenants, plaintiff making leases and collecting rents. Held that, as neither party was in actual physical possession, the wife could not, as against the husband, obtain title by limitation.

Appeal from superior court, New Hanover county; Timberlake, Judge.

Action by Andrew J. Flanner against Carrie L. Butler and another. From a judgment for plaintiff, defendants appeal. Affirmed.

E. S. Martin, for appellants. Bellamy & Peschau, Rountree & Carr, and Stevens, Beasley & Weeks, for appellee.

FURCHES, C. J. The plaintiff and defendant Carrie were married in 1885, when the plaintiff was only 21 years old, and just out of school. Soon after this marriage the plaintiff inherited about \$60,000 upon the death of his uncle Joseph Flanner. This estate was received in money and bonds, and deposited by the plaintiff in the Wilmington Bank, of which his father-in-law, William Larkins, was president. Soon after receiving the estate, said Larkins told the plaintiff that certain property on Front street, in the city of Wilmington, was to be sold very soon; that it would be a good investment, and advised the plaintiff to buy it. The plaintiff then instructed said Larkins, who had control of his money, to buy it for him (the plaintiff). At the sale Larkins bought the property, and paid for it out of the plaintiff's money, but had the deed therefor made to his daughter, Carrie, then the wife of the plaintiff. The plaintiff knew that Larkins bought the property and paid for it out of his money on deposit in the bank, and thought it was bought for him, and did not know the deed was made to defendant Carrie until it was registered. When the

plaintiff discovered the deed was made to defendant Carrie, he complained of it, and told Larkins that he told him to buy the property for him, and he (Larkins) had the deed made to his daughter, Carrie, when Larkins said it was all the same, what a man's wife had was her husband's, and he would have the use and control of it the same as if the deed had been made to him. The plaintiff was young, and without business experience, had just married the daughter of Larkins, was living in his family, and, having confidence in Larkins, he made no further complaint as to the manner in which the deed was made. But he never did consent to its being made to his wife. He and the defendant Carrie continued to live together as man and wife until 1899, and, the property being rented, he collected and used the rents arising therefrom. In 1899 the defendant Carrie notified the tenants not to pay any more rents to him, but to pay them to her, and he has received no rents therefrom since that time. The defendant Carrie, very soon after giving this notice to the tenants, went to South Dakota, where she procured a divorce from him, and, soon after procuring said divorce, married Henry W. Butler, her codefendant. This statement of facts is made principally from the plaintiff Flanner's own testimony, corroborated by that of E. H. Freeman, G. L. Morton, and others; and it is not denied but what the defendants offered evidence tending to rebut or contradict a part of this evidence. But if the plaintiff's evidence is believed, it makes a prima facie case for the plaintiff, and, as the jury may believe it (and in this case did believe it), there was no error in his honor's ruling refusing the defendant's motion to nonsuit the plaintiff as to the Front street property, this being the property involved in this appeal. The court submitted three issues, as follows: (1) Was the land described in article 3 of the complaint purchased with the money of the plaintiff? (2) If so, was the deed to the defendant made to it without his knowledge or consent? (3) Is the plaintiff's cause of action barred by the statute of limitations? The jury answered the first and second issues in the affirmative, and the third in the negative. This, it seems to us, settles the case, unless there were such errors committed on the trial as to vitiate the findings of the jury. It is admitted by the defendants that the general rule is that, where property is bought with the money of another, and the deed made to another person, without the knowledge or consent of the party furnishing the money, the holder of the deed will be declared trustee for the party who furnished the money. *Lassiter v. Stainback*, 119 N. C. 103, 25 S. E. 726; *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24. But it is contended by the defendants that this rule does not obtain in cases of husband and wife; and this is so, nothing else appearing; as the law, owing to the relation of the par-

¶ 3. See *Adverse Possession*, vol. 1, Cent. Dig. § 77; *Husband and Wife*, vol. 26, Cent. Dig. § 102.

ties, will presume that the husband intended it as a gift or present to his wife. *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. But this is only the presumption of a fact the law makes, which may be rebutted by evidence, and when this is done the parties then stand as if they were not man and wife,—that is, they stand as other parties,—and the general rule prevails. *Faggart v. Bost*, 122 N. C. 517, 29 S. E. 833. This being so, and the jury having found that this Front street property was bought with the plaintiff's money, that the plaintiff directed Larkins to buy it for him, and that the deed was made to the defendant Carrie without his knowledge or consent, the plaintiff has a clear case for the enforcement of the general rule, and to have the defendant Carrie declared a trustee for his benefit.

But it is further contended by the defendants that, if the plaintiff ever had this right, it is barred by the lapse of time and the statute of limitations. But in this case neither was the plaintiff nor the defendant Carrie in the actual possessio pedis of this property, it being actually occupied by tenants. And according to the plaintiff's testimony, corroborated by the tenants, the plaintiff made contracts for renting, and received and receipted for the rents, and used them for his own purposes; and we must presume the jury believed this evidence. The plaintiff, therefore, was as much, and even more, in possession than was the defendant Carrie; and where they were both in possession the statute of limitations does not run. *Faggart v. Bost* and *Norton v. McDevit*, supra. So the defendants must fall on the plea of the statute of limitations.

There are some of the exceptions as to evidence relating to the defendant Carrie's going to South Dakota and obtaining a divorce and marrying the defendant Henry that were irrelevant, and should not have been allowed. But we fail to see what bearing it had on the issues, or how it did or could have affected the findings on either of the issues submitted. We are therefore unwilling to grant the defendants a new trial for these errors, which we think in no way affected the verdict on the issues submitted. While we have not discussed each one of the many exceptions of the defendants, we have carefully examined them all, and find no error for which we can give the defendants a new trial.

Affirmed.

(131 N. C. 105)

LOFTIN et al. v. HILL.

(Supreme Court of North Carolina. Oct. 7, 1902.)

BILLS AND NOTES—DONA FIDE PURCHASER—FRAUD—NOTICE—EVIDENCE.

1. Before the execution of a note for \$100, a subsequent assignee thereof was asked by the

payee as to the solvency of the maker, and replied that his note would be good. The assignee knew that the payee was a stranger, and was doing some kind of business in the locality. The maker resided about five miles distant from the town, and on the day the note was executed the payee returned to town, and assigned the note for a consideration of \$30. *Held*, that the assignee had knowledge of facts sufficient to put him on inquiry as to the character of the note.

2. The maker followed the payee to town, and, on ascertaining that the assignee held the note, informed him that he believed it fraudulent, and showed the assignee a contract between maker and payee, reciting the supposed consideration. *Held*, in an action on the note by the assignee, that it was error not to permit the contract in evidence.

3. In an action on a note by an assignee thereof, evidence tending to show that the payee, a stranger in the community, and known to the assignee to be engaged in some kind of business, was engaged in a fraudulent business, and had defrauded another person, whose note he had taken in the course of that business, and that those facts had been made known to the assignee before he purchased the note in suit, is admissible to show circumstances calculated to attract the assignee's notice.

Appeal from superior court, Lenoir county; Timberlake, Judge.

Action by S. H. Loftin and others against R. F. Hill on a promissory note. From a judgment for plaintiffs, defendant appeals. Reversed.

N. J. Rouse, for appellant.

MONTGOMERY, J. The plaintiff is the assignee, before maturity, of a plain promissory note for the amount of \$100, payable to W. T. Magee & Co. The defendant, the maker, in his defense, pleaded fraud in the treaty leading up to the execution of the note, failure of consideration, equities arising out of a contemporaneous agreement between the maker and the payee, and that the plaintiff had, or ought to have had, notice of all those matters; and he further pleaded notice on the assignee's part that the payees were doing a fraudulent business, and that he had knowledge of such facts; that his action in taking the note amounted to bad faith, and that he did not take the note in good faith, and for value. On the trial (an appeal from a justice's court) the plaintiff, as a witness in his own behalf, testified that he bought the note of W. T. Magee, before maturity, and for value, and without any knowledge of any fraud; that he paid \$30 for it; that Magee was a stranger in the community, and asked the witness, before taking the note from Hill, the defendant, as to Hill's financial standing; and that he told him that the defendant was solvent, and that his note would be good. The counsel for the defendant asked the witness "if on Saturday next preceding the purchase by witness of defendant's note in controversy one J. K. Alridge did not ask the witness [plaintiff] whether he had purchased from said Magee a note of \$100, executed by said Alridge to said Magee & Co., and, upon receiving from witness an affirmative reply, if

* See Bills and Notes, vol. 4, Cent. Dig. §§ 326, 343.

said Alridge did not tell witness that said Magee & Co. were doing a fraudulent business, and that he held a contract against said note, and if the said Alridge did not then show the witness [plaintiff] the said written contract." Upon the objection of the plaintiff his honor excluded the evidence. The defendant, on being examined as a witness for himself, said: "I am the defendant in this action, and signed the note in controversy. W. T. Magee came to my home, about five miles from Kinston, on Monday morning about 10 o'clock. After some negotiation, I signed the note, and at the same time we both signed a contract, upon which the note was based. Soon after Magee left, I began to think about the matter, and became convinced that I had been 'picked up,' and immediately hitched my horse and drove to Kinston, arriving there about 1 o'clock p. m. of the same day of the execution of the note. After a few moments consultation with my attorney, I went to the Bank of Kinston, and learned that the note had not been offered there. I then went to the plaintiff's bank, and found that he was not in. I then went out, and soon found the plaintiff, Loftin, on the street, and asked him if he had bought my note. He said he had. I said, 'Mr. Loftin, I have been "picked up," and want to get my note.' I asked him what he paid for it, but he would not tell me. I then told him I had been defrauded, and wanted to get my note in, and would pay him whatever he paid for it and something more. He said he would not take it; that he bought it to make money, and would have to have what it called for. I then left him. I have never received any fertilizer distributors or other benefits under said contract, and have never heard from Magee since, and have investigated, and found that there is no such concern as the Charlotte Plow Co." The defendant then offered to introduce the contract executed by himself and Magee contemporaneously with the note, but upon the objection of the plaintiff his honor refused to admit it. The contract in substance provided for the lease for a term of years of the exclusive right to sell a patent fertilizer distributor,—the Fuller fertilizer distributor. It was stipulated that the distributors would be furnished during the lease through the Charlotte Plow Company, or some other manufactory of Magee's selection. The lessee, the defendant, was to sell the distributors within the territory allotted to him, and to pay Magee a part of the profits, and to execute his note for \$100 as a security for the payment of the profits. It was further agreed in the contract that: "If the parties of the second part shall fail to pay said note at maturity, then the said party of the first part shall, at his option, have the right to cancel this contract, and take back the sample distributor; but if at the time the party of the first part shall decide to cancel the said contract one-

half of the profits on the distributors sold do not equal the amount of the said note, then the party of the first part shall surrender to the parties of the second part the note above referred to, upon the payment to the party of the first part by the parties of the second part of one-half of the profits on the distributors sold up to the said time." The defendant then offered to prove by the witness J. K. Alridge "that on Saturday before the plaintiff purchased defendant Hill's note the said Alridge saw the plaintiff, and told him he had heard that he had bought a note which he (Alridge) had executed to Magee & Co.; that the plaintiff told him he had. Thereupon Alridge told the plaintiff that Magee & Co. were doing a fraudulent business, and defrauding the people of Lenoir county; that he (Alridge) had a written contract against the note, which contract he showed to plaintiff, and he read it,"—but on the objection of the plaintiff the court refused to allow the evidence. The defendant then tendered the following issue, "Did the plaintiff take the note sued on in good faith, and for value?" and the court declined it, and submitted the usual issue in debt, and instructed the jury that, if they believed the evidence, to answer the issue for the plaintiff. The defendant excepted to each ruling of his honor, all and each of them bearing upon the same question; and we think the exceptions were well taken. It is too well settled in our state to need the citation of precedents that the holder of a negotiable note is presumed to be the proper owner thereof, and that he had received it before it became due, for a valuable consideration, in usual course of business; and that, if there be fraud or illegality in the inception of it, the burden is upon the maker to show it. But that presumption is only *prima facie* evidence of such ownership, and may be rebutted or explained. The defendant insists that he introduced evidence, and also offered evidence which was rejected erroneously by the court, tending to rebut that presumption by showing that the plaintiff was not a bona fide purchaser for value, and without notice, and that the court erred in rejecting the proffered evidence, and also in refusing to submit an issue upon his contentions, and in instructing the jury that, if they believe the evidence, they should answer the issues in favor of the plaintiff. We are strongly inclined to the view that, outside the rejected evidence, the instruction to the jury was erroneous. Magee, the payee of the note, was a stranger in the community, and was known to the plaintiff to be doing some kind of a business with the people in Lenoir. Before he took the note from the defendant, the plaintiff talked the matter over with Magee, and told him that the defendant was solvent, and his note would be good. The defendant lived five miles in the country from Kinston, and at 10 o'clock in the morning executed the note. Within

four hours after that time Magee returned to Kinston, sold the note to the plaintiff for \$30, left the town, and has never been heard of since. Also the plaintiff, when asked by the defendant what he paid for the note, refused to tell him. The whole conduct of the plaintiff was so utterly repugnant to every idea of fair and open dealing as to shock the sensibilities of the ordinary man, and is so suspicious as to place the onus on him of extending his inquiries in reference to the circumstance in which this note was given. He had knowledge of such facts and circumstances,—those which we have recited,—which made it incumbent on him to inquire as to the character of the note which he purchased; and, that being so, he would be affected with knowledge of all that the inquiry would disclose. *Bunting v. Ricks*, 22 N. C. 130, 32 Am. Dec. 699; *Hulbert v. Douglas*, 94 N. C. 122.

It follows from what we have said that the judge ought to have permitted the contract between defendant and Magee to have been read in evidence. We further think that the evidence of Alridge was competent. As we have said, this man Magee was a stranger. He was known to the defendant as engaged in some kind of business with the people of Lenoir, and Alridge offered to prove that before the plaintiff bought the note he had been told by Alridge that Magee was engaged in a fraudulent business, and had defrauded him, and showed him the evidence of it in writing. The plaintiff's counsel, in his contention that the evidence of Alridge was not competent, cited, among other cases, three from our own Reports,—*Holmesly v. Hogue*, 47 N. C. 393, *Withrow v. Biggerstaff*, 87 N. C. 176, and *Winborne v. Lassiter*, 89 N. C. 1. We think the law of those cases does not apply to the facts of this case. In the first of them,—*Holmesly v. Hogue*,—it being an action by a creditor to establish the fraudulency of a certain conveyance made by the debtor, defendant, it was held that a fraudulent transfer of other property, which had been made by the defendant to another person, could not be offered as evidence to prove the fraud under investigation; and the two other cases involve the same rule of evidence. In our case the question is whether, in a suit by the assignee of a note against the maker, evidence tending to show that the payee, a stranger in the community, and known to the assignee to be engaged in some kind of business, was engaged in a fraudulent business, and had defrauded another person, whose note he had taken in the course of that business, and that those facts had been made known to the assignee before he purchased the note in suit, is admissible to show circumstances calculated to attract the assignee's notice, put him on his guard, and stimulate inquiry as to the character of the note. There are facts in this case not found in *Farthing v. Dark*, 111 N. C. 243, 16 S. E.

337, and the decision there in upholding in its integrity the law in reference to the rights of the holders of negotiable notes is the extreme limit of that doctrine. We can go no further with it.

New trial.

(131 N. C. 96)

COOK v. AMERICAN EXCH. BANK et al.
(Supreme Court of North Carolina. Oct. 7, 1902.)

APPEAL—REMAND—DIRECTING JUDGMENT—OPENING DEFAULT.

1. Where the supreme court has decided that the trial court erred in not rendering judgment for plaintiff by default, and has remanded the case, it is within the discretion of the trial court to allow defendant to answer; Code, § 274; authorizing the judge to allow an answer or reply to be made after the time limited.

On petition for rehearing. Petition granted, and judgment reversed.

For former opinion, see 41 S. E. 67.

Busbee & Busbee, G. W. Ward, and *Norris Morey*, for petitioners. *E. F. Aydlott* and *F. H. Busbee*, for respondent.

MONTGOMERY, J. This case is before us again upon the defendants' petition to rehear. We have had it under consideration twice before, and it will be found reported in 129 N. C. 149, 39 S. E. 746, and 130 N. C. 183, 41 S. E. 67. On the first appeal the plaintiff's alleged grievances were: First, the refusal of the court below to grant him a judgment upon a verified complaint, no answer having been made; and, second, that his honor vacated the attachment which had been sued out and levied upon the defendants' property by the plaintiff. The vacation of the attachment seemed to have been acquiesced in by the plaintiff when it came to be argued here, and we held that the agreement entered into between the counsel on both sides, and set out in the first reported case, amounted to a general appearance in the action by the defendants, and that, as the complaint was filed and duly verified, and no answer having been made for two terms, the plaintiff was entitled to his judgment at that time, and that the judge was in error in refusing it. We are of that opinion still on those questions. The opinion of this court in the first appeal reached the superior court of Dare in time for its November term, 1901, when the plaintiff moved for judgment according to that opinion. At the same time the defendants, still claiming a special appearance, entered a motion to dismiss the action "for want of legal service." Later the defendants withdrew their motion, and asked leave of the court to answer the complaint. The court refused the plaintiff's motion, and granted to the defendants leave to file an answer, which was done. The plaintiff appealed from both rulings. Upon

¶ 1. See *Appeal and Error*, vol. 2, *Cent. Dig.* § 4677, 4679.

that appeal this court held that his honor below erred in not rendering judgment for the plaintiffs, and that it was not within his discretion to reopen the case for further pleadings, or for any other purpose. The reason assigned by this court for its holding was that the matter in controversy had been concluded by the decision of this court on the first appeal; in other words, that the opinion of this court in the first appeal was a final determination of the matter in controversy between the parties. After a full consideration of the petition to rehear, we think there was error in our conclusion upon the last appeal.

We overlooked the full significance of the case of *Griffin v. Light Co.*, 111 N. C. 434, 16 S. E. 423. There the plaintiff had put in a verified complaint, and the defendant had failed to verify its answer, and the judge below had refused to grant judgment for the plaintiff on the motion of his counsel. This court said that that was appealable error, and the court added: "Since, however, the case goes back, it will be in the discretion of the judge below to permit a verified answer to be filed." Code, § 274. Whether he will permit this should largely depend whether the defendants can satisfy him that they had a meritorious defense, for it is unquestionably true that "a delay of justice is often a denial of justice."

It was in the power of this court to have entered a judgment here upon the first appeal, but it was not done. So the case was sent back to the superior court with a decision upon the question then involved; i. e., the right of the plaintiff to his judgment under the then existing circumstances, where there was a verified complaint and no answer. There was no judgment in the court below at the time of the decision of this court, nor has one ever been rendered in that court up to this time. When, therefore, the plaintiff made his motion for judgment, and the defendant asked leave to file an answer, his honor, looking at the case in all its aspects, considered it proper to let the defendant be heard by an answer, and upon a reconsideration of the whole matter we are decidedly of the opinion that the ruling was a correct one. And this view of the case in no wise conflicts with the cases of *Calvert v. Peebles*, 82 N. C. 334, and *Dobson v. Simonton*, 100 N. C. 56, 6 S. E. 369. In those cases it was held that, where this court affirmed the judgment of the court below, that court had no right or power to disturb or modify the judgment in any respect, and that such judgment could only be corrected or modified by a direct proceeding, as pointed out in those last-mentioned cases. Neither is the case of *Banking Co. v. Morehead*, 126 N. C. 279, 35 S. E. 593, in conflict with this decision, for the reason that the judgment of the superior court was not altered or modified by the proceedings which took place after the decision of this court.

The judgment was not interfered with by those proceedings, but only the respective liabilities of the defendants to each other, and not to the plaintiff, were investigated.

In retracing our steps in this case to the path of former adjudications, we are glad that we have corrected a mistake of practice and not one involving the rights of property.

Petition allowed, and case remanded for further proceedings. Petition allowed.

(131 N. C. 117)

PERRY v. BANK OF SMITHFIELD.

(Supreme Court of North Carolina. Oct. 7, 1902.)

CHECKS—ACTION BY HOLDER—LIABILITY OF BANK.

1. In a cash sale of cotton the seller accepted the buyer's check in payment. The buyer sold a part of it to a third party, drawing his draft on him for the payment, and depositing it, with the bill of lading, to his credit in the bank on which the check was drawn. The bank credited the draft to the buyer's account, and honored checks drawn by him, until his credit was reduced below the amount of the check held by the seller, without knowledge that he had bought the cotton on an agreement to pay cash. *Held*, that the seller could not maintain an action against the bank for the purchase money.

Douglas, J., dissenting.

Appeal from superior court, Johnston county; Robinson, Judge.

Action by J. W. Perry against the Bank of Smithfield. From a judgment for plaintiff, defendant appeals. Reversed.

F. H. Busbee and T. M. Argo, for appellant. Jas. H. Pou and Allen & Dortch, for appellee.

CLARK, J. On October 4, 1900, the plaintiff sold to one Hudson 43 bales of cotton for cash \$2,064, and took his check therefor on defendant bank. On presentation of the check October 6th, payment was refused, the amount to the credit of the drawer being then only \$630. Hudson, after the purchase of the 43 bales from the plaintiff, sold 23 bales thereof, and 27 bales bought from another party, to the Roxboro Mills, for \$2,436, and drew his draft on them for said amount, which he deposited in said bank to his credit, with bill of lading for said 50 bales attached. The other 20 bales bought of plaintiff were returned to him by Hudson, after payment of his check had been refused by the bank, and the plaintiff seeks in this action to recover of the bank only \$1,127, balance due him by Hudson.

His honor correctly instructed the jury that, applying the rule, "the first money in, the first money out" (*Boyden v. Bank*, 65 N. C. 13), the credit on the bank's book October 6, 1900, was part of proceeds of the cotton bought by Hudson and resold by him to the Roxboro Cotton Mills. But the bank did not induce the plaintiff to part with his cotton, as in *Smith v. Young*, 109 N. C. 224, 13 S. E. 735. It took the drafts on the Roxboro

¶ 1. See *Banks and Banking*, vol. 6, Cent. Dig. §§ 380, 385.

Cotton Mills without knowledge, as appears by plaintiff's evidence, that the cotton had been bought upon an agreement to pay cash. If there was fraud, the bank was not a party to it. When the draft on the Roxboro Mills was delivered to the bank, the value thereof was placed to Hudson's credit in the ordinary course of business, and all of said credit was paid out on Hudson's check, save \$630, before the bank had notice that Hudson had not paid Perry for the cotton. The plaintiff has no claim upon the bank by reason of the check drawn on it by Hudson, which it has never accepted or agreed to pay (*Commercial Nat. Bank of Charlotte v. First Nat. Bank*, 118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. Rep. 753), even though there should be standing to the credit of the drawer on the books of the bank a sum more than sufficient to meet the check (*Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank [Ohio]* 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700), in which the conflicting authorities are cited. The following, quoted therefrom, we think states the law correctly, and certainly accords with our own decision *supra* (118 N. C. 783, 24 S. E. 524, 32 L. R. A. 712, 54 Am. St. Rep. 753): "Deposits become the absolute property of the bank, impressed with no trust; and the bank's right to use the money for its own benefit is immediate and continuous, which right constitutes the consideration for the bank's promise to the depositor. The bank's agreement with the depositor involves or implies no agreement with the holder of a check. The giving of a check is not an assignment of so much of the creditor's claim. It passes no title, legal or equitable, to the holder in the moneys previously deposited; nor does it create a lien on the fund, for there is no special fund out of which the check can be paid; nor does it transfer any money to the credit of the holder. It is simply an order which may be countermanded and payment forbidden any time before it is actually cashed or accepted. If accepted, then the agreement is to pay according to the terms of the check or acceptance, but until then the payee looks exclusively to the drawer. He can maintain no action against the bank, for the bank owes to the payee no legal duty, and an action at law cannot be maintained unless there is shown to have been a failure of legal duty. Being liable to the drawer to account with him for failure to honor his check, the bank cannot, on either legal or equitable considerations, be held at the same time liable to the holder of the check. Tested by these rules, the plaintiff can have no cause of action against the bank." To same effect, *Bank v. Millard*, 77 U. S. 152, 19 L. Ed. 897. It was the plaintiff's own fault that he took an order on another party,—a check on the bank,—instead of requiring the cash. The credit was extended to Hudson, not to the bank. The \$630 to the credit of Hudson when the check was presented was not a special fund, nor in fact any fund which could be fol-

lowed. It was simply an indebtedness from Hudson to the bank, which the latter could discharge by paying subsequently other checks, or by charging up to Hudson any indebtedness it held against him. If it did neither, it would remain an indebtedness for which Hudson could bring action, but not the plaintiff. It would seriously impair the usefulness of banks, which are accustomed to credit to a depositor any proceeds of drafts with bill of lading attached, if, whenever it turns out that the depositor has not paid in full for the property bought by him, the seller can hold the bank responsible for the balance of the purchase money, which is a matter between seller and buyer, and which cannot concern the bank when the seller has turned over the property to the depositor. If the title is defective, that concerns the party in receipt of the cotton, and not the bank. *Finch v. Gregg*, 123 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, and *Bank v. Davis*, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795, relied on by the plaintiff, have no application to the facts of this case.

In the instructions given, that the plaintiff could reclaim the property or the proceeds thereof in the hands of the defendant bank, there was error.

DOUGLAS, J., dissents.

(131 N. C. 114)

ARNOLD et al. v. DENNIS et al.

(Supreme Court of North Carolina. Oct. 7, 1902.)

APPEAL—DEFECTIVE STATEMENT—REMAND.

1. Where no evidence is sent up in an action in which plaintiffs allege a tenancy in common with defendants, and pray for a sale for partition, and defendants plead sole seisin, and the statement of the case fails to state in what relation the parties stand to each other, or to testator, or to the devisee under his will the construction of which is the object of the appeal, the case will be remanded for a fuller statement of facts.

Appeal from superior court, Harnett county; Robinson, Judge.

Proceeding by William Arnold and others against W. D. Dennis and others for partition. From a judgment for defendants, plaintiffs appeal. Remanded for new trial.

Murchison & Johnson, for appellants. Stewart & Godwin, for appellees.

PER CURIAM. In this case made up by the counsel we are unable to make a decision for want of a sufficient statement of the facts. The plaintiffs allege a tenancy in common with the defendants, and pray for a sale for partition. The defendants plead sole seisin. There is no evidence sent up, and the statement of the case fails to state in what relation the parties stand to each other, or to the testator, or to the devisee

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 2832.

Nancy E. Thomas, named in the seventh item of the will the construction of which seems to have been the object of the appeal. The case must be remanded for a fuller statement of the facts to be brought out on a new trial.

New trial.

(131 N. C. 113)

ARNOLD et al. v. HARDY et ux.
(Supreme Court of North Carolina. Oct. 7, 1902.)

APPEAL—CASE—STATEMENT OF FACTS.

1. On an appeal involving the construction of a will in which it is essential, for a determination, to know whether or not a certain person died without issue, a statement in the case made up by counsel, that "plaintiffs claim that he died without issue," is not sufficient.

Appeal from superior court, Harnett county; Robinson, Judge.

Ejectment by William Arnold and others against C. Hardy and wife. From a judgment for defendants, plaintiffs appeal. Remanded for new trial.

Murchison & Johnson, for appellants. O. J. Spears and T. M. Argo, for appellees.

PER CURIAM. For the reasons given in the case of *Arnold v. Dennis* (at this term of court) 42 S. E. 552, and also for the additional reason that it does not appear that F. H. Thomas, the devisee in item 8 of the will (a construction of which seems to be the purpose of the appeal), died without issue, the most material part of the case, this case must go back for a new trial. It is said in the statement of the case that "plaintiffs claim that he died without issue," but surely that must be found as a fact before it can be expected that we should make a decision in the matter. The case was made up by counsel.

New trial.

(131 N. C. 103)

HOUSE v. SEABOARD AIR LINE R. CO.
(Supreme Court of North Carolina. Oct. 7, 1902.)

NONSUIT—RAILROADS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—CONFLICTING EVIDENCE—JURY QUESTION—BURDEN OF PROOF.

1. On motion for nonsuit, plaintiff's evidence must be accepted as true, and all the evidence must be construed most favorably to him.

2. Where there is a conflict in the evidence in an action against a railroad company for injuries received by plaintiff, the question of contributory negligence is for the jury under proper instructions.

3. Where there is a conflict in the evidence as to contributory negligence, in an action for injuries received by plaintiff, the court cannot direct a verdict for defendant; he having, under Acts 1887, c. 33, requiring contributory negligence to be pleaded and proved, the burden of proving contributory negligence.

Appeal from superior court, Franklin county; Justice, Judge.

Action by J. W. House against the Seaboard Air Line Railroad Company. Judgment of nonsuit, and plaintiff appeals. Reversed.

F. S. Sprull, for appellant. Day & Bell, for appellee.

COOK, J. Upon the conclusion of the evidence, defendant moved the judge to instruct the jury that, considering all the evidence, it would be their duty to answer the second issue, to wit, "Did plaintiff by his own negligence contribute to his own injury?" "Yes." The judge thereupon intimated that he would so hold, and so instruct them; plaintiff submitted to a nonsuit, and appealed.

After carefully reading the evidence of plaintiff, and that of defendant (69 pages of the printed record), we find it to be very conflicting. If the evidence of plaintiff be believed (and it must be accepted as true, and all the evidence construed in the most favorable light to him, upon a motion to nonsuit), then the jury would be warranted in finding that he was not negligent; while if that of plaintiff be not believed, and that of defendant should be believed, then the jury would be warranted in finding that he was negligent, and but for such negligence the injury would not have occurred. What is negligence, or contributory negligence, is a question of law upon a given or ascertained state of facts, to be decided by the court. But when the facts are not ascertained, and are in dispute, then negligence becomes a mixed question of law and fact, and it is the duty of the judge to leave the question of fact to be found by the jury under proper instructions concerning the rule of ordinary care, and to apply the law to the facts as they may find them. *Miller v. Railroad Co.*, 128 N. C. 26, 38 S. E. 29, and cases there cited; *Moore v. Railway Co.*, 128 N. C. 455, 39 S. E. 57.

Here, the facts were not found, and the evidence concerning them conflicting, with the burden of proving contributory negligence resting upon defendant. Acts 1887, c. 33. So his honor erred in ruling that he would direct the jury to answer the second issue, "Yes." The principle that the court cannot direct a verdict in favor of a party upon whom rests the burden of proof is now too well settled to admit of discussion. *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848, and cases there cited. Under rule 31 of the rules of practice of this court (39 S. E. viii), plaintiff's motion is allowed, and the entire cost of printing the transcript on appeal will be taxed against defendant.

New trial.

(131 N. C. 143)

ARRINGTON v. ARRINGTON.

(Supreme Court of North Carolina. Oct. 14, 1902.)

APPEAL—LAW OF THE CASE—BANKRUPTCY—FINAL JUDGMENT FOR ALIMONY—EFFECT OF DISCHARGE OF BANKRUPT.

1. Where, on a prior appeal, it was held that a foreign judgment for alimony was a final judgment, and therefore enforceable in the state of North Carolina, such decision constituted the law of the case, and was not reviewable on a subsequent appeal.

2. A final judgment for alimony is a judgment provable against the estate of a bankrupt, and hence the bankrupt's discharge constitutes a discharge from the judgment.

Appeal from superior court, Wake county; Allen, Judge.

Action by P. D. B. Arrington against W. H. Arrington to enforce a foreign judgment for alimony. Judgment for plaintiff, and defendant appeals. Reversed.

F. S. Spruill and Shepherd & Shepherd, for appellant. Marion Butler and J. W. Hinsdale, Jr., for appellee.

FURCHES, C. J. This is an action brought in the superior court of Wake county to enforce the collection of alimony due the plaintiff under a decree of a court of competent jurisdiction in the state of Illinois. The plaintiff's right to recover in this action is contested by the defendant upon the ground that it appeared that the plaintiff obtained a decree for divorce a vinculo matrimonii, and alimony is not allowed by the laws of North Carolina where this is the case. Also upon the ground that the decree for alimony in the state of Illinois was not a final judgment, and for that reason could not be the basis of an action in this state. Defendant also pleaded the statute of limitations, and, the judge of the superior court being of opinion that plaintiff's right of action was barred by the statute of limitations, the plaintiff submitted to a judgment of nonsuit, and appealed to this court. Upon the hearing in this court it was held that plaintiff's right of action was not barred by the statute of limitations, and that the judgment sued on was a final judgment, and, although alimony is not allowed in this state upon a decree of absolute divorce, that, as it was admitted that it was so allowed by the laws of Illinois, and as the constitution of the United States (article 4, § 1) required the courts of this state to give to the judgments of Illinois the same validity, force, and effect they had in that state, this court held that plaintiff was entitled to recover upon a proper authentication of said judgment. 127 N. C. 190, 37 S. E. 112. We then held that the Illinois judgment sued on was a final judgment, and we so hold now. And as the bankrupt act provides for the proof of judgments against the bankrupt's estate, we hold that this Illinois judgment was a provable claim, and a dis-

charge in bankruptcy is a discharge against the same.

Error.

DOUGLAS, J. (concurring). I am constrained to concur in the opinion of the court as a matter of law as well as justice under the peculiar circumstances of this case. And yet I am not inadvertent to the cases of *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810, and *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009. In the former it was held (after the rendition of our former opinion in this case), on appeal from the court of appeals of New York, that the courts of that state were bound by a decree for alimony rendered in the state of New Jersey only to the extent of the alimony therein declared to be due and payable at the rendition of the decree. The court says, on page 187, 181 U. S., page 556, 21 Sup. Ct., 45 L. Ed. 1009: "The decree [in New Jersey] for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended upon the local statutes and practice of the state, and involved no federal question." I have quoted this paragraph because it clearly and forcibly expresses my reasons for dissenting from the former opinion of this court in the case at bar. However, this court decided that the Illinois judgment for future alimony was a final judgment, which could neither be reviewed nor modified in the courts of this state: That decision became the law of this case, and is now binding to that extent upon this court. *Setzer v. Setzer*, 129 N. C. 296, 40 S. E. 62; *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440. In *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, the court held that "alimony, whether in arrear at the time of an adjudication in bankruptcy, or accruing afterwards, is not provable in bankruptcy, or barred by the discharge." As this is a federal question, I would feel bound by this decision if it directly applied to the peculiar facts of the case at bar. The decision is evidently based upon the dominating idea that a decree for alimony is not a final judgment or decree. The court says, on page 577, 181 U. S., page 736, 21 Sup. Ct., 45 L. Ed. 1009: "Generally speaking, alimony may be altered by the court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of

money as alimony, is a record which is entitled to full faith and credit in another state, and may, therefore, be there enforced by suit. But its obligation in that respect does not affect its nature. In other respects alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. * * * And, as the court of appeals of the District of Columbia has more than once said: "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction." Herein lies the difference. If our former decision was correct,—and it cannot now be questioned by either party to the action,—the plaintiff sued upon a final judgment upon a fixed sum then due, in the enforcement of which this state had no discretion whatever. Such a judgment comes clearly within the terms of the bankrupt act of 1898, which includes, in section 63, among the debts which may be proved in bankruptcy, "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing." If the plaintiff's Illinois judgment had not been held to be a "fixed liability," it would have been subject to review in this state, where, on grounds of public policy, no alimony is allowed upon a divorce a vinculo. In concurring in the opinion of the court I feel that the spirit and intent of the law have been followed, albeit by a somewhat circuitous route, not entirely of my own choosing.

CLARK, J. (concurring). When this cause was here before (127 N. C. 190, 37 S. E. 112), two members of the court dissented, giving as one ground of dissent that the causa litis, being a judgment for future alimony, was interlocutory, and an action could not be maintained thereon; citing *Lynde v. Lynde*, 162 N. Y. 418, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 322, which has been since sustained on writ of error. 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. But the majority of this court sustained plaintiff's contention that it was a final judgment, and therefore an action could be maintained upon it. Now that the defendant has obtained his discharge in bankruptcy, the plaintiff is again before the court, contending that the Illinois judgment for alimony was not a final judgment, and hence the discharge in bankruptcy does not release defendant's liability. In view of the subsequent decision of the federal supreme court above cited, it may be said here that, if this matter were before us on a rehearing, we would reverse our former decision; but that decision is the law of this case, for a rehearing is not admissible under the form of another appeal. *Perry v. Railroad Co.*, 129 N. C. 333, 40 S. E. 191, and cases there cited. But the plaintiff is in no wise hurt. Could we, on this second appeal,

reverse our former decision, and hold the Illinois judgment interlocutory, this action must be dismissed. Adhering, as we must, to that decision as the law of this case, the Illinois judgment is a final judgment, and the defendant is protected by the discharge in bankruptcy. So, quacunqve via, this long litigation is at an end.

COOK, J., concurs with CLARK, J.

(131 N. C. 125)

COLEMAN et al. v. HOWELL et al.

(Supreme Court of North Carolina. Oct. 14, 1902.)

ADMINISTRATORS — JUDGMENTS — COLLATERAL ATTACK—JUDGMENTS OF COURTS OF OTHER STATES — FRAUD — CONCLUSIVENESS OF DECISIONS—JUDGMENTS ON PLEADINGS—INJUNCTION—CONTINUANCE TO HEARING.

1. Where, in an action against an administrator and others, it is alleged that defendant's intestate, as administrator of another, fraudulently converted the assets of his intestate in another state, the fact that the courts of such state discharged an administratrix of defendant's intestate was immaterial, there being no allegation of maladministration against her.

2. Const. U. S. art. 4, § 1, declaring that full faith and credit shall be given in each state to the judicial proceedings in every other state, does not prevent the impeachment, on the ground of fraud, of an order of the probate court of another state discharging an administrator and settling his account.

3. Code Ga. 1882, § 2608, declares that a discharge obtained by an administrator by means of fraud practiced on the heirs or ordinary is void, and may be set aside on motion and proof of the fraud. Section 3328 declares that a judgment that is void may be attacked in any court and by anybody; and section 3594 provides that the judgment of a court having no jurisdiction of the person and subject-matter, or void for any cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it. *Held*, that under such statutes a judgment of the Georgia probate court discharging an administrator was impeachable in North Carolina for fraud of the administrator practiced on the court and the heirs at law.

4. Where an injunction in an action for devastavit against an administrator, brought in the state where the administration proceedings were pending, was denied for insufficiency of the complaint, and the case was not decided on its merits, such decision was not a bar to an action subsequently brought in another state to set aside for fraud an order discharging the administrator, on the ground that such action established the validity of the order.

5. Where it was alleged that a deceased administrator had converted the assets and obtained his discharge in another state through fraud practiced on the probate court and the heirs at law, and that the property had been brought into North Carolina, where it was being converted by defendants, the heirs of such administrator, a temporary injunction restraining defendants from converting to their own use or removing from the state such assets in their possession was properly continued to the hearing of the cause.

Appeal from superior court, Columbus county; Robinson, Judge.

Action by Vina Ann Coleman and others against W. G. Howell, administrator of the estate of M. Q. Coleman, deceased, and oth-

ers. From an order continuing an injunction to the hearing, defendants appeal. Affirmed.

J. D. Shaw, Shepherd & Shepherd, and Stephen McIntyre, for appellants. D. J. Lewis and McLean & McLean, for appellees.

CLARK, J. This is an appeal from an injunction to the hearing restraining the widow and children of M. Q. Coleman from converting to their own use or removing from the state the assets of the estate of D. K. Coleman, which it is alleged are in their possession, and the appointment of a receiver thereof. It appears that D. K. Coleman died domiciled in Ware county, Ga., in January, 1895, leaving as his only distributees and heirs at law the plaintiffs and defendants, or those under whom they claim. M. Q. Coleman was in March, 1895, appointed administrator in Georgia; took into his custody the estate, which the plaintiffs herein allege was worth more than \$100,000; and in October, 1895, he obtained from the ordinary an order discharging him in full settlement. M. K. Coleman died in May, 1897, and his wife administered on the estate, and received a similar order of discharge, in June, 1900. The plaintiffs allege in full detail and duly itemized and specified many and sundry fraudulent acts of said M. Q. Coleman, by which he converted to his own use the great bulk of the assets of D. K. Coleman, and, further, "that on October 7, 1895, upon the fraudulent concealment from the court of ordinary in the county of Ware of the acts hereinbefore set out, without any personal service upon these plaintiffs, and in their absence, and without any of them being represented by any attorney, and without their knowledge of the fraudulent representations made by the said M. Q. Coleman upon his application for discharge, or of the fraudulent practices of which the said M. Q. Coleman had been guilty, as hereinbefore set out, he was granted letters of dismissal as administrator upon said estate by the court of ordinary of the county of Ware." The plaintiffs further allege the false and fraudulent representations by which said M. Q. Coleman procured from them receipts for their respective shares of this estate, and their ignorance of all above-recited representations and acts till a short time before instituting this action; that the defendant Penelope Coleman has removed with her children to this state, and they have brought with them money, goods, and effects of M. Q. Coleman (duly itemized, making a total of \$65,689); and they allege that "all or a greater part of this amount came from the estate of D. K. Coleman, the same being the proceeds of the property, goods, and effects belonging to the estate of D. K. Coleman, fraudulently converted by his administrator aforesaid"; and it is further alleged that the defendants are converting said property to their own use, and threatening to remove the

same from the state, and, "unless restrained from doing so, will conceal and dispose of all the residue in their hands, so as to prevent any recovery of any part thereof by the plaintiffs in this action." The allegations are full and specific, and are sustained by affidavits and denied by counter affidavits. It is clearly a case where the restraining order should be continued till the hearing, when the truth of the disputed matters of fact may be legally and properly determined, unless the defendants are protected from investigation by the order of the ordinary in Georgia discharging M. Q. Coleman from responsibility; and that is the only point before us. The order discharging the administratrix of M. Q. Coleman cuts no figure, for there is no allegation that she did not administer honestly; and if the assets which came to her hands were really the property of D. K. Coleman fraudulently and wrongfully converted by M. Q. Coleman, the plaintiffs will not be estopped by any administration thereupon by his widow. As to the discharge of the ordinary in Georgia of M. Q. Coleman, the defendants rely upon the provision in the constitution of the United States (article 4, § 1) "that full faith and credit shall be given in each state to the * * * judicial proceedings of every other state." It is well settled that, subject only to the inquiry as to the jurisdiction of the court rendering the judgment and impeachment for fraud (*Simmons v. Saul*, 138 U. S. 430, 11 Sup. Ct. 309, 34 L. Ed. 1054; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538), full faith and credit should be given in every other state to a judgment rendered in another state (2 Black, Judgm. § 859). As to impeachment for fraud, Fuller, C. J., in *Cole v. Cunningham*, 133 U. S., at page 113, 10 Sup. Ct. 271, 33 L. Ed. 538, quotes with approval from *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152, as follows: "The court of appeals held that, while a judgment rendered by a court of competent jurisdiction could not be impeached collaterally for error or irregularity, yet it could be attacked for want of jurisdiction, or for fraud or imposition." This ruling was made in New York sustaining a judgment rendered in Connecticut which had set aside a judgment in New York, because procured by fraud. But apart from that, we must consider the nature of an order by the ordinary in Georgia discharging an administrator, for we are not called upon to give it greater authority here than it has at home. *Pearce v. Olney*, 20 Conn. 544; *Engel v. Scheuermann*, 40 Ga. 206, 2 Am. Rep. 573; *Cage v. Cassidy*, 23 How. 109, 16 L. Ed. 430, cited by Fuller, C. J., in 133 U. S., at page 113, 10 Sup. Ct. 271, 33 L. Ed. 538. It is not held there to be a judgment in the full and complete sense of that term, and its nature is clearly stated by the following opinion of *Simmons*, C. J., in *Pass v. Pass*, 98 Ga., at page 794, 25 S. E. 753: "Whether a judgment can be attacked

collaterally by a party thereto as void because of fraud in its procurement is a question upon which courts have differed [citing authorities]. As to a judgment discharging an administrator, however, the question is settled in this state by our Code, which declares, 'A discharge obtained by the administrator by means of any fraud practiced on the heirs, or ordinary, is void, and may be set aside on motion and proof of the fraud' (section 2608); and 'a judgment that is void may be attacked in any court and by anybody' (section 3828). 'The judgment of a court having no jurisdiction of the person and subject matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it.' Section 3594." Such being the provisions of the statute in the state where the order was made, such must be its effect—no greater, no less—here. If the allegation of fraud practiced is proved, such order is "void, and can be attacked in any court, and by anybody; it is a mere nullity, and may be so held in any court." It may be noted here that the above sections are quoted by Chief Justice Simmons, as numbered in the Georgia Code of 1882, sections 2608, 3828, 3594. These sections are retained, without alteration, in the Georgia Code of 1895, except that these sections are numbered, respectively, 3511, 5373, and 5369. The defendants contend, however, that the validity of this very order was questioned and sustained in *Coleman v. Coleman*, 113 Ga. 150, 38 S. E. 400, but an examination shows that the case did not go off on the merits, but the injunction was denied for insufficiency of the complaint in respects which are fully cured in this proceeding. The parties and the property having been removed from Georgia, there is no opportunity to get jurisdiction to move to set aside the judgment in that state. Jurisdiction can be had both of the property and person here; and under the Georgia statute, if the allegations of the complaint are established, the so-called judgment in that state is a mere nullity, and can be so treated in any court. It cannot have greater sanctity and force here than in the state where rendered. If the allegations are not established, judgment will go against the plaintiffs, and the restraining order and receiver will be discharged. If the allegations are established on the trial, the fund may be paid over to an administrator of D. K. Coleman, who can be appointed in this state when assets of his are found here (*Morefield v. Harris*, 126 N. C. 623, 36 S. E. 125), or it may be that, to save multiplicity of actions, the court may go on and distribute, through the receiver, the fund to the parties according to their several interests; but as to this matter we need express no opinion now.

In continuing the restraining order and receiver to the hearing there was no error.

(131 N. C. 151)

FLANNER v. BUTLER et al.

(Supreme Court of North Carolina. Oct. 14, 1902.)

CONSTRUCTIVE TRUST—GIFTS—EVIDENCE.

1. Where, in a suit by a husband to have property purchased by a former wife and held by her declared held in trust for him, the evidence showed that neither ever had been in actual possession, the rents having been sometimes collected by one and sometimes by the other, the question as to which was in possession was not presented on appeal.

2. A husband, finding that his firm was insolvent, caused notes to be executed by the firm to his wife, and they were paid by the assignee in insolvency by placing the amount in a bank to the wife's credit, and real estate was purchased by her with the funds. *Held*, in a suit by the husband to have a trust declared in his favor, that there could be no recovery, the transaction with the notes having amounted to a gift.

Appeal from superior court, New Hanover county; Timberlake, Judge.

Suit by Andrew J. Flanner against Carrie L. Butler and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Bellamy & Peschau, Rountree & Carr, and Stevens, Beasley & Weeks, for appellant. E. S. Martin, for appellees.

FURCHES, C. J. This is an action to have defendant Carrie Butler declared trustee of two pieces of property in the city of Wilmington, known as the "Front Street Property" and the "Dock Street Property," for the benefit of the plaintiff. The trial resulted in a verdict and judgment in favor of the plaintiff for the Front street property and a judgment for the defendants as to the Dock street property, and both plaintiff and defendants appealed.

At the conclusion of the evidence the defendants moved to nonsuit plaintiff upon the ground that he had not made a prima facie case, taking all the evidence to be true, and viewing it in the most favorable light for the plaintiff. The court refused this motion as to the Front street property, but allowed it as to the Dock street property. To this ruling of the court dismissing his action as to the Dock street property the plaintiff excepted, and this exception presents the only question made by the plaintiff's appeal. The plaintiff and the defendant Carrie were married in 1885, and were husband and wife when the property in controversy was purchased. But since then the plaintiff and the defendant Carrie have been divorced, and the defendant Carrie has intermarried with Henry W. Butler, her codefendant. The defendant Carrie testified that when she was married she had no estate, and that the money used in buying the property came from the plaintiff, Flanner. But it appears from the testimony of the defendant Carrie and from that of the plaintiff (and not contradicted by any evidence) that the plaintiff, some time after his marriage became a

member of a partnership composed of his father-in-law, Larkin, his brother-in-law, Alderman, and himself; that a large amount of money belonging to the plaintiff was used in this partnership, which soon became insolvent, and was compelled to make a general assignment. The plaintiff testified that when he discovered the partnership was insolvent, "in order to save something from the wreck," he procured the execution of notes payable to his wife to the amount of \$6,000, which notes were given a preference in the assignment, and were paid in full by the assignee, Davis; that these notes were deposited in bank to the credit of the defendant Carrie, and, when paid, the money was deposited to her credit; that the plaintiff received about \$3,000 from other sources, which was also deposited in bank to her credit. This money was used in buying and improving the Dock street property, and a deed therefor made to the defendant Carrie, with the plaintiff's knowledge and consent. There has been some discussion as to the possession,—whether it was in the plaintiff or the defendant,—but we do not think that question is raised by the evidence in this appeal, as neither was ever in the actual possession of the property, it being rented by common consent of the parties, and sometimes one collecting the rent and sometimes the other. But the general rule is that possession is presumed to be in the owner, where there is nothing to show to the contrary (*Gaylord v. Respass*, 92 N. C. 553); but this is not always the case as between husband and wife (*Faggart v. Bost*, 122 N. C. 517, 29 S. E. 833). If this property had been bought with the plaintiff's money, and the deed made to his wife with his knowledge and consent, it would not have created a resulting trust in the plaintiff. *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. But in this case the land was bought with the money of the defendant Carrie, as the plaintiff had procured the notes for \$6,000 to be made payable to her, and deposited them in bank to her credit, and when they were paid the money was deposited in bank to her credit. This constituted a gift by the plaintiff to the defendant Carrie, and the money became hers. *Hairston v. Glenn*, 120 N. C. 341, 27 S. E. 32. The other \$3,000 the plaintiff deposited in bank to the credit of the defendant Carrie was a gift, and became her money for the same reason and upon the same authority as the other \$6,000. It seems from the evidence that the plaintiff usually collected the rents until the defendant Henry informed the defendant Carrie that she should control the property, and she at once wrote to the tenants to pay no more rents to the plaintiff, and, as soon thereafter as she could procure the money to do so, she went to South Dakota, where she procured a divorce from the plaintiff, and, not long after procuring the divorce, she married her codefendant, Henry. It seems by these manipulations the

plaintiff has lost his money and his wife, and we are unable to see any legal remedy he has to regain them. The fact that he gave his money to his wife to defraud his creditors will hardly afford him any comfort. But the fact that he also lost his wife may be some consolation to him.

Affirmed.

(131 N. C. 121)

MARTIN et al. v. BANK OF FAYETTEVILLE.

(Supreme Court of North Carolina. Oct. 14, 1902.)

CONSTRUCTIVE TRUSTS—ENFORCEMENT—TENDER—WAIVER—DEMURRER ORE TENUS—PLEADING—AMENDMENT—REVIEW.

1. In an action to have a purchaser at foreclosure sale declared a trustee, and for an accounting, on the ground that the purchaser agreed to purchase and hold for complainants, the complaint alleging that complainant was ready, able, and willing to pay any balance found due on the note secured, the court had power, after a demurrer ore tenus had been interposed at the trial after answer on the ground that the complainants had failed to tender the amount due, to permit an amendment of the complaint so as to allege a waiver of the tender.

2. Since the defendant had answered the complaint, and denied the truth of the facts alleged therein, the amendment was not such as to cause surprise, nor to mislead defendant, and hence it was error for the court to refuse it.

3. Where a court refused to allow an amendment of a complaint on the erroneous ground that it had no power to allow it, such refusal is reviewable on appeal, though rulings granting or refusing amendments in general are discretionary, and not reviewable.

4. Where, in an action to have the purchaser at a mortgage foreclosure sale declared a trustee for the mortgagor, defendant answered, denying any agreement to hold for the plaintiff, claimed ownership of the land, and denied that payments made were to be applied on the debt, such answer, interposed before a demurrer ore tenus on the ground that the complaint did not allege a tender of the amount due, constituted a waiver of the tender, since it showed that a tender, if made, would not have been accepted.

Appeal from superior court, Cumberland county; Robinson, Judge.

Action by J. F. Martin and others against the Bank of Fayetteville. Judgment for defendant, and plaintiffs appeal. Reversed.

D. T. Oates and Busbee & Busbee, for appellants. R. T. & R. L. Gray, for appellee.

FURCHES, C. J. The plaintiffs executed a note to I. Luther for \$1,700, which he indorsed for plaintiffs (as we suppose, though the case does not say so), and they had it negotiated at the Bank of Fayetteville. This, we think, is shown from the fact that the note was made to Luther, indorsed by him, was negotiated at the bank, and plaintiffs made a mortgage to Luther to secure him as such indorser. The plaintiffs paid the interest on the note until about 1889 or 1890, when Luther, as mortgagee, sold the land, and the defendant bank became the purchaser at the price of \$1,500, and Luther

made the bank a deed for the land so sold. And since said sale the plaintiffs have paid the bank at different times something over \$2,100, according to their allegations, which they say was paid on said note, under an arrangement with the bank, or Mr. Williams, its president, that he would buy the land, and hold it for plaintiffs until they could pay and satisfy the note. While the defendant does not deny the payments, it alleges that they were made as rents for use and occupation of the land, which belonged to the defendant, and not as payments on the note. The purpose of this action is to have the defendant declared a trustee, and for an account, alleging that they are able, ready, and willing to pay the defendant any balance that may be found to be due on said note. But after the defendant had answered the complaint, and denied that plaintiffs had any interest in said land, claiming that it belonged to the defendant, and that the plaintiffs were its tenants, and that the payments they had made were rents,—after answering, and setting up this defense,—when the case was called for trial it interposed a demurrer ore tenus that the plaintiffs had not made the defendant a tender of what was due on the note before bringing suit; whereupon the plaintiffs asked permission of the court to amend the complaint by alleging that plaintiffs' attorney, before the action was commenced, went to see the defendant for the purpose of ascertaining the balance due on the note, with the view of arranging to pay the same, when the defendant said the plaintiffs had no right in the matter, as the defendant had bought the land, and was the rightful owner thereof. The court declined to allow this amendment upon the ground that it had no right to allow it, sustained the demurrer, and dismissed the action. In this there was error. The court had the right to allow the amendment, as it made no change in the cause of action. *Woodbury v. Evans*, 122 N. C. 780, 30 S. E. 2; *Knott v. Taylor*, 96 N. C. 553, 2 S. E. 680; *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263. And if the amendment is such as to cause surprise, it is cause for a continuance only. *Sams v. Price*, 119 N. C. 572, 26 S. E. 170. Where the court can see that the opposing party would not be misled, the amendment should be allowed. *Garrett v. Trotter*, 65 N. C. 430. As a general rule, it is discretionary with the court whether it will allow an amendment or not; and, when allowed or refused, as a matter of discretion, such action of the court is not reviewable in this court. But when the refusal is put upon the ground of a want of power it is reviewable. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; *Balk v. Harris*, 130 N. C. 381, 41 S. E. 940. But it is easy to see that the amendment in this case would not have taken the defendant by surprise, as it had answered the complaint, and denied the truth of the facts alleged therein. The defendant must there-

fore have come to court prepared to try the case upon the issue raised by the pleadings, and the court erred in holding it had no power to allow the amendment.

But it does not seem to us that this is such an action as requires a tender. The object of the action is to have the defendant declared a trustee for plaintiffs of the mortgaged land, under a parol agreement with the defendant that it would buy and hold the land for the plaintiffs until they could pay the note, and for an account. But if there was anything in the point, raised for the first time at the trial by the interposition of a demurrer ore tenus, it had been waived by the defendant by its answer denying the rights of plaintiffs as claimed in their complaint. *Cotton Mills v. Abernathy*, 115 N. C. 402, 20 S. E. 522. This answer had been filed before the demurrer ore tenus, and plainly showed that, if plaintiffs had known the amount they owed the defendant on the note, and had tendered it, the defendant would have refused to accept it, as the defendant contends that it is the absolute owner of the land, free from any claim of plaintiffs whatsoever. So the case should have proceeded to trial upon the issues made by the pleadings. If the defendant had answered, admitting plaintiffs' right to the land upon full payment of the note and interest, there should have been a decree for the plaintiffs that defendant convey upon payment of the note and interest, and that plaintiffs pay the cost of action. *Cotton Mills v. Abernathy*, supra. But defendant cannot be allowed to contest the plaintiffs' right to recover, and then be allowed his cost upon a mere technicality. The object of the code practice is to avoid technicalities as much as possible, and to try cases upon their merits. *Allen v. Railway Co.*, 120 N. C. 548, 27 S. E. 76.

There is error, and a new trial is awarded. New trial.

(131 N. C. 133)

JONES v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. Oct. 14, 1902.)

APPEAL — LAW OF THE CASE — MALICIOUS PROSECUTION—PRELIMINARY EXAMINATION—WAIVER—PROBABLE CAUSE—PRIMA FACIE EVIDENCE.

1. A decision, on a prior appeal, of a particular question directly before the court, is the law of the case, and cannot be reviewed on a subsequent appeal.

2. The waiver of a preliminary examination by a person arrested on a criminal charge constitutes only prima facie evidence of probable cause in an action for malicious prosecution.

Appeal from superior court, Cumberland county; Moore, Judge.

Action by William Wright Jones against the Wilmington & Weldon Railroad Com-

§ 2. See *Malicious Prosecution*, vol. 22, Cent. Dig. §§ 2, 24, 25, 27.

pany. Judgment for defendant, and plaintiff appeals. Reversed.

N. A. Sinclair, for appellant. Geo. M. Rose, for appellee.

DOUGLAS, J. The essential facts are thus stated in the report of this case in 125 N. C. 227, 34 S. E. 398, when it was before us for the first time: "The plaintiff, William Wright Jones, was arrested upon a state warrant sworn out by a detective of the defendant upon a charge of breaking the insulators and rocking the railroad train of the defendant. The plaintiff was arrested by a constable at his home near Dunn, was handcuffed in presence of his mother and family, bail offered and refused, and was taken to Fayetteville, and lodged in jail. The next day he was admitted to bail by the justice, and waived a preliminary examination, the state not being ready, and was bound over to court. The grand jury failed to find a true bill, the plaintiff was discharged, and prosecution ended." The plaintiff testified that he was not guilty of the charge imputed to him. Henry Smith, upon whose information the detective testified he had acted in swearing out the warrant, was sworn, and testified that he gave the detective no such information, and had never seen the plaintiff break the insulators or rock the train." When this case was first heard,—the point being directly before us,—this court held, in 125 N. C. 227, Syl. 3, 34 S. E. 398, that "the voluntary waiving of the preliminary examination before the justice of the peace is prima facie evidence of probable cause." Again, on page 232, 125 N. C., page 400, 34 S. E., the court assigns as error that, "his honor refused to instruct unqualifiedly the jury, at the defendant's request, that the waiving of the preliminary examination before the justice of the peace was prima facie evidence of probable cause." From this there was no dissent, and by the unanimous opinion of this court it became *res judicata*,—the law of the case. It is well settled that when a matter of law has been once decided by this court it can be reviewed only on a rehearing, and cannot be again questioned in the same case upon any subsequent appeal. *Pretzfelder v. Insurance Co.*, 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; *Hendon v. Railroad Co.*, 127 N. C. 110, 37 S. E. 155; *Shoaf v. Frost*, 127 N. C. 306, 37 S. E. 271; *Wright v. Railway Co.*, 128 N. C. 77, 38 S. E. 283; *Kramer v. Same*, 128 N. C. 269, 38 S. E. 872; *Setzer v. Setzer*, 129 N. C. 296, 40 S. E. 62. In *Pretzfelder v. Insurance Co.*, *supra*, this court uses the following words on page 167, 123 N. C., page 470, 31 S. E., 44 L. R. A. 424: "The proposition to rehear a cause by raising the same points upon a second appeal cannot be entertained." In *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 93, 22 Sup. Ct. 300, 306, 46 L. Ed. 440, the supreme court of the United

States, in apparently its latest utterance upon the subject, says: "Every matter embraced by the original decree of the circuit court, and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to re-examination upon this appeal." It then proceeds to quote with approval as follows: "In *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969, the court said: 'On the last trial the circuit court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decision of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. * * * We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial.' To the same effect are numerous cases, some of which are cited in the margin." We have quoted at length from that opinion because it seems to be the latest decision of that court upon the subject. When this case was again before us (127 N. C. 188, 37 S. E. 215), the appeal was dismissed, as being premature; therefore there was nothing before us to decide. It is true the court, inadvertent to the scope of its former decision, proceeded to state what it had then intended to "intimate," but such intimation was neither intended to have, nor could have, the effect of reversing a material point decided upon the former appeal. While this point is settled as to this case, it seems proper that we should more fully express our views on account of the importance of the question and the long and careful consideration we have given it on this appeal. We do not find any case in our Reports directly in point, but from analogy to our own decisions and direct authorities from other states we are clearly of the opinion that the voluntary waiving of a preliminary examination before a committing magistrate is prima facie evidence of probable cause, which may, however, be rebut-

ted by any other competent evidence. In other words, we do not see why the mere waiver of examination should have any greater effect than a finding by the magistrate that there was probable cause upon an examination of the testimony. From the earliest times this court has held that (quoting from the syllabus in *Johnston v. Martin*, 7 N. C. 248): "In an action for a malicious prosecution, the dismissal of a state's warrant by the magistrate who tried it is prima facie evidence of the want of probable cause, and throws upon the prosecution the burthen of proving that there was probable cause." *Bostick v. Rutherford*, 11 N. C. 83; *Johnson v. Chambers*, 32 N. C. 287; *Smith v. Association*, 116 N. C. 73, 20 S. E. 963. In *Griffis v. Sellars*, 19 N. C. 492, 31 Am. Dec. 422, this court, speaking through Chief Justice Rufin, says: "It is settled in this state that a discharge by the examining magistrate imports that the accusation was groundless. If the magistrate commit, or if the grand jury find a bill, it has never been doubted that in law that is evidence of probable cause, and calls for an answer from the plaintiff as to the particular circumstances; which imposes it on the plaintiff to go into the circumstances in the first instance. It is true that in these cases the evidence is deemed prima facie only. * * * After conviction, however the evidence rises in degree, and is conclusive." That was an action on the case for malicious prosecution, where the plaintiff had been convicted in the superior court, but obtained a new trial on appeal. It was held that his conviction was conclusive evidence of probable cause, but nowhere do we find in this state that anything less than conviction is conclusive. In other jurisdictions we can find but one case tending to sustain the contention of the defendant that the waiver of examination is conclusive. That single case is *Vansickle v. Brown*, 68 Mo. 627, an ill-considered opinion that will not bear analysis. The following extract from page 636 will show how utterly unreliable it is: "In the case of *Brandt v. Higgins*, 10 Mo. 728, Judge Napton, speaking for the court, said: 'The magistrate and the grand jury have the very question of probable cause to try. The evidence on the side of the prosecution alone is examined, and the proceeding is entirely ex parte. Under such circumstances the refusal of the examining tribunal to hold the accused over to trial must necessarily be very persuasive evidence that the prosecution is groundless.' On the other hand, it has been held that a commitment of the plaintiff is prima facie evidence of probable cause [citing cases]. If the finding of the magistrate on the facts proved before him makes a prima facie case, surely waiving an examination and voluntarily entering into recognizance amount to a confession by the accused that there is probable cause. Vide *State v. Railey*, 35 Mo. 168." This is a clear non sequitur.

42 S.E.—38

But let us examine the only case cited as authority for such a conclusion. What the court really does say in *Railey's Case* is as follows, on page 172: "The justice's docket, though not showing an adjudication by the justice, shows an actual admission of the defendant that the crime had been committed; and not merely that there was probable cause to believe him guilty of it, but a *direct and unequivocal admission of his guilt.*" We have underscored the words to show the force and extent of the miscitation. Of course, if the plaintiff Jones had "*unequivocally admitted his guilt,*" such an admission of guilt would have included an admission of probable cause. Against this single opinion, evidently written *currente calamo*, we have several well-considered cases. The rule is thus laid down in 19 Am. & Eng. Enc. Law (2d Ed.) 664: "The waiver of preliminary examination by a party charged with crime has been held to raise a prima facie presumption of probable cause for the prosecution." In *Schoonover v. Myers*, 28 Ill. 808, the court says, on page 312: "The first question of law which is presented arises upon the fact that when the plaintiff was brought before the magistrate upon the prosecution for the institution of which this action was brought he waived an examination, and voluntarily gave bail for his appearance at the circuit court. This, it is insisted, was an admission, at least, of such a probability of guilt as to preclude him from ever after saying that the prosecution was maliciously instituted. We do not think so. Such a course may often be judiciously advised, when the party is not only innocent in fact, but known to be so by the prosecutor. At least, this course should have no more influence than would the finding of the magistrate, upon a hearing of the evidence, that there was probable cause, and binding the party over for his appearance, or committing him." In *Hess v. Baking Co.*, 31 Or. 503, 49 Pac. 803, the court says, on page 505, 31 Or., page 804, 49 Pac.: "In other words, the waiver of an examination is tantamount in law to a finding by the magistrate that there is sufficient cause to believe the defendant guilty, and the authorities are substantially agreed that such a finding is not conclusive, but only prima facie evidence of probable cause, which may be overcome by competent evidence on the trial, and that an allegation in the complaint of a want of probable cause is a sufficient averment for the admission of such proof." *Railway Co. v. Hendricks*, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14, and authorities there cited." In *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729, it is said that "the waiver of a preliminary examination by a person charged with crime is prima facie evidence of probable cause." In that case *Holt, P.*, dissents in a forceful and elaborate opinion, maintaining that the waiver of a preliminary examination, being merely the exercise of a

lawful right, is not even *prima facie* evidence of probable cause. The following citations will show that our decision in this case is not an extreme view of the law, as other jurisdictions have gone beyond it. In *Barber v. Scott*, 92 Iowa, 52, 60 N. W. 497, it is held that "a conviction of plaintiff, though obtained without fraud, and without false testimony on the part of prosecutor, is not conclusive of probable cause for the prosecution complained of, but such conviction establishes probable cause, unless overcome." In *Miller v. Railway Co.* (C. C.) 41 Fed. 898, it was held that where, on examination, the justice commits, and the grand jury fail to find an indictment, the action of one merely offsets, neutralizes, or destroys the other, so as to render both or either of them valueless to establish a *prima facie* case either for or against the plaintiff; thus leaving the want of probable cause to be established by other testimony.

For the reasons above stated, we adhere to our decision that the waiver by the plaintiff of a preliminary examination is only *prima facie* evidence of probable cause, which may be rebutted by other competent testimony. Error.

(131 N. C. 185)

HALL v. HALL.

(Supreme Court of North Carolina. Oct. 21, 1902.)

DIVORCE—NEW TRIAL ON CERTAIN ISSUES— CONSENT TO VERDICT BY ELEVEN JURORS—COSTS.

1. A new trial may be granted in a divorce case on the issues of adultery by plaintiff without granting it on the issues of desertion by defendant.

2. Consent to a verdict by 11 jurors in a divorce case is valid, the verdict being for defendant, though, under Code, § 1288, providing that no judgment in a divorce shall be given in favor of plaintiff till the facts have been found by a jury, it would not be valid if the verdict was for plaintiff.

Appeal from superior court, Moore county; McNeill, Judge.

Action by Fannie M. Hall against Allan Hall. From a refusal to give defendant judgment, he appeals. Reversed.

U. L. Spence, for appellant.

CLARK, J. This is an action by the wife for a divorce under chapter 211, Laws 1899, alleging that her husband abandoned her November 21, 1898, and since said date has lived separate and apart from her, and has contributed nothing to her support. The answer denies this allegation, and sets up as recrimination adultery by plaintiff with three parties named, and asks for a divorce from her. The jury returned as their verdict, as to the first and second issues, that the parties were married, and had been residents of this state for two years next be-

fore the beginning of this action. As to the third issue, "Did the defendant abandon the plaintiff and live separate and apart from her as alleged in the complaint?" the jury came into open court, and stated that they stood 11 to 1 upon that issue, whereupon the counsel for plaintiff proposed that the finding of the 11 upon this issue should be returned by consent as the verdict of the whole jury, which was agreed to by the defendant's counsel, and the jury then responded "No" to that issue. At the same time the jury announced their hopeless inability to agree upon the fourth, fifth, and sixth issues, which were as to the charges of adultery by the wife with the three persons named in the defendant's answer. A juror was withdrawn, and a mistrial ordered as to those three issues. The defendant then tendered a judgment "that, as to plaintiff's cause of action, the defendant go without day, and recover his costs, and that the plaintiff be not allowed a divorce." This judgment the court declined to sign, upon the ground that the verdict on the third issue was by a majority of the jury, to which the defendant excepted and appealed.

It is in the power of the superior court to grant a new trial on one or more of several issues, and to let the verdict on the others stand (*Benton v. Collins*, 125 N. C. 90, 34 S. E. 242, 47 L. R. A. 33, and list of cases there cited); but this is in the discretion of the court, and not a right of the party (*Nathan v. Railway Co.*, 118 N. C. 1070, 24 S. E. 511), and it must "clearly appear that the matter involved is entirely distinct and separate from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters" (*Benton v. Collins*, supra; *Beam v. Jennings*, 96 N. C. 86, 2 S. E. 245). Such seems to be the case here, and, besides, the plaintiff is not appealing. An appeal lies from the refusal of a judgment to which the party is entitled. *Griffin v. Light Co.*, 111 N. C. 434, 16 S. E. 423; *Kruger v. Bank*, 123 N. C. 16, 31 S. E. 270. There was consent that the verdict on the third issue should be returned by 11 jurors. The authorities seem to be uniform that in civil cases this may be done, but as to criminal cases there is a division in the authorities, this state being among those which hold that it cannot be done. *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720. See authorities collected 17 Am. & Eng. Enc. Law (2d Ed.) 1098. Divorce being a civil action, the only question as to the validity of the consent to a verdict by a jury of 11 arises upon the following provision in the Code (section 1288): "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until the facts have been found by a jury." The object of this pro-

¶ 1. See Divorce, vol. 17, Cent. Dig. § 512.

vision is to prevent the obtaining of divorces by collusion, but here the consent to a verdict by 11 jurors results in a verdict against the plaintiff and against the divorce, and is not prohibited. If the verdict had turned out the other way, it would have been invalid. It was the folly of the plaintiff to have made so unequal an agreement, unless her object was, at all events, to abandon her action. When the remaining issues are tried on the defendant's cross-action, he will become pro hac vice plaintiff in the purview of section 1288.

It was in the discretion of the judge to have refused a partial new trial, but, having granted that without setting aside the verdict on the first three issues, it was error to refuse judgment in favor of the defendant as to the plaintiff's cause of action upon those issues as found. The case must be remanded for judgment in accordance herewith. The judgment tendered was erroneous, however, in asking judgment for costs against the wife.

Error.

(131 N. C. 715)

STATE v. GOULDING.

(Supreme Court of North Carolina. Oct. 21, 1902.)

CLAM BEDS—LICENSES—STATUTES.

1. Code, § 3391, authorizing the clerks of the superior courts to grant license to make oyster or clam beds, in the waters of the state, in a prescribed manner, repealed by Laws 1893, c. 287, § 2, which prescribes a new mode in which beds may be authorized, reinstated by Laws 1895, c. 160, repealing Laws 1893, c. 287, again repealed by Laws 1897, c. 13, which repealed Laws 1895, c. 160, and made new provisions applying only to oyster beds, is again reinstated, so far as concerns clam beds, by Laws 1901, c. 250, which applies only to oyster beds, and, by section 23, expressly repeals said statutes of 1893 and 1897.

Appeal from superior court, Carteret county; Bryan, Judge.

George Goulding was prosecuted for violation of the law relative to clam beds. The warrant was quashed, and the state appeals. Reversed.

A. D. Ward and the Attorney General, for the State. D. L. Ward, for appellee.

CLARK, J. This was a criminal proceeding begun before a justice of the peace, and taken by appeal of the defendant to the superior court, charging the defendant for unlawfully and willfully entering, gathering, and taking away clams from the clam bed of one Effie Gillikin,—said bed being situated in North river,—without her permission, in violation of Code, § 3393. In the superior court the warrant was quashed, and the state appealed.

This presents the question whether private clam beds in public waters are now authorized. Code, § 3391, authorized the clerks of the superior court to grant license to make

oyster or clam beds in the waters of the state in the manner prescribed by section 3390; and section 3393 made it a misdemeanor to take away oysters or clams therefrom. Chapter 287, § 2, Laws 1893, repealed section 3391 of the Code, but prescribed a new mode in which beds might be authorized. Said chapter 287, Laws 1893, was itself repealed by chapter 160, Laws 1895, except as to Onslow county. This repeal of the repealing statute reinstated Code, § 3391, except as to Onslow county, which is not here in question. *Brinkley v. Swicegood*, 65 N. C. 626; *End. St. § 475*; *Suth. St. Const. §§ 162, 168*. Chapter 160, Laws 1895, was itself repealed by chapter 13, Laws 1897, and new provisions enacted, applying only to oyster beds. Thus we have again a repeal of Code, § 3391, since this put in force again the statute of 1893 which repealed that section of the Code. But still the clam bed would be authorized by the mode prescribed in the act of 1893, and there is no controversy here as to the mode, but only as to the power to authorize clam beds, and that has never been repealed. Chapter 250, Laws 1901, is the latest act, and applies only to oyster beds; but section 23 thereof expressly repeals the above-cited statutes of 1893 and 1897, the effect of which is to put again in force the statute of 1895 and the above-cited section 3391 of the Code, unless they were in conflict with said act of 1901. But so far as the matter now in hand is concerned, Code, § 3391, is additional to, and not in conflict with, the act of 1901. There has been at no time a repeal of section 3393, making it a misdemeanor to take clams or oysters from their beds without consent of the owner. The only change has been made in the alternate enactment and repeal of section 3391 as to the manner of allowing private clam or oyster beds to be laid off in public waters. The last statute provides a new method of laying off such oyster beds, but leaves in force the old authority (Code, § 3391) to lay off clam beds. If this bed has not been properly laid off, that would be a matter of defense on the proof, and is not urged, and, indeed, could not be, upon a motion to quash the warrant.

In quashing the warrant, therefore, there was error.

(131 N. C. 169)

FOWLER v. FOWLER.

(Supreme Court of North Carolina. Oct. 21, 1902.)

BASTARDS—LEGITIMATION.

1. Where, by the laws of the domicile of the parents at the time of the birth of their bastard child and of their marriage, their marriage legitimates him, the legitimacy attaches at the time of the marriage, he being a minor, and goes with him wherever he goes.

Appeal from superior court, Moore county; Neal, Judge.

Proceeding by Stanley G. Fowler against

Kitty S. Fowler. Judgment for plaintiff. Defendant appeals. Petition dismissed.

Douglass & Simms and Shepherd & Shepherd, for appellant. U. L. Spence, for appellee.

CLARK, J. This is a proceeding begun before the clerk by the plaintiff for the legitimization of his son under Code, § 39. The petition alleges that the plaintiff is a citizen and resident of the county; that about July 1, 1893, the plaintiff and defendant were married at Milwaukee, Wis.; that for four or five years previous thereto, and up to the marriage, they had lived and habitually cohabited together at 6337 Carpenter street, Chicago, Ill., and during that time there was born to them on November 15, 1892, a son, of whom the plaintiff was and has always been reputed to be the father; and that the plaintiff and defendant have continued to live together since the marriage. The wife answers, admitting all of above allegations, except that she denies that plaintiff is a resident and citizen of the county, and for a further defense alleges cruel treatment by plaintiff, for which she has an action for divorce *a mensa et thoro* pending, and that the clerk of the superior court has no jurisdiction. The child was made a party defendant, and, through his guardian ad litem, answered, admitting all the above-recited allegations of the complaint. The clerk granted the petition, and his judgment on appeal was affirmed by the judge at chambers, from which judgment the wife appealed.

The plaintiff contends that by virtue of Code, § 136, the words "superior court," in section 39, mean the clerk, and that, if this is not so, the case having gotten before the judge of the superior court, his action is valid by virtue of chapter 276, Laws 1887, amending Code, § 255, and relies on *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518, and *Ury v. Brown*, 129 N. C. 270, 40 S. E. 4, and cases there cited. The defendant contends that, considering the caption of section 39, as may be done (*State v. Woolard*, 119 N. C. 779, 25 S. E. 719), and other language in section 39, section 136 does not apply, but the superior court at term alone has jurisdiction, and that this defect is not cured by the appeal to the judge at chambers. We are not called upon to decide this very interesting question, because upon the face of the petition there is a fatal defect, in that no cause of action is stated,—a defect which the court must notice *ex mero motu*. *Nash v. Ferrabow*, 115 N. C. 303, 20 S. E. 458; *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190; *Cary v. Allegood*, 121 N. C. 54, 28 S. E. 61. This proceeding is provided to legitimate illegitimates, but it appears from the averments in the complaint that the child is already legitimated. By the laws of this state the subsequent marriage of the parents does not legitimate their children born prior to the marriage. But legitimacy is a status, and by the laws of Illinois the subsequent marriage of

the parents legitimates their prior offspring. "If the mother of any bastard child and the reputed father, shall at any time after its birth intermarry, the said child shall in all respects, be deemed and held legitimate." Rev. St. 1895, p. 203, § 15. The parties were domiciled, according to the complaint, at the time of the child's birth and up to the time of the marriage, in Illinois, and it is well settled that, the child being still a minor, its legitimacy then accrued, and accompanies it wherever it goes. Even if the domicile had been in Wisconsin at the time of the marriage, the law there is the same, if the father recognized the child as his, as it appears he did. Rev. St. Wis. 1878, § 2274. The Illinois statute was enacted as far back as 1845. By both the civil and canon law the subsequent marriage of the parents legitimated their offspring born before marriage. 1 Bl. Comm. 454. It was when the bishops, at the parliament held at the Priory of Merton, in Surrey, in 1236, attempted to procure a change in the common law to that effect, that the barons answered, "*Nolumus leges Angliæ mutare*,"—"We are unwilling to change the laws of England" (1 Bl. Comm. 456; 2 Kent, Comm. 209),—and made an entry on the journal (20 Hen. III, c. 9) which is known as the "Statute of Merton." This remains the law of England to-day, as it does in North Carolina, though Virginia and many other states, as well as Illinois and Wisconsin, have adopted the civil law in this particular. It seems well settled in England, as well as elsewhere, that when, by the law of the domicile of the parents at the time of the birth and the law of the domicile at the time of the subsequent marriage of the parents, the effect of the marriage is to legitimate the children, the legitimacy attaches (if the children are not adults), and goes with them wherever they go. "If by that law he is thereby rendered legitimate, he will be regarded as legitimated everywhere, even in states whose laws do not recognize subsequent legitimization." Minor, Conf. Laws, § 99, citing very numerous authorities. The English courts only differ from others in holding that it is the law of the father's domicile at the time of the birth which governs, and not the law of the domicile at the time of marriage. Minor, Conf. Laws, *supra*, where the whole subject is clearly and interestingly discussed. To same purport, Dicey, Conf. Laws, rule 134; Whart. Law Nat. 172; Whart. Conf. Laws, §§ 240-248; Story, Conf. Laws (8th Ed.) §§ 93, 93v, where the subject is exhaustively considered; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Ross v. Ross*, 129 Mass. 252, 37 Am. Rep. 321. The American authorities, all to same purport, will be found collected in 3 Am. & Eng. Enc. Law, 935, 896; 6 Cent. Dig. cc. 1827-1830. In *Ross v. Ross*, *supra*, Gray, C. J., reviews all the authorities up to that decision (1880). See, also, *Adams v. Adams* (Mass.) 13 L. R. A. 275, and notes (s. c. 28 N. E. 260). As the child was legitimate, upon the allegations in the complaint,

when the child came to this state, the removal of his parents hither could not have the effect to make him a bastard, and the complaint states no cause of action. A similar instance is that of a marriage solemnized in a state, whose laws permit such marriage, between a negro and a white person domiciled in such state. This is valid on their removal to this state, though such marriage would have been invalid if the parties had been domiciled here. *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *Woodward v. Blue*, 103 N. C., at page 114, 9 S. E. 492. The status accompanies the person, and is not changed by the removal.

Action dismissed.

(131 N. C. 163)

WILSON et al. v. BEAUFORT COUNTY LUMBER CO.

(Supreme Court of North Carolina. Oct. 14, 1902.)

APPEAL—EXCEPTIONS—JUDGMENT—DOCKETING—LIEN.

1. An appeal is in itself an exception to a judgment, and no other record exception is necessary, Code, § 957, requiring the court on appeal to render such judgment as, on inspection of the whole record, it shall appear to them ought in law to be rendered:

2. Code, § 435, provides that every judgment directing the payment of money shall be docketed, and shall be a lien on the real estate of the debtor. A judgment rendered for a fixed sum for damages and for another sum for costs was recorded in full in the court's minute docket. When docketed, the judgment for damages was omitted, but the docketed judgment contained a reference to the entry in the court's minute docket by number and page. *Held*, that the judgment for damages was not sufficiently docketed so as to create a lien on the debtor's real estate, and hence the debtor's grantees were not liable therefor.

3. A statute provides that the lien of a docketed judgment expires in 10 years unless the creditor has been legally restrained from enforcing it. A judgment debtor's allotment of homestead was not recorded until after the expiration of 10 years from the date of the docketing of the judgment. *Held*, that the lien of the judgment had expired, and was not revived by the allotment of homestead, and therefore an execution issued created a lien only from its levy, and not by virtue of the docketing of the judgment.

4. A debtor at the time of the rendering of a judgment against him owned two separate parcels of land, one of which was conveyed to third persons, and the other of which became, through mesne conveyances, the property of the judgment creditor, who entered a release of the lien of the judgment docketed as to such parcel. *Held*, that each parcel should bear its own proportion of the docketed judgment, and hence the parcel conveyed to the third persons was not holden for the entire judgment.

Appeal from superior court, Pitt county; Winston, Judge.

Action by Louis Wilson and others against the Beaufort County Lumber Company. From a judgment granting insufficient relief to plaintiffs, they appeal. Affirmed.

A statute provides that the lien of a docketed judgment expires in 10 years unless the creditor has been legally restrained from enforcing it.

Skinner & Whedbee, for appellants. Fleming & Moore, for appellee.

CLARK, J. A jury trial having been waived, the facts were found by the court. From the judgment rendered thereon the plaintiffs appealed. There is no exception, and none is necessary, the appeal being of itself an exception to a judgment. *Murray v. Southerland*, 125 N. C. 175, 34 S. E. 270; *Delozier v. Bird*, 123 N. C. 680, 31 S. E. 824; *Reade v. Street*, 122 N. C. 301, 30 S. E. 124; *Appomattox Co. v. Buffalo*, 121 N. C. 37, 27 S. E. 999; *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910; *Clark's Code* (3d Ed.) p. 772; Code, § 957. When there is objection to evidence, to the charge, or any other matter occurring on the trial, an exception must always be specifically taken (Code, § 550, and cases cited in *Clark's Code* [3d Ed.] pp. 772-774), and, except as to the charge, such specific exception must be taken at the time (*State v. Downs*, 118 N. C. 1242, 24 S. E. 531, and cases cited; *Clark's Code* [3d Ed.] p. 509). A "broadside exception" to such matters cannot be noticed. *Clark's Code* (3d Ed.) p. 513. By virtue of Code, § 412 (3), an exception to the charge can be taken for the first time in the appellant's statement of the case on appeal, though it must be specific, and not "broadside." *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383; *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266; and numerous cases collected in *Clark's Code* (3d Ed.) pp. 513, 773. But as to errors upon the face of the record proper, such as defects in the summons, pleadings, and judgment, the appellate court is required to take notice of these without assignment of error, by Code, § 957. The distinction is clearly pointed out in *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910, and in numerous cases since, collected in *Clark's Code* (3d Ed.) at pages 772, 800, 924. Errors in the face of the record proper are necessarily either (1) that the court has not jurisdiction; or (2) that the complaint (or indictment) does not state a cause of action, as to both of which rule 27 of this court (39 S. E. vii) states that the court will take notice *ex mero motu* without assignment of error; or (3) that the facts found, whether by general verdict or special verdict, or by the judge, or by consent, do not justify the judgment imposed. *Clark's Code* (3d Ed.) pp. 920-924. The court (a jury having been waived) found as facts that at June term, 1889, of Pitt superior court, judgment was rendered in favor of the plaintiffs against Lizzina Wilson for \$225 for mesne profits and for partition, and \$50.19 costs, and said judgment was recorded in full on the minute docket, but in the judgment as docketed and duly indexed at that term the \$225 was omit-

¶ 1. See *Appeal and Error*, vol. 2, Cent. Dig. §§ 1572, 1577, 1600.

ted from said docketing; and that about December 1, 1898, this omitted part of the judgment was placed on the docket at the request of the plaintiffs, but without notice to the defendants, by the clerk, after the expiration of his term of office. The docketed judgment, however, contained the following: "For decree, see minutes No. 5, pp. 619-623," and the decree there copied in full embraced the \$225 recovery. It is further found as a fact that in June, 1889, at the time the above judgment was docketed, Lizzina Wilson owned in fee two tracts,—one containing 60 acres, which was worth March 1, 1902, \$300, and the other containing 66⅔ acres, worth March 1, 1902, \$800; that on April 12, 1894, said Lizzina Wilson conveyed for \$135 the timber on the 60-acre tract to the Beaufort Lumber Company, and thereafter conveyed the fee of said tract (subject to above conveyance of the timber) to the defendants, her son Geo. W. Wilson and grandson John W. Wilson, without consideration; that on December 18, 1890, she conveyed the 66⅔-acre tract, without consideration, to her son McD. Wilson, who, on December 25, 1896, conveyed the same, for value, to the feme plaintiffs, who are her daughters, and who are now the owners thereof; that on May 25, 1899, notice was issued to Lizzina Wilson for revival of said judgment, and execution was issued thereon May 26, 1899, and the homestead was allotted out of these lands, but the allotment was not recorded till after the expiration of 10 years from the date of docketing said judgment. On June 7, 1901, after the answer in this case had been filed, the plaintiffs entered a release of the lien of said docketed judgment as to the 66⅔-acre tract. His honor correctly held that the judgment was not a lien for the \$225, that part of the judgment not having been docketed. Code, § 435. The reference to the minute docket was sufficient notice to put a purchaser on guard as to the nature thereof as to matters which did not "affect the title or direct the payment of money." But a money judgment cannot be made a lien unless set out in the docketing thereof, which is required for this very purpose of guarding against liens, unless entered on the docket. In *Holman v. Miller*, 103 N. C., at page 120, 9 S. E. 430, it is said: "It is so very clear that, unless the judgment is docketed upon this particular docket, there can be no lien by virtue of the judgment alone;" and in *Dewey v. Sugg*, 100 N. C., at page 335, 13 S. E. 925, 14 L. R. A. 393, *Merrimon, C. J.*, says: "A docketed judgment creates and secures a lien upon the judgment debtor's land. But a judgment, in order to create such lien, must be docketed in the way and manner above pointed out; otherwise the judgment is not docketed, and no such or any lien arises,"—citing authorities. The judgment was docketed in 1889, and, no allotment of homestead having been made till after the 10 years had expired, there was no suspension of the stat-

ute of limitations; and the lien of the judgment, having expired, could not be revived by its allotment after that time. The execution issued on the revived judgment has lien only from its levy, and by virtue of the levy, and not by virtue of his docketing the judgment in 1889. *Spicer v. Gambill*, 93 N. C. 378; *Pipkin v. Adams*, 114 N. C. 201, 19 S. E. 105; *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264. The defendant the lumber company having acquired title for value prior to the levy of such execution, the lands in its hands would not ordinarily be subjected. Whether this, being a judgment for costs in partition, is a judgment in rem, as to which no statute runs (*Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 260; *In re Walker*, 107 N. C. 340, 12 S. E. 136), we are not called upon to decide, as the defendants did not appeal; but, if it is, his honor correctly adjudged that defendants pay only three-elevths of the costs, for each tract should bear its own proportion. *Hinnant v. Wilder*, 122 N. C. 149, 29 S. E. 221. That case holds, also, that no homestead could be allotted against the judgment for costs in partition. The plaintiffs could not transfer the lien on their own tract to the defendants by an entry in their own favor on the judgment docket. The \$225 part of the judgment was not for equality for partition, but a mere personal judgment incidentally annexed for mesne profits, and no lien ever attached, as above stated, by reason of its having been omitted from the docketing of the judgment.

No error.

(131 N. C. 130)

BRINKLEY v. SMITH.

(Supreme Court of North Carolina. Oct. 14, 1902.)

DEEDS—PROBATE IN ANOTHER STATE—CERTIFICATE—SUFFICIENCY—ADVERSE POSSESSION.

1. In partition plaintiff introduced a deed which was excepted to on the ground that it had not been properly probated in another state. On the deed appeared, "Signed, sealed, and delivered in presence of M. and R., J. P.," and following: "Personally appeared before me H., clerk of the superior court, R., who on oath says he saw D. sign a land deed on the 21st Oct., 1897; that he also signed the deed officially as a justice, and saw M. sign as a witness." This was signed by R. and H. Held, that the exception was good, inasmuch as the statement of R. did not identify the deed mentioned therein as the deed then offered for probate.

2. Where the probate of a deed in another state is defective on its face, the certificate of the clerk of the superior court that the certificate of probate and seal of the clerk of the superior court of the other state is sufficient does not validate the certificate.

3. Where plaintiff claimed by adverse possession, it was error to charge that, if the jury found from the evidence that certain persons with whom the plaintiff's title was supposed to have some connection had been in adverse pos-

¶ 3. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 123, 227, 228.

session of the premises for more than 30 years, it was their "duty to answer the issue 'Yes,' notwithstanding the possession had been at intervals interrupted, and that the occupancy of the claimants was not connected," since adverse possession must be open, notorious, and continuous.

Appeal from superior court, Columbus county; McNeill, Judge.

Partition by B. W. Brinkley against Henry Smith. From a judgment for plaintiff, defendant appeals. Reversed.

J. B. Schulken, for appellant. C. C. & H. L. Lyon, for appellee.

DOUGLAS, J. This was a special proceeding commenced before the clerk for partition of the land described in the complaint. The defendant pleaded sole seisin, and the case was transferred to the superior court in term for trial of the issues raised in the pleadings. It was heard on appeal at the last term of this court, but the record was in such condition that we thought it necessary to refer it to the clerk for correction. 130 N. C. 224, 41 S. E. 106. There are only two exceptions which we deem it necessary to discuss, as they result in a new trial, where the other exceptions may not arise. The plaintiff introduced a deed from John Daniel to A. T. Clark, to which the defendant excepted on the grounds that it had not been executed by said Daniel, and had not been properly probated. Upon said deed appear the following statements:

"Signed, sealed, and delivered in the presence of J. M. Miller and J. D. Robinson, J. P."

"State of Georgia, Wayne County. Personally appeared before me, Hansell Rappell, clerk superior court in and for said county, J. D. Robinson, who on oath says that he saw John Daniel sign a land deed on the 21st day of October, 1897, and that he also signed the deed officially as a justice of the peace in and for 1519 district, G. M., of said county, and also saw J. M. Miller sign the same as a witness. Sworn to before me this 22nd day of November, 1897. J. D. Robinson, J. P. Hansell Rappell, Clerk S. C. W. C."

"North Carolina, Columbus County. The foregoing certificate and seal of office of Hansell Rappell, clerk superior court of Wayne county, state of Georgia, is adjudged to be sufficient. Let the deed and certificate be registered this January 19, 1898. A. M. McNeill, Deputy Clerk Superior Court."

This probate is singularly defective. Robinson, who seems to be swearing in his official capacity, does not prove the signature of the grantor to the deed in question, nor even his own attesting signature. He simply says that "he saw John Daniel sign a land deed," and that he and Miller signed the same deed. The only construction we can put upon this language is that he and Miller signed the same deed that he saw

Daniel sign; but he does not pretend to identify that deed, or the signatures thereon, as the deed then offered for probate. In other words, he does not prove the execution of this particular deed, which was the essential fact to be proved. Therefore we think that this deed, in its present condition, was not competent evidence, and should have been excluded upon objection by the defendant. The certificate of the clerk of the superior court of Columbus county merely permitted its registration, and could not have the effect of validating a probate essentially defective upon its face.

There is an exception to the charge that, we think, must be sustained. His honor charged that, if the jury found from the evidence that certain persons with whom the plaintiff's title was supposed to have some connection had been in adverse possession of the premises for more than 30 years, it was their "duty to answer the issue 'yes,' notwithstanding the possession has been at intervals interrupted, and that the occupancy of the claimants was not connected." This state of facts would have been sufficient to take the title out of the state, but not of itself to put it into the plaintiff. *Walden v. Ray*, 121 N. C. 237, 28 S. E. 293; *Everett v. Newton*, 118 N. C. 919, 23 S. E. 961. Twenty years' adverse possession of land by himself or those under whom he claims will give title in fee to the possessor as against all persons not under disability; but such possession must not only be adverse, but must also be open, notorious, and continuous under known and visible boundaries. The reason of this is clear. Such statutes of limitation, originally statutes of presumption, are founded upon the legal presumption of a grant or release. The law presumes that the party holding the legal title, knowing his land is in the actual possession of one who claims it as his own, and having a right of action for its recovery, admits the lawful claim of the possessor if he permits him to remain in open and undisturbed possession for so long a time. If the possession is not so open and adverse as to reasonably put the legal owner upon notice, either actual or constructive, he cannot be expected to sue on a cause of action of which he is ignorant. On the other hand, if the possessor abandons the property, its constructive possession at once reverts to the holder of the legal title. A conveyance of the property, being an assertion of ownership, is not considered as an abandonment. As is said in *Angell on Limitations* (section 390), quoted with approval in *Malloy v. Bruden*, 86 N. C. 251: "The principle upon which the statute of limitations is predicated is, not that the party in whose favor it is invoked has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of another as to give him a cause of action, which, having failed to prosecute within the

limited time, he is presumed to have surrendered."

The other exceptions are not necessary for the determination of this appeal, and may not arise again.

New trial.

(131 N. C. 148)

WHITEFIELD et al. v. GARRISS et al.
(Supreme Court of North Carolina. Oct. 14, 1902.)

WILLS—CONSTRUCTION—ESTATE CONVEYED—CONDITIONAL FEE.

1. Testator bequeathed to his grandson certain described land, and declared that, in the event of the grandson's death leaving no heirs of his body, then the land should descend to the three brothers of the devisee, or the survivors of them, and, in case the last survivor should die leaving no heir or heirs of his body, then the land should be equally divided between all testator's grandchildren. *Held*, that under Code, § 2180, declaring that when real estate shall be devised to any person the same shall be construed as a devise in fee unless such devise shall show in plain and express words, or it shall be intended by the will, that the testator intended to convey an estate of less dignity, such devise vested a fee-simple estate in the devisee, defeasible only on condition that he died without leaving heirs of his body.

Appeal from superior court, Wayne county; Robinson, Judge.

Action by F. G. Whitfield and others against Ransom Garriss and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. C. Munroe, for appellants. Allen & Dortch and F. A. Daniels, for appellees.

FURCHES, C. J. This is an action of ejectment, and involves the construction of the will of Lewis Whitfield. The will was written in 1848, and the testator died in 1850, at the advanced age of 90 years. He was a man of large real and personal estate, without living children, but having a number of grandchildren. In item 15 of the will he disposes of the land in controversy as follows: "I give, devise, and bequeath to my grandson Franklin Whitfield (son of L. S. Whitfield, deceased) that part of my land lying on the north of Neuse river, between Walnut creek and Bear creek, in the counties of Wayne and Lenoir [here follows a description of the land conveyed in item 15, said to be about seven square miles of the most valuable land in Wayne county]; and in the event of the death of the said Franklin Whitfield (son of Lewis S. Whitfield, deceased) leaving no heirs of his own body, then, and in that event, the above-described land and other property shall descend to the three sons of Lewis S. Whitfield, deceased, Hazzard Whitfield, Cicero Whitfield, and Lewis Whitfield, or the survivor of them; and, in case the last survivor of the sons of L. S. Whitfield, deceased, shall die leaving no heir or heirs of his own body, the said land or real estate shall be equally divided between all my grandchildren." Franklin

Whitfield died in 1900, leaving the plaintiffs his children and heirs of his body. It seems to us, if it was not for the large amount involved in this action, it would not be a very difficult one to dispose of; and this fact should not make it any more difficult than if the amount involved was much smaller. The plaintiffs contend that in construing the will the court should find out, if it can, the testator's purpose in making the will, and that should be carried out by the court; and to do this the court should examine the whole will—all that is written within "its four corners," as it is sometimes expressed—to find out the testator's intention. And these are some of the rules adopted by courts for construing wills. But the learned counsel who represents the plaintiffs has pointed out no other part of the will that affords us any aid in putting the construction on item 15 they contend it should have. But there is another rule, more important in the construction of wills than those suggested by the plaintiffs, and that is, there must be something to construe. The court can no more make the language of a will than it can make the will. Where there is language of doubtful meaning used in the will, for the purpose of interpreting the meaning of such doubtful language the court may try to ascertain the intention of the testator. But some language is too plain, the meaning too obvious, to admit of interpretation. In such cases the language of the testator must be taken to mean what it says. *Coble v. Shoffner*, 75 N. C. 42. The plaintiffs contend that the testator only intended to give Franklin a life estate, to be enlarged into a fee simple upon his having heirs of his body, and, having but a life estate, he could not convey the fee-simple estate; that the effect of the condition was to enlarge the estate of Franklin from a life estate to a fee simple. We do not think this the proper construction of item 15. But, if it was, when the condition was fulfilled by Franklin's having heirs of his body, we do not see what benefit the plaintiffs, who are his children and heirs at law, would have on that account, when their father had conveyed it to the defendants for full consideration, and with general warranty. But we think the devise to Franklin without any limitation, under the act of 1784, then chapter 122, § 10, of the Revised Statutes, and now section 2180 of the Code, was a devise in fee simple, with a condition of defeasance,—that, if he died without leaving heirs of his body, his fee-simple estate should be defeated, and the land should go to the three children of L. S. Whitfield, named in the will. The public law enters into and becomes a part of every transaction and conveyance (*McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99), and chapter 122, § 10, of the Revised Statutes, was then in force. Therefore item 15 must read as if it had been written "to Franklin Whitfield, his heirs and assigns, forever, but upon condition that if

the said Franklin Whitfield shall die without leaving heirs of his body, then, and in that event, to the heirs of L. S. Whitfield." This is written in the will by the statute of 1784. So, if the contingency had happened upon which the condition was to take effect (dying without heirs of his body), the lands would have gone to "Hazzard Whitfield, Cicero Whitfield, and Lewis Whitfield," sons of L. S. Whitfield, deceased. So it would seem that the plaintiffs in no event could take the land under the will of the testator, Lewis Whitfield. If Franklin died leaving heirs of his body, the contingency never happened by which his fee-simple estate was to be reduced to a life estate, and he was the fee-simple owner; and, if it had happened, then the land was to go to the heirs of L. S. Whitfield. Franklin died leaving heirs of his body (the plaintiffs in this action), and the land did not go over to the heirs of L. S. Whitfield. The plaintiffs would have inherited it from their father, Franklin; but he sold and conveyed it to the defendants with full covenants of warranty, and the plaintiffs have no interest whatever in it. The authorities cited by the plaintiffs are not in point. They are as to the time when the contingency must happen, and there is no such question in this case, as that is fixed by the will to be at the death of Franklin.

The judgment must be affirmed for the reason assigned by his honor who tried the case below. Affirmed.

(131 N. C. 726)

STATE v. BLACKLEY.

(Supreme Court of North Carolina. Oct. 28, 1902.)

ESCAPE—EVIDENCE—QUESTION FOR JURY.

1. Code, § 1022, relating to the charge against an officer of allowing a prisoner to escape, provides that it shall be sufficient, in support of the indictment, to prove that the prisoner was committed to his custody, and it shall be on defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent it, and acted with proper care and diligence. *Held*, that where defendant testified that the escape was not with his consent; that he acted in good faith in trying to prevent it; that, to prevent a lynching, he concluded to conceal the prisoner in a dark wood over night; and that an armed force there captured the prisoner,—it was error to direct a verdict of guilty.

Appeal from superior court, Granville county; Shaw, Judge.

F. M. Blackley was convicted of allowing a prisoner to escape from his custody, and appeals. Reversed.

Royster & Hobgood and J. W. Graham, for appellant. The Attorney General, for the State.

FURCHES, C. J. This was an indictment for an escape, under section 1022 of the Code. The defendant was a constable in Granville county, and one Rogers was put in

his custody, with a mittimus from the justices of the peace who had investigated the case, against Rogers, upon a warrant charging him with rape. The facts that the defendant was a constable, that Rogers was tried upon a warrant charging him with rape, that sufficient cause was found to commit him to jail, and that he was committed to the custody of the defendant, with a mittimus, were shown in evidence, and are not denied. This made a prima facie case of guilt against the defendant, under section 1022 of the Code, and threw the burden on the defendant of showing that he was not guilty. The statute itself provides that, after the prima facie case is made out, "it shall then lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence."

The defendant, for the purpose of showing that he was not guilty, went upon the witness stand in his own behalf, and testified as follows: "Rogers was committed to my custody by the justices of the peace about eight o'clock in the evening. I took him to Lyon's store, and the justices wrote out mittimus and handed it to me. C. H. Parham came to me at the store, and said there was a crowd coming out from Oxford to lynch Rogers, and I heard this from several other parties. Pete Kearney, Phil. White, Tom Mitchell, and others whose names I do not recall, told me so. There had been several lynchings in Granville county. I had no buggy at the place of trial. I lived two miles from there by the road, but one and a quarter miles by path. When I heard these rumors about the lynching, I took Rogers and Phil. White, and when I got into the woods I told Phil. White to go and summon some men and arm them, and to bring them on to my house, and that we would do something to protect this man. I arrested Rogers on the Saturday before, and this was on Tuesday night. I had had him in my custody from then until the trial. I did not put him in the jail. The justices of the peace told me to keep him in my custody until Tuesday, when the trial was had. I did keep him in my custody, and he made no attempt and showed no disposition to escape. After I sent Phil. White back, I went on to Mr. Dement's house, and woke him up, and summoned him to help me. I then went to my own house, and saw Ed. Blackley, who is no kin to me, but about twelfth or thirteenth cousin, and works at my place, and summoned him as a guard. I carried the prisoner to my house, but did not keep him there, on account of my wife's condition. She was nervous and delicate,—had been an invalid for two years. I went from my house first to the cornfield, and the dew was so heavy that Mr. Dement suggested that we go back into the old field. Ed. Blackley went after our supper and brought it, and after

we had eaten it we agreed to carry Rogers a mile away. It was pretty quick after supper that I saw a crowd coming. It was bright moonlight, and they were in their shirt sleeves. They shot four or five times when they were about as far as across the courthouse from me, and kept coming, and started shooting again; and as they shot again I ran, and shot behind me. I ran into the cotton patch, and Rogers was right with me. They caught me, and Rogers fell into the ditch. I told them they ought to give the man a fair trial, and ought not take him and butcher him up. They took Rogers off, while some of them held me down and cursed me, and said if I didn't hold my mouth they would kill me. There were twelve or fifteen in the crowd. They held me three or four minutes. There were handkerchiefs over their faces. I do not know who they were. While they had me down, they shot two or three times. Sam Ball's people lived thirty-five or forty yards from there, and they heard it. I told them to get off of me, and not to do this thing. I tried to make them turn Rogers loose. They cursed me. I was saying nothing while running. Dement and Blackley were with me when we started to run. Dement stopped, and Blackley stopped in cornfield. I was in front of both of them. I had heard nothing of Rogers' friends trying to rescue him. I had no reason to believe they would."

On cross-examination, this witness testified: "I have been constable three years. I drink something, but never drank when I have business to attend to. Rogers did not have pistol while in my custody. I will not say he did not have pistol on the trial, because I had nothing to do with him after I turned him over to the justices of the peace. After turned him over to them he went to the store, and I did not watch him. I did carry him to see his sweetheart on Saturday night before the trial. He was my friend. I did not handcuff him; did not tie him. I never tie white men. Only one man went with me and prisoner from Wilton. There were one hundred representative men there when I left the store, and I could have deputized them to assist me. I deputized Phillip White across the road. I heard it from a dozen men that Rogers was to be lynched. Two of his brothers and his friends were there. He had a heap of friends there. I went away from there across the road into a thick body of woods with but one man, and I honestly thought there was a crowd coming to mob him. Phil. White is not kin to me. I based my judgment on the information given me by Parham. Parham was drinking some. He has been in court. Did not hear Judge Graham say report as to lynching by people from Oxford was false. I knew he was to be tried that evening, and did not bring my horse because I was driving his horse to my buggy. I had sent my buggy home the evening before, but did not

send Rogers' horse. Some one rode my horse up there, and I sent him home to be fed as they went into trial. After I heard report of lynching, I decided not to bring him to Oxford that night. I did not hear report until after he was committed to me. As soon as I got the mittimus, I carried him off. I had not formed the opinion not to carry him to Oxford when I sent my horse and buggy home. I did not say to the crowd at the trial: 'Stand back. This man is not going to jail.' I did not get hurt at the shooting, nor was any skin bruised or hurt anywhere. There are three different roads from Wilton to Oxford. Sheriff Fleming was at trial during the afternoon. Excitement was pretty high after he was found guilty. I did not believe they would find Rogers guilty. I had reason to believe that there would be trouble. I did not ask Sheriff Fleming to stay and assist me. After the trial was over, it was dark. I knew of ten or twelve buggies leaving there and coming to Oxford. I did not consult Graham, Hobgood, or any of the justices as to how I should care for the prisoner. Four or five representative citizens from Oxford were there. I did not take Rogers to my house to spend the night. I knew my wife's condition before I took him there. I made up my mind to go by way of Franklinton and come to Oxford. When I left Wilton, Rogers' brothers and friends could have seen us if they had looked. There were thick woods there into which we went. I did not tell my wife where we were going. We were one-fourth mile from road, and the night was quiet and still. We were in the old pine field as far as from here to the door from the path. They walked down the path, and stepped back and commenced shooting. They hit no one, though they shot twelve or fifteen times. They found me about half past nine o'clock. I did not regard this as a safe place to stay all night, but regarded it as safest place. We had just eaten supper, but had not had time to get away. I do not know how they knew where we were, unless some one watched us. My wife did not know where I was. I ran before firing a shot. I had a pistol with five loads in it. No. 38 caliber. As I ran I shot behind me. I have not seen Rogers since they took him away from me that night. I know everybody in that community. Only four of the crowd came close to me. The others did not get in ten steps of me. There were three of us and prisoner. Rogers had a pistol. I did not know he had one until he commenced firing. I did not search him that day. I heard since the trial that he had one on the trial. I was afraid he was going to be lynched, and we all talked about his going to be lynched. I reckon all those with me had guns. I did not try to hit any one, and no one on either side got hurt, so far as I ever heard of."

On redirect examination: "I was arrested

day before yesterday in this case. I was not bound over to court. I was summoning witnesses for sheriff, and was out all night. During the trial at Wilton I was walking about and trying to keep the crowd off the lawyers and magistrates. I sent my horse home about four o'clock in the afternoon. When the justices put Rogers in my custody on Friday, they told me I could take him and go around with him to see his witnesses and his lawyers, and I could keep him with me. From the time he was arrested and placed in my custody up to the time of the trial, he was never out of my presence. I slept with him every night."

At the close of the defendant's evidence, the court informed the defendant's counsel that, if the defendant's evidence was believed, he was guilty, and the court so charged the jury. Defendant excepted. Verdict of guilty, judgment, and appeal by defendant. In this there was error. The statute (Code 1022) provides that the defendant may "show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence." The defendant swears that the escape was not with his consent, and that he acted in good faith in trying to prevent it. He testifies that he was told by a number of persons that a crowd was coming from Oxford to lynch the prisoner. It was then night, and, to avoid the lynchers, he concluded not to carry Rogers to Oxford that night, but to conceal him until morning, and for that purpose he took him into a dark wood. There was great excitement at the close of the trial, and he did not summon any of the large and excited crowd to assist him, but did summon others after he left the place of the trial. But his principal object was to conceal him until morning. There had been several lynchings in Granville county, and he believed the report that a crowd was coming from Oxford to lynch Rogers; and when they were attacked, and Rogers taken from him by force, he thought it was the lynchers, and he begged them not to lynch him, but to let him have a fair trial. It was suggested on the argument that what the defendant testified to was not true; that he was playing false; that it was the friends of Rogers who attacked and rescued Rogers for the purpose of liberating him, and not for the purpose of lynching him. Suppose this was so (and we do not say but what there are circumstances tending to show this to be the case); did the court have the right to pass upon this fact and say it was so, or was it not a matter to be passed upon and found by the jury? To sustain the judgment of the court, we would have to hold that the court had the right to try the fact of good faith, of due diligence, and that he had not used due diligence, or that the defendant was in a conspiracy with the friends of Rogers to release him, and did not believe a mob was coming from Oxford to lynch him, but that story was only a sham

and falsehood to cover the fraud of releasing him. This may all be so, but they were such facts as a jury must pass upon, and not the court. It cannot be contended that if the defendant acted in good faith; that he believed the report that a crowd was coming from Oxford to lynch Rogers; that, for the purpose of preventing this, he concluded to go into hiding, and not carry Rogers to Oxford that night; and that he and those with him were set upon by a masked, armed force, and the prisoner, Rogers, was captured and taken off, while he was held and ordered to keep quiet under threats of death,—the defendant would be guilty. And to find that this was not so would be to find that the defendant had sworn falsely. This the court had no right to find. Wherever a question of good faith, or of negligence or reasonable care, or the truth or falsity of a witness' evidence, is to be passed upon, it is a matter for the jury, and not for the court. A judge cannot even weigh the evidence. *State v. Locke*, 77 N. C. 481. Where the trial involves a question of intent, it becomes a question for the jury, and not for the court. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973. It is like finding the felonious intent in a trial for larceny. *State v. Coy*, 119 N. C. 901, 26 S. E. 120. Where a party is indicted for an assault and battery, the question of excessive force is a question for the jury, and not for the court. *State v. Goode*, 130 N. C. 651, 41 S. E. 3. In the case of *State v. Lewis*, 113 N. C. 622, 18 S. E. 69, which was an indictment for escape, the court held that, if the defendant was too sick to give the matter his personal attention, that would excuse him, if he had used due diligence in selecting his deputy who had the prisoner in charge, and these were questions of fact to be found by the jury.

There is error. New trial.

(131 N. C. 159)

SAVAGE v. DAVIS.

(Supreme Court of North Carolina. Oct. 14, 1902.)

MALICIOUS PROSECUTION—SET-OFF AND COUNTERCLAIM—PLEADING—REQUESTED INSTRUCTION—PARTICULAR MALICE.

1. Where, in an action for malicious prosecution and slander, defendant averred that plaintiff on the trial of the warrant admitted that he purchased certain guano, and was chargeable therewith, and that the value thereof was \$120, with interest, and that plaintiff was therefore indebted to defendant in that amount, such allegation constituted a sufficient pleading of a set-off against plaintiff's damages, if any, and the fact that the court erroneously stated that the allegation was a counterclaim, though deducting the amount from plaintiff's recovery, was immaterial.

2. In an action for malicious prosecution, a requested instruction that by malice is meant special or particular malice; not general malice, but particular malice against the plaintiff; and that, before plaintiff could recover, he must prove that defendant was prompted by particu-

¶ 1. See *Malicious Prosecution*, vol. 23, Cent. Dig. §§ 59, 60.

lar malice toward him in procuring his arrest, etc.,—was proper, and its refusal was error.

Appeal from superior court, Edgecombe county; Timberlake, Judge.

Action by T. F. Savage against J. A. Davis. From a judgment in favor of plaintiff, both plaintiff and defendant appeal. Reversed.

John L. Bridgers and G. M. T. Fountain, for defendant.

Plaintiff's Appeal.

MONTGOMERY, J. The complaint embraces two causes of action; the first count charging the defendant with a malicious prosecution without probable cause, and the second the slander of the plaintiff by the defendant, growing out of the same transaction. The defendant, in his answer, denies having prosecuted the plaintiff maliciously, and without probable cause, and also denies that he used the slanderous words imputed to him by the plaintiff. The jury answered all the issues in favor of the plaintiff, and assessed his damages on the issue as to the malicious prosecution in the sum of \$500, and his damages for injury on account of the slander at nothing. The defendant, in his answer, made the following averment: "That T. F. Savage claimed that he alone purchased the guano on the trial of the said warrant, and was chargeable therewith; that the value thereof is \$120, with interest from November 1, 1898, and said plaintiff is therefore indebted to the defendant in said amount." The defendant had arrested and brought before a justice of the peace the plaintiff on a charge of having gotten five tons of guano from him, the defendant, under false pretense. On the trial of the action in the superior court, the plaintiff, denying that he procured the guano under a false pretense, admitted that he had received four tons at the price claimed by the defendant, and his honor, treating the averment as a set-off, though inadvertently calling it a counterclaim, gave judgment for the plaintiff for the \$500 against the defendant, less the amount of the four tons of guano, which the plaintiff admitted that he received from the defendant. The plaintiff thereupon demurred ore tenus to that section of the answer which his honor treated as a set-off on the ground that it did not take the cause of action in respect to said counterclaim, and the court had no jurisdiction of the same. The court overruled the demurrer, and rendered a judgment as above set out, and the plaintiff excepted and appealed.

The exception of the plaintiff was not to the pleading of a set-off in an action in tort, but the exception was—First, to the jurisdiction of the court, the amount of the set-off being less than \$200; and, second, to the failure of the defendant to state a cause of action in counterclaim. But it will be seen by reference to that part of the defendant's

answer that a counterclaim was not intended to be, nor was in fact, pleaded. It was only a set-off sufficiently pleaded, and the court committed no error in deducting it from the amount of the plaintiff's recovery. There was, as we have said, no demurrer to the pleading of the set-off in the action.

No error.

Defendant's Appeal.

His honor properly charged that the plaintiff's right to recover on the issue concerning malicious prosecution was dependent upon both malice and want of probable cause on the part of the defendant. In explaining the term "malice" his honor said to the jury: "Whenever want of probable cause is found by the jury, the jury may infer malice therefrom, or not; but there is no presumption of malice, simply an inference which the jury may or may not draw. The plaintiff contends that, in addition to the inference which you may draw from the want of probable cause, he has offered you evidence upon which you should find malice. There is evidence tending to show that on several occasions the defendant said if he was not paid he would put the plaintiff in the penitentiary, and tending to show that he started the prosecution to collect his money. These are circumstances to be considered by you on the question of malice. On the other hand, the defendant denies this evidence, and says he had no malice against the plaintiff; that he honestly believed that he had gotten his guano under false pretenses; and, to guard against error, he employed and consulted counsel. All of these circumstances are to be considered by you as tending to negative malice, and it is your duty to consider them carefully and impartially. Unless you find malice, although you may find want of probable cause, you will answer the issue 'No.' But if you should find both, under the rules of proof laid down as to evidence and law, you will answer the issue 'Yes.' By malice is not necessarily meant that state of mind which must proceed from a spiteful, malignant, and revengeful disposition, but it includes as well that which proceeds from an ill-regulated mind not sufficiently cautious, and recklessly bent on the attainment of some desired end, although it may inflict wanton injury on another." If no other instruction had been requested by the defendant, that charge might be sufficient on the question of malice. But the defendant requested the court to instruct the jury more particularly as follows: "By malice is meant special or particular malice; not general malice, but particular malice against the plaintiff. So, before the plaintiff can ask a verdict at your hand on the first issue, he must show you that the defendant was prompted by particular malice toward him in procuring the warrant complained of in this action, and at the same time did not have reasonable grounds or

probable cause to commence the prosecution." In *Brooks v. Jones*, 33 N. C. 260, which was an action for malicious prosecution, the court said: "The case, then, as we infer, was intended to present this question: In an action for malicious prosecution, is it sufficient for the plaintiff to show that the defendant, in instituting the prosecution, was influenced by general malice, or must he show that the plaintiff had particular malice against him? His honor thought the plaintiff must show particular malice on the part of the defendant towards him." We concur in this opinion. In actions for libel it is not necessary that the ill will or malice should exist against the plaintiff personally. *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931. The rule, however, is different in actions for malicious prosecution, as we have seen.

Error.

(131 N. C. 173)

BURNS et ux. v. WOMBLE.

(Supreme Court of North Carolina. Oct. 21, 1902.)

WRIT OF POSSESSION—TRESPASS IN EXECUTING—RELEASE OF JOINT TRESPASSER—JOINER OF WIFE IN MORTGAGE.

1. A wife who joins her husband in a mortgage with full covenants, for the purpose, as recited therein, of relinquishing her right of dower and claim to homestead, not having intervened in the action of ejectment brought by the purchaser at the mortgage sale against her husband, cannot maintain trespass for execution of the writ of possession issued on the judgment for plaintiff in ejectment, though, after the giving of the mortgage, she received a deed for an interest in the property from a third person.

2. Release of a sheriff from liability for trespass in executing a writ of possession releases the plaintiff in the writ.

Douglas, J., dissenting in part.

Appeal from superior court, Chatham county; Neal, Judge.

Action by G. B. Burns and wife against J. W. Womble. Judgment for plaintiffs, and defendant appeals. Reversed.

Womack & Hayes and H. A. London, for appellant.

FURCHES, C. J. On the 14th of February, 1888, the plaintiff G. B. Burns made and executed a mortgage to S. T. Womble for the tract of land on which he resided, with full covenants of warranty and seisin, in which the plaintiff Martha, who is the wife of the plaintiff G. B. Burns, united. It is stated in the mortgage that the plaintiff Martha joined in the deed for the purpose of relinquishing her right of dower and claim to homestead. The mortgage contained the usual power of sale upon default of payment, and upon such default the mortgagee sold said land, and the defendant became the purchaser, and took a deed therefor from the mortgagee. Upon the plaintiff's refusing to surrender possession to the defendant, he commenced an action of

ejectment against the plaintiff G. B. Burns in the superior court of Chatham county. In this action for possession the plaintiff therein (the defendant in this action) set forth in his complaint the making of the mortgage to S. T. Womble, the sale and purchase by him, that he is thereby the owner of the land, and demands possession. The defendant (G. B. Burns) answered, admitting the execution of the mortgage as alleged in the complaint, but saying that he had not sufficient knowledge of the facts stated in the second paragraph of the complaint to admit it, and therefore denies the same; and he denied that the plaintiff was the owner of the land mentioned in the mortgage and in the complaint. At May term of said court the case came on for trial upon the issues raised by the complaint and answer, and the court submitted this issue: "Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint?" and the jury answered, "Yes." And upon this issue being found for the plaintiff, his honor Judge Allen, on motion of plaintiff's counsel, rendered judgment as follows: "It is ordered and adjudged that the plaintiff is the owner and entitled to the immediate possession of the land described in the complaint, and that he recover his costs of the defendant, to be taxed by the clerk." And upon this judgment the clerk of said court issued an execution and writ of possession to the sheriff, in which the following language is used: "You are therefore commanded to satisfy the said judgment by dispossessing the said G. B. Burns and those holding under him, and by placing the said J. W. Womble in possession," etc. This writ was placed in the hands of the sheriff, and he was attempting to execute it when the trespass complained of was committed. It is clear that the sheriff had a duty to perform in discharge of the requirements of his office for which he would have been liable to penalties and damages if he failed in its performance. All he could do was to see that the judgment was regular, and authorized the issuance of the writ, and then to execute the same. Whether the plaintiff G. B. Burns was the owner of the land or not, he had made his deed (the mortgage), in which he alleged and covenanted that he was the owner in fee simple; and he was certainly estopped to deny that he was the owner, and has no right to complain that he has been dispossessed by a judgment of the court and a writ of possession. The wife, the feme plaintiff, was a party to the mortgage, signed and duly executed the same, in which she covenanted that her husband, G. B. Burns, was the fee-simple owner, "and had the right to make" said mortgage. But she now claims that on the 11th of January, 1895, M. T. Burns made her a deed to one undivided fourth of said land, and that she is now the owner thereof. This may be so, but, if it is, the sheriff could not take her word for that, and not discharge the duties of his office in

executing the process of the court. If she was the owner of one-fourth part of this land, or any other part, she had the right to intervene, make herself a party to the action of Womble against her husband, and set up her claims, whatever they are, and have them passed on by the court. Cecil v. Smith, 81 N. C. 285; Taylor v. Apple, 90 N. C. 343; Young v. Greenlee, 82 N. C. 346. Suppose the plaintiff Martha had not gotten a deed from M. T. Burns (dated January 11, 1895), will it be contended that the sheriff would have committed a trespass on the plaintiffs in this action by removing them and their effects from this land in obedience to the execution then in his hands? And the fact that she had a deed (which she did not even show to the sheriff) can make no difference. Suppose that Burns had been the tenant of A., and Womble had brought his action of ejectment against him, A. would have had the right to intervene and set up his title to the land, and, if he sustained his title, Womble would not have been entitled to a writ of possession. But suppose he sat by, and did not intervene, and Womble recovered judgment declaring that he was the owner and entitled to the immediate possession, would it be contended that A. would be allowed to meet the sheriff on the premises, and defy his authority to dispossess Burns? As A. was not a party, he would not be estopped to bring an action, and assert his title against Womble, if he had any. But he would not be allowed to enforce his claim by preventing the sheriff from executing the process of the court. The plaintiff Martha stands in the same condition as A. would have stood, as it will appear from the cases already cited. The sheriff being authorized to dispossess the plaintiffs, he committed no trespass for which he is liable for damages, unless it be on account of the manner in which he executed the process. And, although the plaintiffs allege that it was done with great violence, the evidence does not seem to sustain that allegation, and, if it did, that matter is not before us, as the plaintiff did not appeal. The right of the plaintiffs to recover against the defendant depends upon the unlawful acts of the sheriff, and, as we are of the opinion that he was authorized to do what he did, the plaintiff's action must fail. But it further appears that the plaintiffs had compromised with the sheriffs Jenkins and Johnson for the alleged trespass for which this action is brought, for which they received \$135 from each one of them. This was a discharge of the defendant Womble. A party may have an action against each of several trespassers, but the satisfaction of one judgment is a satisfaction and discharge of all; and a compromise and discharge of one is a discharge of all. Kirkwood v. Miller, 73 Am. Dec. 144, 145, notes, and authorities there cited; Patterson v. Manufacturing Co. (Minn.) 4 L. R. A. 744, 745, notes (s. c. 42 N. W. 926). And this is held to be so although the plaintiff stipulates

that it is not to be a discharge of the others. Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534.

There is error.

DOUGLAS, J. I concur in the opinion of the court only in so far as it holds that the release of the sheriffs by the plaintiff operated as a release of the defendant. I cannot concur in the remainder of the opinion, either upon reason or authority; nor is it at all necessary to do so for a determination of this case. It may at times create unmerited hardship, but I feel compelled to adhere to the principles laid down by this court in Smith v. Ingram, 130 N. C. 100, 40 S. E. 984. It should be remembered that in the case at bar the plaintiff is, and was at the time of the eviction, a married woman; that she was not a party to the action of ejectment; and that she held possession of the land from which she was evicted as a tenant in common under a title admittedly good, and entirely disconnected from her husband. As is said in the opinion of the court, it is stated in the mortgage that the plaintiff Martha joined in the deed for the purpose of relinquishing her right of dower and claim to homestead. She acquired one undivided fourth of the land after the execution of the mortgage, which, therefore, could not possibly have been conveyed in the mortgage. To say that a married woman is estopped by any covenants of warranty contained in a deed professedly made for the sole purpose of conveying only her dower and homestead is an extension of the doctrine of "feeding an estoppel," which I am not prepared to accept. Neither can I admit that a married woman can lose her rights of property by failing to intervene in a suit to which she then plaintiff did not see fit to make her a party.

(131 N. C. 168)

SHANKLE v. WHITLEY.

(Supreme Court of North Carolina. Oct. 21, 1902.)

PREMATURE APPEAL—REFERENCE—COUNTERCLAIM—ESTOPPEL.

1. Where a referee is appointed to take and state an account after verdict, an appeal before final judgment on the coming in of the referee's report is premature.

2. The fact that a defendant might, had he chosen, have pleaded a counterclaim in a former action against him by the plaintiff, brought for a different cause of action, did not estop defendant to set it up in a subsequent suit.

Douglas, J., dissenting.

Appeal from superior court, Richmond county; McNeill, Judge.

Action by W. F. Shankle, survived after his death in the name of Sallie Shankle, administratrix, against Green Whitley. Judgment for defendant, and the administratrix appeals. Dismissed.

Jas. A. Lockhart, for appellant. Morrison & Whitlock, for appellee.

CLARK, J. Upon the issues found by the jury it was necessary to have an account taken, and the cause was referred to a referee to state the account. It was premature to appeal before the final judgment upon the coming in of the report. *Blackwell v. McCain*, 105 N. C. 460, 11 S. E. 360, and numerous cases there cited. The plaintiff should have merely entered his exception at this stage. *Williams v. Walker*, 107 N. C. 334, 12 S. E. 43. A distinction must be noted between those cases in which the plea in bar is sustained, or overruled as a matter of law by the judge, whereupon the party may appeal at once, if he so elect (*Royster v. Wright*, 118 N. C. 155, 24 S. E. 746, and cases there cited; *Smith v. City of Goldsboro*, 121 N. C. 350, 28 S. E. 479), and cases like this, where the issues arising upon the pleadings have been found by the jury, and the reference is afterwards made to state an account, or ascertain some incidental matter, which becomes necessary before final judgment upon the hearing. Even in the first class of cases it is optional to note an exception or appeal at once. *Kerr v. Hicks* (at this term) 42 S. E. 532. It may not be improper to say, as the case was fully discussed on the merits, that the defendant was not estopped to set up his counterclaim in this action, because he might, if he had chosen, have pleaded it in a former action against him by the plaintiff, brought for a different cause of action. The pleading of a counterclaim is optional. *Woody v. Jordan*, 69 N. C. 189; *Tobacco Co. v. McElwee*, 94 N. C. 425.

Appeal dismissed.

DOUGLAS, J. (dissenting). I do not think the appeal is premature.

(181 N. C. 725)

STATE v. FREEMAN.

(Supreme Court of North Carolina. Oct. 28, 1902.)

ARSON—THREATS—EVIDENCE—SUFFICIENCY.

1. The only evidence against one on trial for the crime of burning a barn, with live stock,—Code, § 985 (6),—was threats made by him, with no evidence connecting him with the execution of the threats, or with the offense charged. *Held*, that the case should have been taken from the jury.

Appeal from superior court, Guilford county; Neal, Judge.

J. L. Freeman was convicted of burning a barn, with live stock, and he appeals. Reversed.

C. M. Stedman and A. W. Cook, for appellant. The Attorney General, for the State.

PER CURIAM. Indictment for burning a barn, with live stock, under Code, § 985 (6). The only evidence against the defendant was threats made by him, without any evidence whatever connecting him with the execution

of said threats or with the offense charged. The judge should, as prayed, have withdrawn the case from the jury. *State v. Rhodes*, 111 N. C. 647, 15 S. E. 1038, is exactly in point. Indeed, the attorney general, with commendable frankness, conceded as much on the argument here.

Error.

(181 N. C. 178)

QUEEN CITY PRINTING & PAPER CO. v. McADEN.

(Supreme Court of North Carolina. Oct. 21, 1902.)

AVOIDING CONTRACT—FALSE REPRESENTATIONS—PLEADING—EVIDENCE.

1. Evidence, in action on a subscription for stock of plaintiff corporation, *held* sufficient to show material false representations, inducing defendant to subscribe for stock of plaintiff corporation, known to plaintiff's president and agent, who made them, to be false, and therefore authorizing defendant to avoid the subscription.

2. Defect in an answer expressly alleging all the facts material and necessary to show false representations, making defendant's contract voidable, except that plaintiff knew when the representations were made that they were untrue, is waived by failure to demur as required by Code, § 248, when the answer contains new matter which on its face does not constitute a defense.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Action by Queen City Printing & Paper Company against Henry M. McAden. Judgment for plaintiff. Defendant appeals. Reversed.

This action is brought to recover the amount (\$500) subscribed by defendant for 10 shares of stock in plaintiff company. Defendant resisted a recovery upon the grounds (among others not necessary now to be stated or discussed) that plaintiff, through its agent and president, H. A. Murrill, induced the subscription by false representations. Upon the trial the defendant in his own behalf testified that: "Between the 16th and 20th of April, 1900, Mr. Murrill came to me with the subscription list introduced in evidence. He had other papers with him, or at least told me he had, but I did not see them. He told me that he and J. P. Wilson and George B. Hiss and others had been talking about reorganizing the Queen City Printing & Paper Company, and wanted me to help him; that he, J. P. Wilson, E. A. Smith, and George B. Hiss had agreed to take most of the stock, and would take it all, but wanted a few outsiders for their influence, and that George B. Hiss had recommended and sent him to me. He said George B. Hiss would be treasurer of the company, and that George B. Hiss, J. P. Wilson, and E. A. Smith would be large stockholders, and that George B. Hiss would be actively in charge of the financial part of the business. I said to him: 'I don't know anything about your business, but if George B. Hiss is going to

¶ 1. See *Arson*, vol. 4, Cent. Dig. § 71.

be a stockholder and manage the thing, and I can be of any assistance to you, I will be glad to take some stock. I suppose you want only a small subscription. I will subscribe for three shares, or \$150.00.' He said, 'You might as well make it \$500.00.' I replied, 'Well, if George B. Hiss is going to be interested and manage this concern, and asks for my help, we will make it \$500.00.' I then signed my name for \$500.00. At that time George B. Hiss and I were associated in a number of business enterprises, and we had been accustomed to help each other out. If Mr. Hiss wanted help, I would help him, and vice versa. Mr. Murrill told me that Mr. Hiss had sent him to me. * * * I said to him, 'Why is it that Mr. Wilson and Mr. Hiss have not subscribed?' He said, 'They haven't subscribed their names, because they expect to take whatever stock is left, and don't know now what to put down,' and he further said that Wadsworth and Franklin had authorized him to put their initials on the list, but had not signed themselves because they were constantly being solicited to take stock in companies, and didn't want everybody to be bothering them, but that they were going to be stockholders in the company. Mr. Hiss is a splendid business man, and I had absolute confidence in him. When Mr. Murrill came to see me, he stated that he knew I had great confidence in Mr. Hiss. I told Mr. Percy Thompson what I have told here. Some time before the meeting, which was held on the 26th of April, 1900, Mr. Murrill came back to see me, and said: 'It may be Mr. Hiss is so busy in other matters that he can't become treasurer. Would some other good man do for treasurer?' I said, 'Any reliable man that the stockholders may agree on for treasurer will be satisfactory to me.' He then said, 'Would Mr. D. W. Oates do?' and I replied, 'If Mr. Oates is satisfactory to a majority of the stockholders as treasurer, he will be satisfactory to me.' He showed me a paper from Mr. Oates, stating that he would accept the position. I then said to him, 'Well, what about Mr. Hiss?' He said, 'He is a stockholder, and will give it as much of his time as his business will permit, and will be interested in the management of the company.' I then said to him, 'I take the stock on account of my friendship for Mr. Hiss, and because it has been represented to me that he wanted me to take it.' This representation was what had caused me to sign the subscription list. I told Mr. Murrill of my friendship for Mr. Hiss, and of the different things we were interested in together. Mr. Murrill told me that the corporate stock of the reorganized company was to be \$15,000; that he did not want a large subscription from outsiders, because Mr. Smith, Mr. Wilson, and Mr. Hiss expected to be large stockholders. Mr. Wilson and Mr. Smith are highly successful business men. The main reason why I signed the subscription list was

because Mr. Murrill stated to me that Mr. Hiss was going to be a large stockholder and take an active interest in the company, and I was willing to intrust my money in the enterprise on account of my confidence in Mr. Hiss. Afterwards I had a conversation with Mr. George B. Hiss and Mr. J. P. Wilson. In consequence of what they said to me, I went and saw Mr. Murrill before the meeting, which was held on the 26th of April, and stated to him that things had been misrepresented to me, and that Mr. Hiss had told me that he was not a stockholder and had never intended to be, and had not suggested Murrill's going to see me, and would have nothing to do with the management of the concern. I told Mr. Murrill that I withdrew my subscription. I got the notice of the meeting of the 26th of April, 1900, after this conversation with Mr. Murrill. After the notice, and on the day set for the meeting, I went to see Mr. Murrill again, and repeated to him what I have just stated, adding that I was not liable on the subscription and would not come to the meeting. It was stated in the notice that the meeting would be held for the reorganization of the company on the 26th of April, 1900. Mr. P. M. Thompson was with me when I had the last conversation with Mr. Murrill. Mr. Murrill didn't deny what I said, but said to me, 'I am not in a position to release you, and it will break up the whole thing if you drop out.' He said, 'You come to this meeting, and I will find a way afterwards to take the stock off your hands.' I said to him, 'If I come to your meeting I will make it so hot for you that I had better stay away.' * * * My refusal to go into the company was because of the representation that Mr. Hiss was going to be a stockholder and actively interested in the business. The fact that this representation was not true was the reason that I refused to go into the company. * * *

The case on appeal states that "upon the conclusion of the evidence the court ruled that the representations which defendant, McAden, testified had been made to him by Murrill were insufficient to invalidate McAden's subscription to the stock upon the grounds, as contended by defendant, that said subscription was induced by said representations, were false, and constituted a condition to the subscription which had not been complied with, and that the jury would not be permitted to consider said representations for the purpose of finding the subscription invalid upon the grounds aforesaid"; to which defendant excepted. There was a verdict for plaintiff. Motion for new trial refused, and defendant appealed.

Defendant contends that the evidence of defendant must be taken as true, as the court ruled it out upon the ground that it was insufficient in law to establish any defense to the plaintiff's claim; and assuming that the subscription of McAden was in-

duced by the false representations that Hiss had agreed to become a stockholder and to take an active part in the management of the business of the company, and that plaintiff's agent had been sent by it to defendant to request him to take stock, then such representations were material, and that the court erred in its ruling.

Plaintiff contends that this evidence was immaterial and insufficient to invalidate the contract of subscription, and that its consideration was properly excluded by the court upon the grounds that the allegations in the answer do not state facts constituting fraud, in that they do not allege that the falsity of the representations was known to plaintiff, and insist that it was necessary for defendant to have alleged and proved the same.

Burwell, Walker & Cansler, for appellant. C. W. Tillett and T. C. Guthrie, for appellee.

COOK, J. (after stating the facts). From the ruling of his honor we understand he held that, taking McAden's evidence to be true, it was immaterial and insufficient to make out such a case of fraud as would rescind the contract of subscription, and in this we think there was error. To constitute the fraud, there must have been a representation express or implied, false within the knowledge of Murrill, reasonably relied on by defendant, and constituting a material inducement to the contract. Adams, Eq. 177. From the evidence of McAden it clearly appears that the representations made to him by Murrill, and upon which he relied, were false; that they were material to the inducement, for otherwise he would not have signed the subscription list. The nature of the transaction shows that Murrill was speaking as of his own knowledge ("Murrill told me that Mr. Hiss had sent him to me;" "he [Hiss] is a large stockholder;" "I went to see Murrill again, and repeated to him what I have just stated; * * * Murrill did not deny what I said"), and therefore the falsity of the representations must have been known to him. If this be so, then the subscription was induced by fraud, and voidable at the option of defendant, which he promptly repudiated, without laches. Clark, Corp. 283 et seq.; 1 Cook, Stock, Stockh. & Corp. Law, §§ 151, 161; Henderson v. Lacon [1867-68] L. R. 5 Eq. 249; Ross v. Investment Co., 3 Ch. App. 682.

The contention of plaintiff as to the failure to allege knowledge by Murrill of the falsity cannot be sustained. It is true that such knowledge should have been expressly pleaded, for otherwise the answer would be demurrable, and the answer does not allege that Murrill knew that the representations he made were false; but plaintiff did not demur to it, as he should have done (Code, § 249) had he desired to take advantage of such defects in the answer. So we have a defective

statement of defendant's grounds of defense, which must be deemed to have been waived under the principle well settled and fully discussed in Halstead v. Mullen, 93 N. C. 252; Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190; Martin v. Martin, 130 N. C. 27, 40 S. E. 822. In those cases the exceptions were taken to defects appearing in the plaintiff's complaint, while in the case at bar they are taken to the allegations made in the answer, which sets up an affirmative defense, with the burden of proof on defendant, and is subject to those rules which apply to a complaint. The facts relied upon as the basis of a defense must be set out in the answer with the same precision as is required in a complaint. Anderson v. Logan, 105 N. C. 266, 11 S. E. 261; Rountree v. Brinson, 98 N. C. 107, 3 S. E. 747. The answer expressly alleges all the facts material and necessary to constitute the fraud, except that plaintiff knew that his representations were untrue at the time he made them to defendant, of which no advantage was taken by demurrer. Had plaintiff demurred to the answer, stating such defect as his grounds, it could have been easily remedied by amendment (Ladd v. Ladd, and Martin v. Martin, supra) had defendant been so advised.

As there will have to be a new trial, we deem it unnecessary to discuss the other questions raised in this appeal. New trial.

(131 N. C. 212)

MORRIS v. LIVERPOOL, L. & G. INS. CO.
(Supreme Court of North Carolina. Oct. 28, 1902.)

JUDGMENTS—DEFAULT—EXCUSABLE NEGLIGENCE—MOTION—HEARING—APPEAL.

1. Under Code, § 274, providing that a judge may, "in his discretion," set aside a judgment by default for excusable neglect of the defendant, if the judge find excusable neglect, but refuses to set aside the judgment, his action is not reviewable.

2. The findings of fact by the judge as to the excusable neglect are conclusive, except when there is no evidence to support them.

3. Whether the facts found constitute excusable neglect is a conclusion of law, reviewable on appeal.

4. A summons, returnable at the January term, was properly served on defendant's local agent; but he informed the sheriff that the service should be made on the general agent, and made the same remark to plaintiff's counsel, who merely answered that he "thanked him for the information." At the return term a verified complaint was filed, and judgment by default and inquiry was entered. At the March term the inquiry was had, and final judgment rendered on the verdict; but defendant had no actual knowledge thereof until May, when he moved to set the judgment aside. Held, that the agent's neglect was the neglect of the defendant, and was inexcusable, and the judgment would not be set aside.

Appeal from superior court, Durham county; Neal, Judge.

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 3323.

Action by B. Morris, trading as B. Morris & Sons, against the Liverpool, London & Globe Insurance Company. Judgment for plaintiff by default. From the court's action in overruling a motion to set aside the judgment, defendant appeals. Affirmed.

Hinsdale, Lawrence & Hinsdale, for appellant. Jones Fuller, for appellee.

CLARK, J. This is a motion to set aside a judgment for excusable neglect, under Code, § 274. The findings of fact by the judge are conclusive, except when there is no evidence to support them. *Koch v. Porter*, 129 N. C. 132, 39 S. E. 777; *Clark's Code* (3d Ed.) p. 311. Whether the facts found constitute excusable neglect is a conclusion of law, reviewable on appeal. But, if there is excusable neglect, whether the judge shall then set aside the judgment or not rests "in his discretion," by the terms of section 274, from which an appeal lies only when there has been a clear abuse of such discretion. *Wyche v. Ross*, 119 N. C. 174, 25 S. E. 878; *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476. The discretionary power only exists when excusable neglect has been shown. *Stith v. Jones*, 119 N. C., at page 431, 25 S. E. 1022; *Brown v. Hale*, 93 N. C. 188; *Simonton v. Lanier*, 71 N. C. 498.

The facts found in this case are that the summons was served on the local agent of the defendant at Durham January 4, 1902, returnable to the superior court of that county which began January 20th. Said agent was a proper party upon whom service could be made (Code, § 217); but he informed the sheriff that he was not, and that the service should be made on the general agent of defendant company at Raleigh, and, soon after, meeting counsel for plaintiff, said local agent imparted the same legal information to him. The said counsel told the agent he "thanked him for the information,"—merely this and nothing more. At said January term a verified complaint was filed, and, no defense being interposed by the defendant, judgment by default and inquiry was entered up. At the March term, the inquiry was instituted before a jury, and a final judgment rendered in accordance with their verdict. The defendant had no actual knowledge of said judgment till May term, when this motion was made.

On appeal, every intendment is in favor of the judgment below. If the refusal to set aside the judgment was upon the ground that, though there was excusable neglect, the judge "in his discretion" refused to set it aside, his action is not reviewable, as section 274 vests him with that discretion. But, if it were conceded that the judge held that the facts did not constitute excusable neglect, it can require no discussion to hold that he was right. There was gross and inexcusable neglect. The agent should have notified the company

that service had been made on him, and his neglect to do so was the neglect of the principal. With the slightest attention to the case, it should have been known that a complaint was filed, and that inquiry before a jury was to be instituted at the next term. As calendars of causes for trial are usually printed in the newspapers in a town like Durham (though there is no finding by the judge on this point), it is strange that the agent, or some one in the employ of the company, as attorney or otherwise, did not take notice of the matter. *Henry v. Clayton*, 85 N. C. 371.

The nearest case upon the facts is *Churchill v. Insurance Co.*, 88 N. C. 205, where the defendant supposed that in law it was not required to answer till a copy of the complaint was served upon it. The court held that this was inexcusable neglect, as was here the somewhat similar error in law of the agent in supposing that the summons could not be served upon him. Action founded upon a mistake in law is not excusable neglect. *White v. Snow*, 71 N. C. 232, and *Williamson v. Cocke*, 124 N. C. 585, 32 S. E. 963, in which cases the defendant misconceived the legal purport of a summons served on him. In this last case it was said by Faircloth, C. J., at page 590, 124 N. C., and page 964, 32 S. E.: Such "negligence cannot be held a sufficient ground for setting aside a regular judgment, entered up in consequence of inattention on the part of defendant to an important duty. The courts must proceed with business in a reasonable way or forfeit their usefulness to the public." In *DePriest v. Patterson*, 85 N. C. 376, the defendant, who was sick and unable to leave home, told the officer he thought he was serving the summons on the wrong man, and understood the officer to promise to ascertain whether he was or not, and let him know before returning the summons, but did not, and judgment was taken against him. It was held that it was inexcusable neglect for the defendant not to look after the case, and the judgment was not set aside.

It was argued here that the agent was misled by the plaintiff's counsel thanking him for his legal advice. The judge does not find that in fact he was misled, and we cannot assume that he was. He could not have been reasonably misled thereby. The duty of the agent was to have informed his company of the fact, which he knew, that the summons had been served on him, instead of advising the counsel of the other side as to a matter of law, which he did not know. It was inexcusable neglect to suppose that the attorney of the opposite party would be governed by his (the agent's) opinion on the law. The agent "carried his coals to Newcastle," and his employer should not be surprised that it has now to pay the freight.

No error.

(131 N. C. 195)

PICKETT et ux. v. GARRARD.

(Supreme Court of North Carolina. Oct. 28, 1902.)

DEEDS—CONSTRUCTION—MERITORIOUS CONSIDERATION—BASTARDS.

1. A conveyance granting "to J. and W., their heirs, a certain tract of land. * * * The condition of the deed is that the said W. does not come into the possession of the said land until after the death of J. To have and to hold the aforesaid tract, and all privileges and appurtenances thereto belonging, to the said J. and W., their heirs and assigns, to their only use and behoof, forever,"—conveyed the undivided half to each, and did not give J. a life estate, with remainder in fee of the entire tract to W.

2. Though the fact that a grantee was the illegitimate son of the grantor may not show a meritorious consideration for the grant, it does not deprive the grantee from showing a meritorious consideration by evidence that the grantor stood in loco parentis to him.

Appeal from superior court, Durham county; Neal, Judge.

Proceedings for partition by L. G. Pickett and wife against W. W. Garrard. From a decree for plaintiffs, defendant appeals. Reversed.

Boone, Bryant & Biggs, for appellant. Winston & Fuller, for appellees.

FURCHES, C. J. The feme plaintiff, Mary Pickett, is the legitimate daughter of Waine Garrard, and the defendant, W. W. Garrard, is the illegitimate son of Waine Garrard. This is alleged by the defendant and admitted by the plaintiffs. Martha Garrard was the wife of Waine Garrard and mother of Mary Pickett, but not the mother of the defendant. On the 15th day of April, 1887, Duane (D. W.) Garrard made and executed the following deed, to wit: " * * * Witnesseth that said Duane Garrard, in consideration of one dollar and fifty cents to him paid by Martha J. Garrard and W. W. Garrard, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain and sell and convey, to said Martha J. and W. W. Garrard, their heirs, a certain tract or parcel of land in Durham county, state of North Carolina, adjoining the lands of Gaston Pickett, W. O. Cole, C. G. Marcom, and others, bounded as follows, viz.: * * * Containing one hundred and forty-eight acres of land, more or less. The condition of the deed is that the said W. W. Garrard does not come into the possession of said land until after the death of Martha J. Garrard. To have and to hold the aforesaid tract of land, and all privileges and appurtenances thereto belonging, to the said Martha J. and W. W. Garrard, their heirs and assigns, to their only use and behoof, forever. And the said Duane Garrard covenants that he is seised of said premises in fee and has the right to convey the same in fee simple, that the same are free and clear from all incumbrances, and that he will warrant and defend the said title to the

same against the claims of all persons whatsoever. In testimony whereof the said Garrard has hereunto set his hand and seal the day and year above written. [Signed] D. W. Garrard. [Seal.] Attest: L. G. Pickett, J. B. Gates." And, Waine Garrard and Martha Garrard both being dead, the plaintiff Mary claims that said deed conveyed one undivided half of said land to the defendant and the other half to her mother, which descended to her, upon the death of her mother, as her only child and heir at law; and, so claiming, this action was commenced as a special proceeding for partition, but, upon the defendant's pleading sole seisin, it was transferred to the superior court in term for trial.

The defendant contends that a proper construction of this deed gave the wife, Martha, a life estate and the remainder to him in fee simple, but, if it does not do this as it was written, it should have done so; that it was the intention of the said Duane Garrard to convey the land to Martha for life and the remainder to him in fee, and, if it did not, it was because of the mutual mistake of the parties and the ignorance of the draftsman; that it was delivered and accepted by the grantee with the understanding and belief that it did so convey said land, and, if it does not, the defendant asks that it may be reformed so as to carry out the intention of the parties, and so as to convey the fee simple to him. As the deed is written, we cannot sustain the contention of the defendant that it gives him the fee simple estate in the whole of the land after the death of Martha. It seems to us that it conveyed the land to Martha and the defendant as tenants in common, but the defendant was not to have the possession and enjoyment of his part until after the death of Martha; or, in other words, we sustain the contention of the plaintiffs as to the construction of the deed as it now stands.

This leaves but one matter for our consideration (as the error committed in refusing to allow the defendant to show that he paid 75 cents as a consideration is harmless), and that is whether the fact that the defendant is a bastard will deprive him of the benefits arising from a "meritorious consideration." The plaintiffs contend that it does. And it seems that the fact that the defendant is the natural son of Waine Garrard of itself would not be a meritorious consideration. *Ivey v. Granberry*, 68 N. C. 223. But the facts in that case did not present the question of loco parentis, and that question is not discussed, nor decided in that opinion. But many authorities hold that the relation of loco parentis does create a meritorious consideration upon which courts of equity will give relief. *Powell v. Morisey*, 98 N. C. 426, 4 S. E. 185, 2 Am. St. Rep. 343; *Hunt v. Frazier*, 59 N. C. 90; 2 Pom. Eq. Jur. § 588; *Adams, Eq. *98*; *Ex parte Pye*, 18

Ves. *140, *144, *145; Ex parte Du Bost, Id. The defendant claims that Waine Garrard took him to his house when he was only four or five years old, and he lived with him until his death as a member of his family, calling Waine father and his wife mother; and these and many other facts will show that the relation of in loco parentis existed between him and Waine Garrard, and that Waine stood in the place of a father to him. He also offered to show that the plaintiff Mary had been provided for by her father, Waine Garrard, in conveying to her other lands of equal value to this. But the court, being of opinion that the fact that the defendant was the natural son of the grantor debarred him from all benefits of an equitable nature, rejected this evidence. We have found no authority debarring the defendant from the benefits growing out of the relation of in loco parentis, because he was the natural son of Waine Garrard; and we see no reason for doing so, except it would be as a punishment for a misfortune for which he was in no wise responsible. We are therefore of the opinion that the relation of in loco parentis furnishes a meritorious consideration, upon which courts of equity will act, and the defendant had the right to show that this relation existed between him and the maker of the deed, if he could, and, if he succeeded in doing this, then to show ground for reforming the deed, if he could.

This, we think, disposes of all the matters presented by the appeal; and we prefer not to go further, but to leave the court, on a new trial, free to act upon such issues of fact and questions of law as may then arise.

New trial.

(181 N. C. 717)

STATE v. MacKNIGHT.

(Supreme Court of North Carolina. Oct. 21, 1902.)

PRACTICING MEDICINE—LICENSE—OSTEOPATHY.

1. Code, § 3132, as amended by Laws 1885, c. 117, declaring it a misdemeanor for one to practice medicine or surgery for fee or reward without obtaining a license from the board of examiners, is not violated by one practicing osteopathy,—he using neither drugs, medicine, nor surgery, though on two occasions using a surgeon's knife to open an abscess, but charging no fee for his service, and though advertising as "doctor," he having a diploma from a college of osteopathy giving him that title; the examination required by section 3124 of applicants to practice medicine or surgery covering subjects most of which are useless to an osteopath.

Appeal from superior court, Moore county; Robinson, Judge.

Harry P. MacKnight, indicted for practicing medicine without a license, was acquitted, and the state appeals. Affirmed.

Indictment for practicing medicine without license. The jury returned the following special verdict: "That the defendant advertised in the Free Press, a newspaper pub-

lished in Southern Pines, Moore county, North Carolina, before the finding of the bill of indictment herein, his profession or business in the following words, to wit: 'Dr. Harry MacKnight. All acute and chronic diseases successfully treated without drugs or medicines. Office hours: Nine to eleven a. m.; two to five p. m.; seven to eight-thirty p. m. Second floor brick building, opposite depot.' That about the first of the year 1902 the defendant came to Southern Pines, in Moore county, opened an office, at the door of which he placed his sign in these words, 'Office of Dr. Harry MacKnight,' and began the treatment of acute and chronic diseases without drugs or medicines. That the defendant had numerous patients, and claimed to treat as many patients as any other physician in Southern Pines. That his treatment of said patients did not consist in the administration of drugs or medicines, but in manipulation, kneading, flexing, and rubbing the body of his patients, and in the application of hot and cold baths, and in prescribing rules for diet and exercise, and made use of these different processes for different patients. That the defendant took supreme charge of the cases of his patients, with a view of effecting a cure and restoring his patients to sound bodily health. That the defendant was engaged in the general practice of osteopathy, and professed to effect the cure of diseases by the practice of that science. That he also practiced hypnotism and suggestion under hypnotism, such as deep breathing, and magnetic healing, and the like, for the purpose of effecting a cure and restoring his patients to sound bodily health. That the defendant exhibited a diploma issued by the Columbia College of Osteopathy, duly incorporated under the laws of Illinois, conferring upon the defendant the degree of Doctor of Osteopathy, dated May 13, 1900, but the defendant was not licensed to practice medicine or surgery, or any of the branches thereof, nor to prescribe for the cure of diseases for fee or reward, as required by chapter 34 of the Code of North Carolina, and the amendments thereto. That the defendant charged a fee or reward for his services in the treatment of his patients. That upon two occasions he used a small surgeon's knife in opening an abscess in the mouth of one Shedd, but charged no fee for his services. That all the foregoing facts took place in Moore county, North Carolina, prior to the finding of the bill of indictment, and during the year 1902. If, upon the foregoing finding of facts, the court adjudges the defendant guilty, then the jury find him guilty; and, if the court adjudges the defendant not guilty, the jury returns for its verdict not guilty." The court being of opinion that the defendant was not guilty as charged in the bill of indictment, the jury, in accordance therewith, returned a verdict of not guilty, and judgment was entered discharging the prisoner.

The Attorney General and W. J. Adams, for the State. Harry P. MacKnight, in pro. per.

CLARK, J. Chapter 117, Laws 1885, amending Code, § 3132, under which this bill was drawn, reads as follows: "Section 3132. And any person who shall begin the practice of medicine or surgery in this state, for fee or reward, after the passage of this act, without first having obtained license from said board of examiners, shall not only not be entitled to sue for or recover, before any court, any medical bill for services rendered in the practice of medicine or surgery, or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned at the discretion of the court for each and every offence: provided, that this act shall not be construed to apply to women who pursue the avocation of a midwife; and provided further, that this act shall not apply to regularly licensed physicians and surgeons resident in a neighboring state." This last clause has since been modified. Laws 1889, c. 181. The constitutionality of this act was discussed and affirmed *State v. Call*, 121 N. C. 643, 28 S. E. 517. The simple question, therefore, upon the facts set out in the special verdict, is whether one who practices "osteopathy" is indictable if he has not procured the license required for any one by the above section before beginning "the practice of medicine or surgery."

The special verdict finds that the defendant's "treatment of his patients did not consist in the administration of drugs or medicines, but in manipulation, kneading, flexing, and rubbing the body of his patients, and in the application of hot and cold baths, and in prescribing rules for diet and exercise; * * * that the defendant was engaged in the general practice of osteopathy, and professed to effect the cure of diseases by the practice of that science; that he also practiced hypnotism and suggestion under hypnotism." It is also found that "upon two occasions he used a small surgeon's knife in opening an abscess in the mouth of one Shedd, but charged no fee for his services." The only surgery was "without fee or reward," an act of charity, and that was incidental, and not in the usual course of the practice of osteopathy. It cannot be said that one "practices medicine and surgery" when he uses neither drugs, medicine, nor surgery. Section 3124 requires the "board of medical examiners" to examine all applicants "to practice medicine or surgery" in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, and the practice of medicine," almost all of which would be useless knowledge to exact of an osteopath, who declines to use medicine, drugs, or surgery,

and whose treatment consists solely in kneading, flexing, and rubbing the body, applying hot and cold baths, and prescribing diet and exercise. It cannot be conceived that the legislature would require the above examination for a profession which eschews the use of drugs and surgery. The medical society of this state, being "allopaths," would certainly not recognize an "osteopath" as one of their body, any more than they would a "homeopath," nor license any one to pursue that calling with their diploma as his authority so to do; and if they would not, and we were to hold it indictable to practice osteopathy without such license, it would be a judicial prohibition upon the exercise of that phase of healing.

In *Smith v. Lane*, 24 Hun, 632, construing a statute very similar to ours, it is said: "To entitle a person to a certificate under this provision, it would be necessary that he should be qualified to practice either medicine or surgery in all its branches. If that was not made to appear, he could receive no certificate under the provisions of this act. For that reason, it appears to be quite manifest that the object of the legislature in the enactment of this chapter was only to provide for regulating the practice of 'medicine' or 'surgery,' as those terms are usually and generally understood; and, confining them to such significance, it is evident that they would not include the occupation of the plaintiff. The practice of medicine is a pursuit very generally known and understood, and so, also, is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations, usually performed by surgical instruments or appliances. It was entirely proper for the legislature, by means of this chapter, to prescribe the qualifications of the persons who might be intrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other manner. * * * No such danger could possibly arise from the treatment to which plaintiff's occupation was confined." In *State v. Liffing*, 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358, the same conclusion was reached, and also in *Nelson v. Board* (Ky.) 57 S. W. 501, 50 L. R. A. 383. From this last case we learn that osteopathy originated with Dr. A. T. Still of Kirksville, Mo., in 1871, and that at a college of osteopathy in that state in 1900 (when that opinion was filed) there were over 500 students from 29 states, besides several from Canada. And there are doubtless other colleges of osteopathy, for the special verdict finds that the defendant exhibited a diploma from the Columbia College of Osteopathy in Illinois.

It is argued to us that the science, if it be a science, of osteopathy, is an imposition. Of that we, judicially speaking, know nothing.

It is not found as a fact in this verdict. We only know that the practice of osteopathy is not the "practice of medicine or surgery" as commonly understood, and therefore it is not necessary to have a license from the board of medical examiners before practicing it. If it is a fraud and imposition, and injury results, the osteopath is liable both civilly and criminally. Certainly "baths and diet" could be advantageously prescribed to many people. Rubbing is well enough, if the patient is not rubbed the wrong way. The real complaint is that osteopaths restrict themselves to these remedies, and do not resort to drugs and surgery; but that very fact establishes that they do not violate the law requiring a license to practice medicine and surgery. Doubtless there is an appeal to the imagination, but that is a necessary ingredient in all systems of healing. Who does not know that a prescription by a physician in whom the patient has implicit confidence is oftentimes more effective than the same treatment by one in whom he has none, and that at times bread pills and other harmless prescriptions are administered with good results? The aim of medical science, which is now probably the most progressive of all the professions, is simply to "assist nature." Osteopathy proposes to do that by other methods than by the use of medicines or the surgeon's knife.

We attach no weight to the argument that the defendant hung out his sign and advertised himself as "Doctor." The special verdict finds that he had a diploma from a college of osteopathy bestowing that title upon him. There are many kinds of doctors, besides doctors of medicine,—as doctors of laws, doctors of divinity, doctors of physics, and veterinary doctors, and others still. Besides, in this country, so far, at least, as titles go, "honors are easy." We know from common knowledge that druggists' clerks are ordinarily addressed as "doctor," justices of the peace are usually called "judge," and a teacher of the saltatory art always styles himself "professor," while "Yarborough House colonels" and "honorables" by courtesy of like tenor are almost as

"Thick as autumnal leaves that strew the brooks
In Vallombrosa."

Certainly the courts cannot abate a man as a nuisance because some one gives him, or he gives himself, a title.

If the general assembly shall deem osteopathy a legitimate calling, it may see fit, possibly, to secure educated and skilled practitioners by requiring an examination and license by learned osteopaths of applicants for license; but certainly the examination would be on subjects appropriate to secure competency therein, and not on an entirely different course of learning, such as that prescribed for applicants to practice "medicine or surgery." *State v. Gravett*, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791. Dentistry is not the "practice of medicine or surgery"; but

it is a related profession, as is also pharmacy, and each has its prescribed course of examination of applicants for license. Whether the same rights and dignity shall be bestowed on osteopathy is a matter for the general assembly, or, if it is found to be a fraud and imposition, its exercise is made indictable. It seems that it more nearly approximates "nursing" in many respects (though different in others), when taught as a profession, as it now is.

The state has not restricted the cure of the body to the practice of medicine and surgery,—"allopathy," as it is termed,—nor required that, before any one can be treated for any bodily ill, the physician must have acquired a competent knowledge of allopathy and be licensed by those skilled therein. To do that would be to limit progress by establishing allopathy as the state system of healing, and forbidding all others. This would be as foreign to our system as a state church for the cure of souls. All the state has done has been to enact that, when one wishes to practice "medicine or surgery," he must, as a protection to the public (not to the doctors), be examined and licensed by those skilled in "surgery and medicine." To restrict all healing to that one kind—to allopathy, excluding homeopathy, osteopathy, and all other treatments—might be a protection to doctors in "surgery and medicine"; but that is not the object of the act, and might make it unconstitutional, because creating a monopoly. The state can only regulate for the protection of the public. There is also "Divine Science" (which some one has said is neither divine nor a science), and there may be other methods still. Whether these shall be licensed and regulated is a matter for the lawmaking power to determine before any question in that respect can come before the court. Certainly a statute requiring examination and license "before beginning the practice of medicine or surgery" neither regulates nor forbids any mode of treatment which absolutely excludes medicines and surgery from its pathology. All that the courts can declare upon the facts found in the special verdict is that the defendant's practice is not "the practice of medicine or surgery," and no license from the medical board of examiners is required.

No error.

(131 N. C. 183)

WILLIAMS et al. v. AVERY et ux.
(Supreme Court of North Carolina. Oct. 28, 1902.)

CONTRACTS—ABOGATION—NEW CONTRACT—THIRD PARTIES—INSTRUCTION—EVIDENCE SUPPORTING.

1. Where, in an action to quiet title, the chief issue was as to the execution of a contract between certain parties, an instruction as to the effect of the abandonment of such a contract was erroneous, as submitting a question not raised by the evidence.

2. At the sale of certain land under forecle-

sure, the purchaser had contracted with the owner to bid in the land and hold the title for his benefit until redeemed. After such sale was made, the purchaser failed to pay the price, and the land was resold, whereupon he purchased the land for his daughter. *Held*, that the agreement under which the first purchase was made extended to the second sale, though he purchased at such sale under authority from his daughter, as, the original contract being unrevoked, its binding effect was not affected by the subsequent contract which he made with his daughter.

Appeal from superior court, Burke county; Justice, Judge.

Action by J. W. Williams and others against Calvin Avery and wife. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This was an action to quiet title, brought by the grantee of a mortgage foreclosure deed and her grantee against the mortgagor. Defendant claims that the purchaser at the sale, who bid in the land in the grantee's name, was under contract with him (the owner) to bid in the land and hold it for him. There were two foreclosure sales, the purchaser defaulting at the first one and repurchasing at the second.

S. J. Ervin and J. M. Mull, for appellants. Avery & Ervin, for appellees.

COOK, J. Defendant relies upon his second and third exceptions taken to the charge of the court to the jury. That part of the charge to which the second exception is taken is: "If they found this agreement made prior to the first sale was abandoned prior to the second sale, then such agreement would not extend to the second sale, and they should answer the issue, 'Was said land purchased by the plaintiff Julia T. Hayes or her agent at said sale under a contract with defendant Calvin Avery that he (said Avery) should be allowed to redeem the same upon payment of the amount bid at said sale?'—'No.' " Defendant contends that this part of the charge was erroneous, upon the ground that there was no evidence tending to show any abandonment of the contract by him. This contention must be sustained, because it nowhere appears in the evidence certified to us that defendant by act or word did or said anything inconsistent with a purpose to raise the money and redeem his land under his alleged agreement with Dr. Tull, made on the day of, and shortly before, the first sale. Whether the agreement was made was the question in dispute between the parties, to be settled by the finding of the jury. Dr. Tull denied that he made such agreement, and testified: "No contract with Avery to bid in land for him. I probably told him before the first sale to tell Mr. Wall to bid in land, and I would give him chance to pay for it. He never said anything more about it till after the second sale, but it was readvertised and resold. Never had any agreement with him to buy it at the second sale. I bid it off at

second sale for Mrs. Hayes, and deed was made to her. When Laxton came, I told him I would have to write to Mrs. Hayes and see whether she wanted to sell the land. * * * Defendant testified: " * * * Dr. Tull told me before the first sale that he would save the land for me, and buy it in for me, and take care of it for me * * * after sale (first sale) I told Dr. Tull I was going off to make the money, and I went to Marion to work, and stayed 15 days, and my family got down with fever. * * * Went to Marion two weeks after first sale. Second sale while I was in Marion. I knew nothing of second sale. * * * Dr. Tull told me after second sale that he wanted me to pay, and I told him I didn't have the money. I got Mr. Laxton to go with me to Dr. Tull and offer him the money, and he declined it. * * * " No evidence of an abandonment of the alleged contract appearing, it was error to have given such charge.

The third exception is to a part of the charge given in response to an inquiry by the jury after they had retired, and returned into court the next day and asked "if an agreement made prior to the first sale would extend the second sale." In response to this inquiry the court replied: "That would depend on circumstances. If, at the first sale, Tull bid in the land in his own name for defendant under an agreement with defendant that he would hold it for him until defendant could repay him his money, and the first bid was not paid, nor title made, and mortgagee sold the land, and at second sale he again bid in the land in the name of his daughter, and caused the deed to be made to her, and this was done as a mere pretense or subterfuge, and for the purpose of defrauding the defendant out of his rights under his contract with him, then the contract made prior to the first sale would extend to the second sale; but if Tull at the second sale was authorized by his daughter, Mrs. Hayes, to purchase the land for her, and he did so at her request, with her money, and in good faith, and not for the purpose of defrauding the defendant under his contract, or if the contract had been abandoned by the parties, then the agreement would not extend to the second sale." In this charge we think his honor also erred. While there is no evidence tending to show that Tull was authorized by his daughter to purchase the land for her, or that he did so at her request with her money, nevertheless, whether he bid in the land for his daughter in good faith, or for the purpose of defrauding the defendant, the contract made before the first sale would continue and remain as then made. How that contract could be changed, modified, or abrogated, so as not to extend to the second sale, by any act or conduct of Tull, without the consent of Avery, we cannot see. If he assumed the trust, he could not release himself from it by making a contract with a third party, whether in good faith or fraudu-

lently; nor could he do so by causing the land to be sold a second time, and then purchasing at said second sale. Having defaulted in the payment of his bid at the first sale, had he promptly notified Avery of such default, and of his failure to acquire title, and of his abandonment of the contract, so that Avery could have protected his interest at or before the second sale, then no trust would have attached to the land, should he have purchased at a second sale. But he could not, in good conscience, obtain an advantage in buying at the second sale by his bad faith in defaulting at the first.

For the errors above declared, there must be a new trial.

(131 N. C. 199)

GATTIS v. KILGO et al.

(Supreme Court of North Carolina. Oct. 28, 1902.)

EVIDENCE—IMPROPER ADMISSION—ATTEMPTED WITHDRAWAL.

1. During a trial of the president of a college by the trustees on widely circulated charges of moral unfitness and incompetence, the president delivered a speech defamatory of one of the witnesses. The proceedings, including the speech, were afterwards published by the president and other trustees, and for this the witness brought action for libel. During a second trial, on which the issue was reduced to that of malice on a privileged occasion, the plaintiff introduced a mass of testimony as to circumstances attending the trial, and as to other matters, none of which either pertained to the regularity of the trial, or tended to show malice in the publication, but which were calculated to arouse prejudice in the jury. The trial lasted several days. The court, before argument was commenced by counsel, informed them, in the presence of the jury, that he would take from the jury all such evidence. Nevertheless plaintiff's counsel used the evidence in his argument. After argument the court attempted to withdraw from the consideration of the jury the whole mass of objectionable testimony. *Held*, that the mistake of the court in admitting the mass of testimony, and permitting it to remain with the jury so long, could not be corrected by such withdrawal.

Appeal from superior court, Granville county; Shaw, Judge.

Action by T. J. Gattis against J. C. Kilgo and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

During a trial of the defendant Kilgo, the president of a college, by the board of trustees, on charges publicly made of immorality and incompetence, he delivered a speech defamatory of plaintiff as one of the witnesses therein, and afterwards, with some of the trustees, caused the whole proceedings to be published. For such publication, plaintiff brings this action of libel.

Winston & Fuller, T. T. Hicks, and Royster & Hobgood, for appellants. Boone, Bryant & Biggs, Guthrie & Guthrie, A. W. Graham, and A. A. Hicks, for appellee.

MONTGOMERY, J. In the opinion of the court delivered at the February term, 1901,

and published in 128 N. C. 402, 38 S. E. 931, it was said, "Whether or not the speech of the defendant Kilgo, published by the defendants in pamphlet form, and embodied with the whole proceeding in the matter of the investigation, was a privileged communication [and it would have been more accurate to have said a "privileged occasion"], was a question of law, there having been no dispute or uncertainty as to the circumstances attending the publication, and his honor properly tried the case as one of qualified privilege." In the new trial ordered in that opinion, it was anticipated that in that trial the question of malice in the defamatory publication would be the only matter before the trial court. It was perfectly apparent to this court, and it seemed to be equally so to his honor who presided at the first trial of this case, that, from the plaintiff's evidence, the investigation by the trustees of Trinity College of certain charges of incompetency and moral unfitness made against its president, Dr. Kilgo, was a matter of justice to Dr. Kilgo and to the college, and that the college was, in a sense, a public institution, and therefore that the publication of the proceedings in the investigation by the college was a privileged occasion. From a careful reading of the statement of the case on the present appeal, it seems clear that the plaintiff's counsel acquiesced in that view of the opinion of this court. The plaintiff himself, when upon the stand as a witness, was asked by his counsel "whether you were a witness before the board of trustees of Trinity College upon the investigation of the matter of charges said to have been brought by Judge Clark against Dr. Kilgo?" And we find nothing in the whole evidence tending to show that the meeting of the board of trustees was not properly called or was not properly constituted. The plaintiff also introduced in evidence a paper called a "challenge" of Judge Clark to the board, in which challenge exception was made to certain individual members of the board. But the regularity and authority of the board were recognized in the last lines of the challenge, in these words: "As an act of justice to yourselves, to the college, and to myself,—an act of justice that no North Carolinian should ever seek in vain,—I ask that the trials be polled, and that no one shall sit on this investigation who is not absolutely and altogether impartial, and uncommitted by former deliberate expressions of his views." The manner, too, in which the plaintiff's counsel conducted the plaintiff's case, shows that the counsel regarded the publication of the defamatory matter as an occasion of privilege. The plaintiff, in his complaint, did not allege any matters or make any admission to the effect that the publication of the matter was a privileged occasion. The simple allegation of the complaint was that the publication had

been made. It was therefore incumbent on the defendants to show the privileged occasion. The plaintiff, however, was not satisfied to introduce evidence of the publication of the defamatory matter, and stop, which was all he was required to do upon the allegations of the complaint, and wait for his adversary to take up the burden of showing a qualified privilege. He went into matters showing the privileged occasion himself. And that can only be accounted for upon the supposition that he would have to meet that contention on the part of the defendants when the defendants should have put in their evidence on that point, and that he (the plaintiff) had as well meet the matter in limine. But the counsel of the plaintiff, instead of being consistent in the matter of the introduction of evidence, and confining it to matters going to show malice in the publication, brought into the trial a vast pile of evidence inconsistent with their theory of the case, and entirely incompetent if the occasion of the publication was privileged. His honor, however, in what he calls "Note Y," in the record, as distinguished from what he designates as his charge, states that, "in the admission of evidence of what transpired before the board of trustees upon the trial of Kilgo, the court opened the door and permitted plaintiff to offer evidence of everything that happened there, to determine as to whether there was a trial there." As we have said, the plaintiff, having alleged the publication by the defendants of matter which was and is libelous per se, and having introduced evidence of its publication, was entitled to judgment, if he had not shown by his own testimony an occasion of privilege in the publication of the defamatory matter, or unless the defendants had assumed the burden, and in their evidence had shown a privileged occasion in the publication of the matter. But if his honor, notwithstanding the manner in which the plaintiff's counsel conducted the case, felt it his duty to investigate the proceedings before the board of trustees of the college, to see whether there had been any trial, he should have admitted only such evidence under that head as pertained to the regularity and the integrity of the proceeding. That he did not do. He allowed evidence to the effect: That the meeting of the trustees was held with closed doors. That the stenographer was not sworn. That Judge Clark was refused a stenographer. That Judge Clark's challenge to the board was rejected. That Mr. Journey said: "I am a Kilgo man. I told the district conference at Rockingham yesterday I was coming here to fight for Kilgo; that I should fight for him with my fingers and with my teeth, and, when my teeth gave out, I would gum it for him." That Judge Montgomery nodded and consulted with Dr. Kilgo, and referred him to Greenleaf on Evidence, and that Dr. Kilgo's con-

duct and behavior when cross-examining the witnesses, including the plaintiff, were overbearing and offensive, and brutal to the plaintiff. Especially should his honor not have allowed as evidence that part of the challenge to the board which is in these words: "I have been pronounced in my views against the illegality of trusts, and I have concurred with the resolutions of the Western North Carolina conference against the sale and manufacture of cigarettes; and I stand here, by the terms of your invitation, in Benefactor's Parlor, Duke's Building,—a room thus doubly labeled with the reminder of the cigarette business, the influence of whose vast accumulations is like the darkness of Egypt, in that it cannot only be seen, but can be felt. This institution itself becomes a partner in that very business by being the holder of a large block of its stock, from which it derives no small part of its income." His honor also allowed a witness for the plaintiff to state that Dr. Kilgo during the investigation locked the door of the room against a correspondent of one of the daily newspapers of the state, and another witness to state that just before the trial commenced, and as he got up to the building, in the shade, on the grass, Mr. Oglesby and Dr. Kilgo were lying on their stomachs, with their heads close together, and seemed to be in an interesting conversation. How that evidence could be considered as going to show malice in the publication of the defamatory matter on the part of the defendant Kilgo, we cannot see; but it was allowed, also, to be given in against defendants Odell and Duke.

His honor erroneously admitted evidence as to special damages suffered by the plaintiff, and the loss of gross profits and individual customers (6th, 7th, 11th, 12th, and 13th exceptions); also evidence of the church membership of Duke (14th exception); also evidence that Oglesby, the prosecutor, lived in the parsonage of the Main Street Methodist Church, Durham (19th exception), the plaintiff having been allowed to show that the defendant Duke belonged to that church; that the stenographer, Newsome, was the private secretary of Dr. Kilgo (27th exception); that Oglesby was pastor of Main Street Church, Durham (34th exception), the defendant Duke having been shown to be a member of that church; upon the character of the plaintiff as a minister of the gospel (66th exception); evidence that there were published in the Morning Post large number of supplements to that edition, containing nothing but the speech of Dr. Kilgo, no evidence having been given as to the knowledge or consent of defendant to such publication (exceptions 76, 77, 78, 79, 80, 127, 128). It must be remembered that the great question in the case was whether or not there was malice on the part of the defendants in the publication of the defamatory matter, for his honor held, as a matter of law, that every-

thing that occurred before the board of trustees was absolutely privileged, and he also told the jury, "If you believe the evidence in the case, the publication complained of by the plaintiff was one of qualified privilege." His ruling of law is in these words: "At the close of the evidence the court, in the presence of the jury, ruled that it would hold, as a matter of law, that everything that occurred before the board of trustees in connection with the investigation of the charges, including the trial, was absolutely privileged, and could not be considered by the jury as any evidence of malice or the falsity of the publication, nor on the question of damages, and that the evidence as to the folders or supplements was ruled out." He had discovered then, before argument was commenced, all that mass of damaging evidence that we have mentioned as having been admitted, concerning the matters which had occurred before the board of trustees; but he allowed the argument to proceed, and to be concluded upon the very matters which he had said to the counsel, in presence of the jury, should not be considered by the jury. After the argument on both sides was closed, his honor undertook to withdraw from the consideration of the jury not only the incompetent evidence concerning the investigation before the board of trustees which he allowed, but also the other objectionable evidence which we have above referred to. It may be best to quote the language of the court in reference to the attempted withdrawal of the evidence. It is as follows:

"Note Y. At the close of the argument, and before charging the jury, his honor stated to the jury as follows: 'The court charges you that the pamphlet introduced by the plaintiff is not evidence to be considered by the jury in showing the falsity of the publication complained of for malice. The court withdraws from your consideration, and instructs you that you must not consider in making up your verdict, or in any way in this case, any of the following evidence: The testimony of the plaintiff covered by the 6th exception and that part of the 7th exception in brackets; the evidence covered by the 11th, 12th, 13th, and 14th exceptions, the 19th exception, the 28th exception, and the 34th exception; also the evidence covered by the 66th exception, 77th, 78th, and 79th exceptions, and the questions and answers between the 77th and 79th exceptions, and one question and answer before the 77th, and the three succeeding the 79th exception; also the evidence covered by the 127th and 128th exceptions, and the question and answer between those two.' The questions and answers referred to in the foregoing exceptions, and the intervening questions and answers above referred to, were read to the jury. And the court further stated to the jury as follows: 'In the admission of evidence of what transpired before the board

of trustees upon the trial of Kilgo, the court opened the door and permitted plaintiff to offer evidence of everything that happened there, to enable the court to determine as to whether there was a trial there. And the court charges you that nothing that occurred upon said trial is to be considered by the jury as evidence of malice against either one of the defendants in this case, and as to the evidence tending to show that the meeting was held with closed doors; the evidence as to the stenographer not being sworn, and the refusal to allow Judge Clark to have one; his challenge to the jury, and the rejection of the same; what Journey said, if anything, about "gumming it" for Kilgo; and Judge Montgomery's nods and consultation with Kilgo, and his reference to Greenleaf's Evidence; and Dr. Kilgo's conduct and behavior in cross-examining witnesses, including the plaintiff; that he was imperious, overbearing, offensive, and brutal to plaintiff in cross-examining him (except you may consider this, if true, in connection with the testimony of the plaintiff as to why he didn't answer questions asked); and that certain evidence was excluded upon said trial. As to all these matters, if they occurred, they were simply incidents of a trial, and all were under the control of the board of trustees, and are not to be considered by the jury in any respects, except as tending to show there was a trial being conducted before the board of trustees. They are not to be considered as evidence of the falsity or maliciousness of the publication, or on the question of damages. The evidence as to Kilgo and Oglesby lying on their abdomens under the shade of the trees, and of excluding newspaper correspondents, including Merritt, from the meeting, and closing the doors on him, does not have anything to do with the case, and is withdrawn from and must not be considered by the jury at all in passing upon any of the issues of this case, or in considering the case.' (54) The defendants except to the manner and time of withdrawing evidence between 53 and 54 from the jury, and insist that when evidence is admitted, and remains with the jury several days, it cannot be withdrawn from the jury as was done in this case, and assign such ruling and order of his honor as error. (Exception. One hundred and thirty-second exception.) The evidence in the case was taken down by a stenographer, and at the beginning of the argument very little of it had been transcribed by him, and the same was not completed until a short time before the court began its charge. The evidence covered about eighty typewritten, single-spaced pages. The defendants requested the court to put its charge, and every part of it, in writing, and the court had not completed the writing of its charge, and the reading and consideration of the evidence and exceptions thereto, when the argument was concluded, and the court announced its rulings as to the exclusion of

evidence, as hereinbefore set out, as soon as it could be done under the circumstances."

This case was being tried for several days. Some of the ablest lawyers in the state had appearances on either side, and the plaintiff's counsel were allowed in the argument to use a mass of evidence against the defendants totally incompetent, and calculated to arouse passion and prejudice against the defendants, and to obscure the real question at issue. But the plaintiff's counsel here contended that, under our decisions, his honor did what was allowable. They insisted that he simply corrected a slip in the admission of evidence. We have searched our Reports for cases bearing on the question of the right and power of the trial judge to correct a slip in admitting incompetent evidence. The first one is that of *State v. May*, 15 N. C. 328. There the court held that, if improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to consider it. The court said (Chief Justice Ruffin speaking for the court): "In such a case I conceive it is not the object of the law, nor the province of an appellate tribunal, to watch for and catch at an inadvertence into which the judge was betrayed for an instant, but to see that no error was finally committed, and that ultimately that law and justice of country were truly administered." In *McAllister v. McAllister*, 34 N. C. 184, there was one piece of incompetent evidence received,—the register's book. The court said: "If there had been an error in admitting the register's book, the defendant would have no cause of complaint, for the evidence was clearly and promptly withdrawn from the jury as irrelevant, and the defendant suffered no prejudice from it. It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error as will prevent it from misleading a jury. Here that was so effectually done that neither the court nor the counsel on either side took any notice of the mortgage in submitting their observations to the jury." In *State v. Collins*, 93 N. C. 564, after the evidence had closed, and one of the counsel for James Collins had finished addressing the jury, and when the solicitor was partly through his remarks to the jury, but before the last speech of the defendant's counsel, who had the closing speech, was made, his honor told the jury that the declaration of the defendant Julius Jones, made to the witness Southall, which had been received in evidence, was inadmissible and was ruled out. In *Bridgers v. Dill*, 97 N. C. 225, 1 S. E. 767, the court told the jury that the evidence of one of the witnesses on one point—how much crop might have been made on a piece of land but for the trespass—was to be excluded from their consideration. So in the cases of *State v. Eller*, 104 N. C. 853, 10 S. E. 813, *State v. Crane*, 110 N. C. 530,

15 S. E. 231, *Wilson v. Manufacturing Co.*, 120 N. C. 94, 26 S. E. 629, and *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810, only one point of evidence was corrected and withdrawn from the consideration of the jury. But the permitting of the introduction of the incompetent evidence pointed out in this case was not a simple slip on the part of the judge, which our trial judges can correct at almost any time before judgment, but it was a misconception of the theory on which the case should have been tried. It was a case of privileged occasion. His honor tried it as a case of ordinary libel, the publication being *per se* libelous. The incompetent evidence embraced nearly the whole of the evidence offered to show malice. Indeed, we are not absolutely sure that there was any evidence of malice offered in the case. But we do not undertake to decide that now.

There was error, for which there must be a new trial.

CLARK, J., did not sit on the hearing of this case.

(131 N. C. 225)

PHILLIPS v. POSTAL TEL. CABLE CO.

(Supreme Court of North Carolina. Nov. 5, 1902.)

TELEGRAPH COMPANIES—POLES—EVIDENCE OF DAMAGE—ADMISSIBILITY—HARMFUL ERROR.

1. In an action to recover damages on account of the maintenance of telegraph poles on defendant's land, a witness testified that he was an adjacent landowner, and, "I would not have those poles across me for several hundred dollars." Held, that the admission of the testimony was prejudicial error, where the only other evidence on which verdict of \$180 could have been based was the extravagant estimate of plaintiff, who put his damages at \$800.

On petition for rehearing. Petition allowed, and new trial ordered.

For former opinion, see 41 S. E. 1022.

F. H. Busbee, J. R. McIntosh, and Walser & Walser, for petitioner. E. E. Raper, for appellee.

FURCHES, C. J. This is a petition to rehear this case, decided at the last term of the court, and opinion published in 130 N. C. 513, 41 S. E. 1022. There are many errors assigned in the petition, and, while they have all been considered, we find but one error, and for that we grant the petition and a new trial. This error was not overlooked on the former hearing, but it was then thought by a majority of the court to be harmless. The witness Sink, introduced by the plaintiff for the purpose of proving the amount of damage done the plaintiff's land by reason of the poles being on the land, testified that he did not know, but he was an adjacent landowner to the plaintiff, and was then allowed to testify, over the objection of the defendant, "I would not have those poles across me for several hundred dollars." The poles were erect-

ed on the land before the plaintiff became the owner of it. This removed any idea of damages for the trespass of going upon the lands to erect the poles, and the only question to be considered by the jury was that of damages for the right of the defendant to have and keep them there. For this they awarded the plaintiff \$180, which, in the opinion of the court, was excessive. The court is asked to grant the petition and a new trial for this reason, and cases are cited to sustain this contention. But whatever may have been done by courts of other jurisdictions, we cannot grant the defendant's petition upon that ground without reversing a long line of decisions of this court, made with such unanimity that we are unable to find one to the contrary. But the verdict, in our opinion, is excessive, and there is no evidence to support it, except that of the plaintiff, which puts his damage at \$800, and this estimate seems to have been so extravagant that the jury disregarded it; and, if they did, it only left the erroneously admitted evidence of Sink for them to base their finding upon. The court did not hold, in considering this case at the last term, that this evidence was properly admitted, but thought it harmless. But upon a review of the case we think it might, and probably did, influence the jury in finding the amount of damages they did; and for this reason, and this alone, we allow the petition, and award the defendant a new trial.

Petition allowed, and a new trial awarded the defendant. Petition allowed.

(131 N. C. 227)

BAKER v. DAWSON.

(Supreme Court of North Carolina. Nov. 5, 1902.)

ADMINISTRATORS — PREFERRED CLAIMS — MEDICAL SERVICES—LANDLORD AND TENANT—APPEAL—EXCEPTIONS.

1. An appeal is itself an exception to the judgment, or any other matter appearing on the face of the record.

2. Code, § 1416, placing among the sixth class of preferred debts of an estate of a decedent debts for "medical services within the twelve months preceding the decease," means services to the decedent only, and not to his wife, child, and tenants.

3. It was error to allow a claim against decedent's estate for medical services to his tenants, in the absence of allegations that the services were rendered at the instance and request of deceased.

Appeal from superior court, Edgecombe county; Bryan, Judge.

Action by Julian M. Baker against N. B. Dawson, administrator. From a judgment for plaintiff, defendant appeals. Reversed.

John L. Bridge, for appellee.

CLARK, J. There is no exception in the record, but an appeal is itself an exception to the judgment, or any other matter appearing on the face of the record proper. *Wilson v. Lumber Co.* (at this term) 42 S. E. 505.

The following facts are admitted: The plaintiff, a physician, rendered medical services within 12 months just prior to the intestate's death, as follows: (1) To intestate personally, \$347; (2) services to intestate's wife and child, \$84; to tenants of intestate, \$36. The plaintiff seeks to have all of above adjudged to be preferred debts, under Code, § 1416, which places among the sixth class of preferred debts "medical services within the twelve months preceding the decease." This language, however, contemplates only services rendered to the deceased personally; for the indebtedness is given priority if rendered 12 months prior to his decease, and not within 12 months prior to decease of his wife, his child, or his tenant. As to them, the physician renders the services like any other creditor, relying upon the credit of the person requesting the services that he will pay or can be made to pay. It must be noted that there is no priority, even for medical services rendered the deceased personally, unless he dies. In all other cases the physician's bill is like any other debt. If the physician wishes to secure such debts, he must exact security or proceed to collect by law. When the patient is in his last illness, this might be inconvenient or indecent, and, as such illness might extend to 12 months, the law endeavors to secure for the patient medical attention by giving a legal priority for such services, if rendered to the patient within 12 months preceding his decease. But such reason does not apply to services rendered his wife and children, as to which the physician has extended credit, relying upon the father or husband or landlord himself paying the debt incurred. There are no words extending the meaning to such debts other than personal services to the debtor, and the language of the statute is restrictive,—"For medical services within twelve months prior to the decease,"—meaning the decease of the debtor, not of his wife, child, or tenant. The statute, being in derogation of the equity of a pro rata distribution, should be strictly construed, so as not to confer a priority over other creditors unless clearly called for. A somewhat similar provision is in class 2 of this same section (1416), which clearly means the funeral expenses of the debtor, and not of his wife, child, or tenants. The defendant did not contest that the first debt above stated, for medical services rendered deceased himself, was a preferred debt; and the judge rightly disallowed any priority as to medical services rendered the tenants of the deceased, but erred in rendering judgment therefor, to be paid pro rata with other debts of the intestate, since it is not alleged or proved or admitted that the services were rendered to the tenants at the request of the intestate, and without this the landlord is not liable for such services.

The judge also erred in adjudging that the bill for medical services rendered the wife and child of the deceased was a preferred

debt. He should have rendered judgment for the amount thereof, to be paid pro rata with the other unpreferred indebtedness of the defendant's intestate.

Error.

(131 N. C. 209)

STATE ex rel. FOWLER et al. v. McLAUGHLIN.

(Supreme Court of North Carolina. Oct. 28, 1902.)

GUARDIAN AND WARD—MARRIAGE OF WARD—LIMITATION OF ACTIONS.

1. Where a ward was married in 1865, the guardianship ceased then, and her husband, being the owner of all her personal property, alone was entitled to sue to recover the property, or the value thereof.

2. As a guardian's possession of the ward's choses in action on her marriage in 1865 was transferred to the husband, so that he alone could maintain an action to recover them, or their value if converted, limitations began to run against him from the date of the marriage as to any action on the guardian's bond.

Appeal from superior court, Union county; McNeill, Judge.

Action by the state, on the relation of Eunice A. Fowler and another, against C. R. McLaughlin, executor. From a judgment for plaintiffs, defendant appeals. Reversed.

Jones & Tillett and Shepherd & Shepherd, for appellant. Redwine & Stack, for appellees.

OLARK, J. Charity Hasty qualified as guardian of the feme plaintiff April, 1864; the defendant's testator being surety on her guardian bond, in the sum of \$300. The complaint alleges that she "took into possession various sums of money and other property of her said ward," and died November 21, 1867, without having made any return or final settlement as guardian. Her administrator made due advertisement for creditors, and settled her estate. The defendant's testator, surety on said guardian bond, died August, 1893. The defendant qualified as his executor, and on August 24, 1893, advertised according to law for creditors to present their claims, and plaintiff's claim was not presented within 12 months, nor within 7 years, thereof. The feme plaintiff was married July, 1865, before she was 16 years of age, and has been continuously ever since a feme covert. The defendant pleads the various statutes of limitations. The plaintiffs, to repel the bar of the statute, rely upon the disability of coverture.

As the law stood at the time of the marriage (1865), the guardianship of the female ward ceased upon her marriage, because "the husband became the owner of all her personal property in the hands of the guardian, and seised in her right of all her real estate," says Gaston, J., in *Shutt v. Carlous*, 36 N. C. 238. *Tiffany, Dom. Rel.*, § 186 (d), and cases

cited in note 10. The personalty became eo instante his property, for the possession of the guardian was the possession of the ward, and the law transferred the possession to the husband. It was, in law, "reduced to possession." *Pettijohn v. Beasley*, 15 N. C. 512; *Miller v. Bingham*, 36 N. C. 423, 36 Am. Dec. 58; *Stephens v. Doak*, 37 N. C. 348; *Caffey v. Kelly*, 45 N. C. 48; *Ferrell v. Thompson*, 107 N. C. 420, 12 S. E. 109, 10 L. R. A. 361; *McDaniel v. Whitman*, 16 Ala. 343, which was as to money of the ward received by the guardian; *Magee v. Toland*, 8 Port. 30. The husband could therefore at once have brought his action in 1865 to recover the possession of the property of every description in the hands of the guardian, or the value thereof if converted, for it became absolutely his upon the marriage, and this action has long since been barred. In 15 Am. & Eng. Enc. Law (2d Ed.) 822, where the cases are collected, it is shown that as to the possession of the wife's agent, trustee, bailee, guardian, or any other person not holding adversely, such possession became the possession of the husband, and this rule applies to money possessed by third persons, as well as to other chattels; and such personalty goes, under the above decisions, if the husband die before recovery of possession, to his personal representative, and not to his wife. But the possession of an executor or administrator was not the possession of the husband, as to any interest in the estate belonging to the wife. That is a chose in action which belonged to the husband only when he reduced it to possession.

It has been suggested that a part of these assets in the hands of the guardian may have been choses in action, and, if so, the husband not having reduced them to possession, should he die before doing so, and within three years from the enactment of chapter 78, Laws 1899, the wife could bring this action. *O'Connor v. Harris*, 81 N. C. 279. To this it may be observed: (1) That this action is necessarily by the husband in his own right (*Morris v. Morris*, 94 N. C. 613; *Benbow v. Moore*, 114 N. C. 273, 19 S. E. 156), and is barred, whatever might be the case as to an action by the wife if the husband has died and the wife has brought her action before the expiration of the three years since the enactment of chapter 78, Laws 1899. (2) The complaint avers only the receipt by the guardian "of various sums of money and other property belonging to her said ward, the exact amount of which plaintiffs cannot state." Nothing indicates that any part thereof consisted of choses in action, but, if it did, the guardian's possession of them was the ward's possession, which the law transferred to the husband, and, as against the guardian, the husband and the husband alone was and is entitled to recover them, or the value thereof if converted; and such action is barred, for 37 years have elapsed. If the husband had received possession of any choses in action from the guardian, then, as against the debtor therein,

¶ 1. See *Guardian and Ward*, vol. 25, Cent. Dig. § 72.

he would be entitled only if he reduced the same to possession by collection thereof; and if he had failed to do so, and had died, the wife could maintain an action thereon, if brought before she has become barred under the act of 1899, above referred to.

It was error not to hold, upon the facts agreed, that this action is barred by the statute of limitations. Reversed.

DOUGLAS, J. I concur in the result only, but cannot concur in the second part of the opinion, which seems to me unnecessary to a determination of the case.

(131 N. C. 191)

SPRINGS v. PHARR et al.
(Supreme Court of North Carolina. Oct. 28, 1902.)

ACTION ON JUDGMENT—MERGER.

1. Where a person brings an action on a judgment constituting a lien on the debtor's homestead, and obtains a new judgment, the first judgment is not merged in the second, so as to destroy the priority of the first; and therefore such person, by virtue of the first judgment, is entitled to the proceeds of the sale of the homestead under a decree to make assets, as against a creditor recovering a judgment subsequent to the first judgment and prior to the second.

Appeal from superior court, Mecklenburg county; Hoke, Judge.

Submission of controversy by E. B. Springs against H. N. Pharr, administrator of W. A. L. Owens, deceased, and W. R. Berryhill & Son. From a judgment in favor of Berryhill & Son against H. N. Pharr, plaintiff appeals. Affirmed.

Clarkson & Dula, for appellant. Burwell, Walker & Cansler, for appellees Berryhill & Son.

CLARK, J. The plaintiff's judgment was docketed December 22, 1888. The defendants Berryhill & Son obtained their judgment before a justice of the peace and docketed same December 19, 1888. They obtained a judgment upon said judgment and docketed the same December 2, 1895. The homestead of the defendant in the above judgment had been laid off December 3, 1888. Said homesteader having died since said second judgment, the defendant Pharr, his administrator, sold the homestead under a decree to make assets, and, the proceeds being insufficient to pay both above-named judgments, this action is submitted without controversy, under Code, § 567. The plaintiff contends that, by obtaining the second judgment, Berryhill & Son lost the priority to which their first judgment was entitled; that there was a merger; and that the Berryhill judgment has rank only from the date of the second judgment, in 1895.

In *Andrews v. Smith*, 9 Wend. 53, *Savage, C. J.*, says: "The only question in this case

is whether a judgment before a justice, rendered upon a judgment before another justice, *extinguishes* the judgment first obtained. As to judgments in courts of record, this question has been settled in the negative. *Jackson v. Shaffer*, 11 Johns. 517, and cases there cited; *Doty v. Russell*, 5 Wend. 129; *Harvey v. Wood*, Id. 222. The general principle of law governing in cases of this kind, and which applies to all securities, is that a security of a *higher* nature extinguishes *inferior* securities, but not securities of an *equal* degree." The italics are in the original. To same purport, *Mumford v. Stocker*, 1 Cow. 178; *Preston v. Pertion*, Cro. Eliz. 817, cited in *Weeks v. Pearson*, 5 N. H. 324; *Griswold v. Hill*, 2 Paine, 492, Fed. Cas. No. 5,836,—which seem to us sustained by the reason of the thing, as tersely stated by *Savage, C. J.*, above. The contrary view is taken in *Purdy v. Doyle*, 1 Paige, 558, and *Gould v. Hayden*, 63 Ind. 443. These last have been followed by 17 Am. & Eng. Enc. Law (2d Ed.) 808, and 20 Am. & Eng. Enc. Law (2d Ed.) 600; but the weight of the authorities (which are very few, the above embracing all directly in point, except the one below quoted) and the reason of the thing, as we have said, are the other way. *Lawton v. Perry* (1893) 40 S. C. 255, 18 S. E. 861, is a case "on all fours." There a judgment was obtained in 1867. In 1871 the debtor made a payment thereon. After his death the creditor, not proceeding to revive the judgment, as he could have done, brought instead an action on the former judgment, and obtained judgment thereon in 1889. "Held, that the old judgment of 1867, acknowledged by the payment in 1871, and therefore not presumed to be paid until 1891, was not so merged in the judgment of 1889 as to deprive the latter judgment of its original lien of 1867 on all the property of the then living judgment debtor." In the present case, the Berryhill judgment, docketed December 19, 1888, had not lost its lien on the homestead, notwithstanding the lapse of seven years. *Laws 1885, c. 359*. See *Clark's Code* (3d Ed.) p. 677, note. In the above case of *Lawton v. Perry*, 40 S. C., at pages 274, 275, 18 S. E. 869, it is said: "Usually it happens that the cause of action is so completely absorbed in the judgment that it is not competent longer to consider such cause of action apart from the judgment. This is not universally the case, however. * * * So far as dignity or rank as between the judgments (that of 1867 and 1889) they were the equal, one of the other, for each was a judgment. There was therefore no new dignity created. Would it not be a hardship to declare this judgment obtained in 1889 to have destroyed that of 1867? It seems to us that it should fall among the exceptions to the general rule, and not affecting the general rule." We must concur in this conclusion that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a cause of action is merged

¶ 1. See *Judgment*, vol. 30, Cent. Dig. §§ 1662, 1753.

in the judgment. Here, by virtue of the act of 1885, the justice's judgment, when docketed, remained a lien on the homestead after the lapse of 10 years, but would lose its validity as to any other property after 10 years (*McDonald v. Dickson*, 85 N. C. 248), and could not be sued on after 7 years. *Daniel v. Laughlin*, 87 N. C. 433. Is there any reason why the judgment creditor can only keep it alive and enforceable as to subsequently acquired property outside of the homestead by paying as a penalty the surrender of the priority of lien which he holds (*Jones v. Britton*, 102 N. C. 166, 9 S. E. 554, 4 L. R. A. 178) on the homestead under the first judgment? We know of none, and there is no precedent in this state to that effect. Indeed, our only precedent is in complete accord with what we have said above, and is decisive of this case. In *McLean v. McLean*, 90 N. C., at pages 531, 533, *Smith, C. J.*, says: "Assuming that the recovered judgment is but a renewal of the first, the one being the sole cause of action, we see no reason why both may not subsist and remain in force as separate securities for the same debt, with the advantages incident to each retained. It is not correct to say that one extinguishes the obligation contained in the other, and that the plaintiff's remedy must be sought only in the last. As soon as one judgment is entered, the plaintiff may take out execution, and at the same time bring another action upon the judgment, as itself a cause of action. This is clearly involved in the decision, if not directly decided, in *Carter v. Colman*, 84 N. C. 274. It may be that liens on land have been acquired since the rendition of the first and prior to the last recovery, and, if so, the plaintiff ought to be at liberty to revive and sue out remedial writs on the oldest."

Affirmed.

(131 N. C. 216)

TARLTON v. GRIGGS et al.

(Supreme Court of North Carolina. Nov. 5, 1902.)

DEEDS—DELIVERY—CONDITIONS—EXECUTION—PRESUMPTIVE DELIVERY.

1. A widow claimed dower in land as against heirs who claimed under a deed by the widow and her deceased husband. The evidence for the widow was that this deed was delivered by the husband to a third person to hold until he should execute certain other deeds, and that it was taken possession of by the heirs without a delivery. *Held*, that it was error to refuse to instruct that a deed will not be enforced when the maker has not gone so far with its execution that he cannot recall it, and that a deed is only operative from actual delivery, and, if there was no actual delivery until after the death of the maker, that delivery could not defeat the right of the widow to dower.

2. The acknowledgment of a husband and acknowledgment and privity examination of the wife to the "due execution of the foregoing deed" raised no presumption of delivery of the deed.

Appeal from superior court, Anson county; McNeill, Judge.

Special proceedings for dower by Sarah Jane Tarlton against Mary Ann Griggs and others. From a judgment for defendants, plaintiff appeals. Reversed.

Plaintiff is the widow of Willis R. Tarlton, from whose will she dissented, and filed her petition in this special proceeding, praying to be endowed of the land whereof he was seised and possessed during their coverture, and alleging that her husband died seised and possessed of the land in controversy, described in the petition. Defendants, who are his devisees, in their answer aver that said Willis R. Tarlton duly conveyed by deed, in which plaintiff joined in relinquishment of her dower, the land of which she asks to be endowed, to the defendants J. B. Tarlton and others, and plead the said deed as an estoppel in bar of her recovery. Plaintiff, replying, says that the deed so signed and acknowledged before a justice of the peace by her said husband and herself, whose privity examination was taken, was never delivered by her said husband, or any other person under his direction, to the grantees named in said deed, nor to any one for them, and that the same passed no title to the grantees, and is of no effect and void; that her said husband was at the time of signing the same, and continued so to be up to and at the time of his death, in possession of the land described therein, cultivating and paying the taxes on the same. The issue joined is, "Is plaintiff entitled to dower in the land described in the complaint?" The exceptions relied upon by plaintiff are to the refusal of the court to give, among others, the following instructions: "(5) That a deed is not considered executed, and the courts will not enforce the same, when the maker has not gone so far with its execution that he cannot recall or control it; and if the jury shall find from the evidence that the maker, W. R. Tarlton, could control and recall said deed, they will answer the issue, 'No.' (6) That a deed is only operative from the time of actual delivery; and if the jury shall find from the evidence that there was no actual delivery of said deed until after the death of the maker, W. R. Tarlton, said delivery cannot defeat the right of the widow to dower in said land, and they will answer the issue, 'No.'" The evidence relating to the delivery is as follows: The deed, in due form, signed: "W. R. Tarlton. [Seal.] S. J. Tarlton. [Seal.]" Then follows the acknowledgment and privity examination of plaintiff, in the statutory form, taken before Z. T. Redfearne, justice of the peace, under his seal. Z. T. Redfearne, introduced by plaintiff, testified: "Several years prior to the 26th November, 1895, Shepherd, a son-in-law of W. R. Tarlton, came to me and said that Tarlton wanted me to go over to his house and fix up some papers. I went, and drew

¶ 2. See Acknowledgment, vol. 1, Cent. Dig. § 230; Deeds, vol. 16, Cent. Dig. § 574.

several deeds for him, and a will. The deeds were executed by him and his wife, and the will by him. Tarlton told me to keep the deeds and will, and, if not called for during his life, to deliver them after his death. Two or three years afterwards, Shepherd came for me again. He wanted me to go again to Tarlton's to fix up some papers. I went, and Tarlton said that he had deeded some of the land, and wanted to make some changes in the papers that I had previously prepared for him. He then destroyed the first deed prepared by me under his direction. I drew a consolidated deed to all his children, except Eliza Tarlton. I then drew a deed for Eliza, conveying 50 acres of land to her; then a deed conveying ten acres to Tarlton's wife, Sarah Jane Tarlton. Tarlton signed all the deeds. Mrs. Tarlton signed the first,—the consolidated deed, dated November 28, 1895, to J. B. Tarlton and others; and, when asked to sign the deed to Eliza, she declined to do so. Then W. R. Tarlton said: 'If I cannot make deeds to all my children, I will not make deeds to any of them.' Mrs. Tarlton retired, and Mr. Tarlton told me that his wife was out of humor that day, and for me to carry them home with me, and that he thought she would consent to sign them in a few days, and, if she did consent, he would carry her over to my house to sign them. I kept the papers for several years just as they were. I thought of leaving the state, and sent word to him to know what disposition he desired me to make of his papers; and Shepherd, his son-in-law, came for them, and I let him have them. I knew nothing more of them until after Tarlton's death. At the time of drawing them, I was an acting justice of the peace." Allen Watson, introduced by the plaintiff, testified: "A bundle of papers was placed in my hands by Shepherd some time before Tarlton's death. I was requested to keep them. I did not know what the bundle contained until after Tarlton's death. I was told to keep the papers, without further directions. After Tarlton died, Mr. C. C. Griggs came to me and inquired if I had any of Tarlton's papers. I told him that I did, and gave the bundle of papers to him. Tarlton never spoke to me about the papers, and I have never received any instructions from him, one way or the other." Frank Shepherd, introduced by defendants, testified: "I was present at the time the deed dated November 28, 1895, was made. This was the deed from Willis Tarlton to J. D. Tarlton and others. Z. T. Redfearne, Mr. and Mrs. Tarlton, were the only ones present. Mr. Tarlton told Redfearne to take the papers and keep them till his death, and then to deliver them to his executor. I married the daughter of Tarlton, and she and I are parties to this action. I afterwards got the papers from Redfearne, and carried them to Watson, and he kept them until after Tarlton's death. I went after Redfearne at each

of the times that he prepared papers for Tarlton. Redfearne drew no deed when he made the will. The will was drawn in 1890. He sold me a part of the land that was divided in the will. Tarlton had this joint deed drawn, dated November 28, 1895, and a deed to his daughters, and one to his wife. His wife signed the joint deed and the one to herself, but refused to sign the deed to his daughter. He never said that he did not want to make deeds to a part of his children unless he could make deeds to them all. He did not say that his wife was out of humor that day, and that she would get all right, and that he would carry her over to Redfearne's to sign the other deeds. Tarlton did not destroy any papers." C. C. Griggs, introduced by defendants, testified: "I am son-in-law of Willis R. Tarlton, deceased, and one of the defendants in this action. The deed from Willis R. Tarlton to J. B. Tarlton, dated November 28, 1895, conveys all the land that Willis R. Tarlton was possessed of at the time of his death, except about 50 acres. I got the deed from Allen Watson on Saturday after Tarlton's death, which was on Thursday before. The grantees have been in possession of the land since Tarlton's death. I went to Watson and asked him if he had Tarlton's papers, and he gave me a bundle of papers. This deed was found in the bundle. I didn't know that Tarlton had this deed, and didn't know at that time that it was in this bundle of papers. I do not know that Watson was the agent of Tarlton, or that he held the papers in the capacity of his agent. I brought the deeds to the courthouse and had them recorded, and have had them in my possession since." Verdict and judgment for defendants, and plaintiff appealed.

Robinson & Caudle, for appellant. Jas. A. Lockhart, for appellees.

COOK, J. (after stating the case). Plaintiff was clearly entitled to have the instructions prayed for given to the jury. We learn from the sages of the law, Sir Edward Coke and Sir William Blackstone, that no title passes by deed unless it is delivered. What acts constitute delivery, and when the delivery becomes complete, have been the subject of much discussion in many of the decisions of our own court, as well as in those of other jurisdictions. "No particular form or ceremony is necessary. It will be sufficient if a party testifies his intention in any manner, whether by action or by word, to deliver or put it into possession of the other party; as, if a party throw a deed upon a table, with the intent that it may be taken by the other, who accordingly takes it, or if a stranger deliver it with the assent of the party to the deed." 1 Phil. Ev. (2d Ed.) 467; 1 Co. Litt. 38a. Where the deed was executed by the donor in the presence of the donee, and then attested by the wit-

ness, who immediately retired, leaving the deed, so executed, lying on the table in the presence of both the donor and the donee, which, it seems, was, after his death, found among the donee's aunt's papers, a presumption is raised that the deed was delivered to the donee. *Levister v. Hilliard*, 57 N. C. 12. There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so with the intent that it shall be taken by the grantee, or by some one for him. Both the intent and act are necessary to a valid delivery. Whether such existed is a question of fact to be found by the jury. *Floyd v. Taylor*, 34 N. C. 47. But if the grantor did not intend to pass the deed beyond his possession and control, so that he would have no right to recall it, and did not do so, then there would be no delivery in law, the facts of which must likewise be found by the jury. No presumption of delivery arises so long as the deed remains in the possession of the maker, but, per contra, the presumption is that it had not been made, and the contrary has to be proved. *Kirk v. Turner*, 16 N. C. 14; *Baldwin v. Maulsby*, 27 N. C. 505; *Newlin v. Osborne*, 49 N. C. 157, 67 Am. Dec. 269. No title can pass by the signing, sealing, and attestation of a deed. There must also be a delivery, which is a necessary agency by which the title moves from one person to another. But when the deed, properly executed, is found out of the possession of the maker and in the possession of some other person, then the law presumes the fact to be that it was intentionally delivered to or for the grantee. *Snider v. Lackenour*, 37 N. C. 360, 38 Am. Dec. 685; *Ellington v. Currie*, 40 N. C. 21; *Airey v. Holmes*, 50 N. C. 142; *Phillips v. Houston*, Id. 302; *Robbins v. Rascoe*, 120 N. C. 79, 26 S. E. 807, 38 L. R. A. 238, 58 Am. St. Rep. 774. But if the deed passed out of the maker's possession by accident, fraud, or mistake, or was not intended to be delivered to the grantee, or any one for him, then such presumption of the fact of delivery may be rebutted. *Love's Ex'rs v. Harbin*, 87 N. C. 249; *Whitman v. Shingleton*, 108 N. C. 193, 12 S. E. 1027; *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556. In *Snider v. Lackenour*, supra, Judge Gaston, speaking for the court, says: "The deed of gift from George Lackenour to the plaintiff was executed in the absence of the plaintiff, was attested in the presence of the donor by two witnesses, and at the request of the donor was proved and registered. We hold, therefore, unhesitatingly, that the defense set up, that it was not delivered, is, in law, unfounded." In *Phillips v. Houston*, supra, where the donor handed the deed to a third person, signed and sealed, to have it proved and registered, without retaining any authority or power to control it, which was returned to him, and he then delivered it to

another person in like manner and for the like purpose, but who neglected to have it registered until after the donor's death, it was held that the delivery to the first person to whom it was handed was a complete delivery; the point being that the donor absolutely parted with the deed, with no intention of exercising any further control over it. But when the grantor parts with the possession of the deed, showing an intention that it should not then become a deed, but delivered merely as a depository, and subject to the future control and disposition of the maker, then the delivery would be incomplete, and no title could pass. *Roe v. Lovick*, 43 N. C. 89. This case is specially applicable to the case at bar. In the cases above cited where delivery was made to the clerk of the superior court for probate, or probated and registered, no condition or purpose was expressed inconsistent with an intent to make a complete and absolute delivery. Our conclusion is that there is no delivery of a deed, where the maker has not gone so far with its execution that he cannot recall or control it; and if, from the evidence, the jury should have found that Tarlton intended that Redfearne should hold the deed subject to his further direction and control, then there would have been no delivery. And if there was no delivery made when he handed it to Redfearne, then no delivery could have been made after Tarlton's death (*Baldwin v. Maulsby*, supra); and his honor erred in not giving the instructions prayed for.

Defendants, however, contend that delivery is presumed from the acknowledgment of the husband and acknowledgment and privy examination of the wife (plaintiff) before the justice of the peace,—they "acknowledged the due execution of the foregoing deed,"—and that by "due execution" the law presumes the fact to be that it had been delivered. This contention is without merit, and cannot be sustained. To convey title free from incumbrance, the acknowledgment and privy examination of the wife is a prerequisite imposed by law. Having complied with the statute, the deed would then be ready for delivery, not delivered. Her acknowledgment and privy examination cannot be taken as an admission that the deed had been made; for, had delivery been made before it was taken, the deed would have been invalid as to her rights. If so, why presume that an invalid delivery had been made, when the object of taking it was to make a valid one which would bar her dower right? Should the law impose such a presumption as is contended for, great hardship and gross injustice would follow. A deed thus prepared or "executed" for delivery, and in fact not delivered on account of mischance, awaiting the compliance of bargainee, or an opportunity to meet and perfect the agreement, or

upon his default, etc., and then found in the possession of the maker (among his papers, perhaps) after his death, would impose upon the widow and devisees or heirs at law the burden of proving that it had not been delivered. How could this be done? From what source could they get the evidence to prove the nonoccurrence of such a presumed fact? No evidence showing that the deed was ever out of his possession, yet should they be required to prove that it never was? Then, if such proof is not made, she would be debarred of her dower, and the heirs at law or devisees deprived of their land, for which not a dollar had been paid. Surely this cannot be law. We can find no decision to support such a proposition. We are cited to *Redman v. Graham*, 80 N. C. 231, where the headnote says, "The execution of a deed *includes delivery*, and therefore the adjudication of a probate judge that the execution has been duly proved is a judicial determination of the fact of delivery, which cannot be *collaterally impeached*." (The italics are ours.) Upon an examination of the case, we find that it shows a state of facts similar to many of the others above cited: "The deed for the land was prepared and executed by the said defendants and their wives, the latter being privily examined, and duly proved before the judge of probate, and *left in his custody*" (italics ours), without expressing any intention whatsoever of exercising any further control over it. Had defendants instructed the judge of probate to hold the deed subject to their order, could it be held by a court that the delivery would be complete, and that title passed to the grantees? We think not.

In the case of *Baldwin v. Maultsby*, supra, the deed was signed and sealed and attested by two witnesses, and the maker declared to the witnesses that it was "his act and deed," and afterwards told a friend: "I am satisfied with the way I have disposed of my negroes. The deed of gift is in my trunk. I wish you would deliver it to Charles Baldwin immediately after my death." No presumption of delivery arose there. So, in the case at bar, no presumption of delivery arose from the acknowledgment of the husband, or from the acknowledgment or privy examination of the wife. When he handed the deed to Redfearne, it had been duly prepared and properly "executed" according to the forms and requirements of law, and ready for delivery. Nothing else appearing, this would have been a delivery in law. But there is evidence tending to show that such delivery was for a temporary purpose, and that he intended to exercise further control and authority over it; and, if he did, it did not then become his deed.

New trial.

(64 S. C. 502)

PERSON v. FORT et al.

(Supreme Court of South Carolina. Oct. 10, 1902.)

TRUSTEE—ACCOUNTING—LACHES.

1. Where title and right to possession of land was conveyed to a trustee, the only equity remaining in the grantor being a right to compel execution of the trust and a payment to him of the balance after such execution, and it appeared that the debts to be paid by the trustee exceeded the value of the land, and the trustee and his heirs were in long and exclusive possession of such land, and the grantor delayed for more than 30 years to assert any equity in the land, and it was not shown that any debt provided for in the deed remained unpaid, the grantor will be refused an accounting, though the land was never sold by the trustee as provided in the deed.

Appeal from common pleas circuit court of Florence county; Dantzler, Judge.

Action by P. A. Person against W. B. Fort, John Fort, Addison S. Fort, Matilda I. Parker, and William Bryant. From circuit decree, defendant William Bryant appeals. Affirmed.

H. G. Connor, J. P. Neill, and George Galletly, for appellant. Wilcox & Wilcox, for respondent.

JONES, J. In this action for partition of land in Florence county, William Bryant was made party defendant in order to have it declared that he had no interest in the premises. The circuit court (Judge Dantzler) decreed for partition among the plaintiff and defendants other than William Bryant, and adjudged that William Bryant had no interest in the land; but that, if he ever had any interest therein, or right to an accounting after the execution of the deed hereinafter set forth, he is now barred by his laches. The appeal questions the correctness of these conclusions.

We quote from the decree as follows:

"It appears that in the year 1867 the defendant William Bryant executed and delivered to one John Coley a deed of conveyance to the real property mentioned and described in the complaint upon the trust and for the uses and purposes therein set forth, a copy of such deed being attached to the complaint herein marked 'Exhibit A,' as follows: 'This indenture, made and entered into in the year of our Lord one thousand eight hundred and sixty-seven, between William Bryant, of the state of North Carolina, Wayne county, of the first part, and John Coley, of the same county and state aforesaid, of the second part, for and in consideration of the sum of one dollar to him in hand paid by the said John Coley, the receipt whereof is hereby acknowledged, have this day bargained, sold, and conveyed and enfeoffed with the said Coley a certain tract or parcel of land being and situate in the state of South Carolina, Darlington district,

adjoining the land of John G. Carter, John Young, the heirs of James Phillips, and Zachens S. Hill and R. Doll, and the Wilmington and Manchester Railroad, containing three hundred and seventy acres, more or less, known as the "E. G. Conner and Bay Branch Tract," to him, the said Coley; to have and to hold, to him, his heirs and assigns, forever. I, William Bryant, for myself, my heirs, executors, administrators, and assigns, do hereby warrant and defend the right and title of the above-named tract of land to the said John Coley; to have and to hold to him, his heirs and assigns, forever, free from all claims and demands of all and any person or persons whatsoever, this 25th day of January, 1867. The conditions of the above obligation is such that the said William Bryant, being indebted to the said John Coley in a large amount of money, and the said Coley is security for the said Bryant to a large amount of money, and for the purpose of better securing the said Coley and to save him harmless, have this day conveyed unto the said Coley the above-named tract of land in special trust for his use and behoof for the payment of certain notes and bonds: Firstly. One note or bond made payable to John Coley for the sum of twelve hundred and fifty dollars, due January 3d, 1859, with interest till paid. Wyatt Earp, for the sum of eleven hundred and twenty-five dollars, with a credit of five hundred dollars on said bonds, due January first, 1859, with John Coley as surety to said bond. Ann Exum, for the sum of one hundred and seventy-five dollars, due January the 7th, 1859, with John Coley as surety. The above-named bonds or notes are to be paid in the first class of my creditors. Henry Vaughn, for one hundred dollars, with a credit of fifty dollars due about 1860,—the exact date do not recollect; David or R. J. Large for thirty-three dollars, due 1860. Two other notes given to the estate of Simon Parrott, deceased, one for eighty or ninety dollars, the other between one and two hundred dollars, with John W. King and John Horn and Giles Carter as securities. These are to be paid in the first class pro rata. Secondly. After my trustee, John Coley, has paid himself and the other bonds of the first class, the residue, after paying all costs and expenses in selling said land, the said trustee is to pay pro rata to Jesse Parrott and J. W. Owens, deceased, to secure their inferior debts. These are the second class. Said John Coley, my trustee, is hereby empowered by me to sell the above-described land, either publicly or by giving twelve months or two years credit, or for cash, at his option, so the said Coley, trustee, sells said land to the best advantage; that is, either privately or publicly. In testimony whereof I have put my hand and signed in the presence of J. N. Bardin, B. D. Applewhite. Wm. Bryant. [Seal.] Duly probated and recorded 22 February, 1867.' That John Coley, the grantee and

trustee named in said deed, assumed the trust thereby reposed, and died intestate, in the year 1872, leaving him surviving, as his only heirs at law and distributees of his estate, his daughters, Mrs. P. A. Person, the plaintiff in the above-entitled action, and Mrs. Fannie Fort. That thereafter Mrs. Fannie Fort departed this life, leaving as her only heirs at law and distributees of her estate her husband, W. B. Fort, and her children, John F. Fort, Matilda I. Parker, Addison S. Fort, and Pearl Fort, defendants herein. At the time of his death said John Coley had his domicile in the state of North Carolina, and W. B. Fort qualified as administrator of his estate in that state, and is now such administrator. There does not seem to have been any administration upon his estate in this state, and no trustee has been substituted in his place. William Bryant, the grantor, and John Coley, the trustee hereinbefore named, lived in the state of North Carolina from the time of the execution of the said deed, and all of the parties to this action have been and now are residents of that state. The tract of land described in the complaint was in the possession of said John Coley from the date of the execution of the deed to the time of his death, in 1872, and thereafter his heirs at law were in possession of it; and the plaintiff, as an heir at law of John Coley, together with W. B. Fort and his children, heirs at law of a daughter of said John Coley, who subsequently died, now claim the same in fee, and pray for a partition thereof. The claim is resisted by the defendant Bryant upon the grounds alleged in his answer.

"The vital question arising in the consideration of the matters in controversy is, what was the interest conveyed to said John Coley by William Bryant by the deed of conveyance? It is evident from an examination of the deed that he conveyed all the interest he ever had in the land, and therefore John Coley took, by virtue of the deed, all such interest. John Coley was 'empowered' thereby to sell the tract of land now in question for the purpose of applying the proceeds of such sale to certain debts of William Bryant mentioned therein. William Bryant, therefore, became divested of all interest in the land conveyed by him, and John Coley became vested with the title thereto, impressed with the trust named in the deed. Bryant was not the cestui que trust. His creditors were the beneficiaries. It is clear to my mind that William Bryant never had at any time after the execution and delivery of the deed to John Coley any valid claim to the land in question, and he has none now. He would have had a right to any surplus which might have remained in the hands of the trustee from the sale of the land after his said indebtedness had been paid with the proceeds of such sale, but he had no interest in the land. (I cannot assume or conclude that the

deed was intended as a mortgage. The conduct of the parties from 1867 to the time of the commencement of this action rebuts any such assumption or conclusion. The deed was executed in 1867. The trustee, John Coley, died in 1872, and the testimony does not disclose any demand made by William Bryant upon his trustee for the possession of the land, or for any accounting whatsoever. Nor is there any testimony tending to show any demand made upon the heirs at law of John Coley for the possession of the land, nor any demand made upon them for any accounting, nor any claim filed with the administration of his estate in all these years.) On the contrary, the testimony shows that William Bryant was largely indebted; and it is evident from an examination of the deed that Bryant did not expect the proceeds from the sale of the land to be sufficient for the payment of his debts. The aggregate amount of indebtedness named in the deed was much more than two thousand dollars, besides the interest thereon; and the testimony shows that at no time could John Coley have sold the land for a sum sufficient to pay such indebtedness. One of the witnesses—Ex-Sheriff McLendon—testified that Coley offered to sell him the land 'some time between '67 and '70 for twelve hundred dollars,' and that he did not purchase. It seems that Coley did make ineffectual efforts to sell the land for a sufficient sum of money to pay the indebtedness of Bryant, and that finally he concluded to pay the indebtedness, and take the land in consideration of the payment of the same and execution of the trust. The evidence shows that he did actually pay a portion of the indebtedness, and the reasonable presumption from lapse of time is that he paid the whole, and fully executed the trust. If he did so, and at the time of such payments the land could not have been sold for more than the amount of indebtedness paid, Bryant would have had no cause of action against him for an accounting for any surplus, because, necessarily, there could have been no surplus. And during all this time Bryant seems to have given himself no concern about the conduct of Coley, nor about the possession of the land after Coley's death. As hereinbefore stated, Bryant was not the beneficiary under, or by the terms of, the deed. His creditors were the beneficiaries, and he cannot now claim the land conveyed to the trustee for their benefit.

"From my construction of the deed in the light of the conduct of the parties, from the presumption that the beneficiaries named in the deed have been satisfied and their claims against Bryant paid in full, I conclude that

the title to the land in question vested absolutely in John Coley in his lifetime, and that at his death the land descended to his heirs at law free from any trust (*Hay v. Hay*, 4 Rich. Eq. 382); and that the plaintiff and the defendants other than the defendant William Bryant are entitled to judgment for partition thereof among themselves according to their respective rights and interests therein. Furthermore, if the defendant Bryant ever had any interest in the land after the execution of the deed,—which I cannot concede,—and was ever entitled to an accounting from his trustee, he is now debarred by his laches (*Story*, Eq. Jur. § 529; *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277; *Wagner v. Sanders*, 62 S. C. 73, 39 S. E. 950); and that, as against his codefendants and the plaintiffs, he has now no valid defense to their claim. It is therefore ordered, adjudged, and decreed: First. That the defendant William Bryant has no right, title, or interest in or to the tract of land mentioned and described in the complaint in this action, and that he is not entitled to the accounting prayed for in his answer. Second. That the plaintiff and the defendants W. B. Fort, John F. Fort, Matilda I. Parker, Addison S. Fort, and Pearl Fort are entitled to partition of the real property mentioned and described in the complaint herein, according to their several and respective rights and interests, as alleged in the complaint, and that a writ of partition do issue accordingly. Third. That the plaintiff and the defendants other than the defendant William Bryant do pay the costs of this action."

The exceptions are numerous, but it is unnecessary to consider them in detail. We approve the findings of fact by the circuit court and the correctness of the judgment founded thereon. The only equity which William Bryant ever had with respect to the land after deed in trust was the right to compel application of the land to the payment of the debts, and the return of any surplus remaining after such payment. The fact that the indebtedness due to and paid by the trustee exceeded the value of the land in the lifetime of the trustee, the failure to show that any debt provided for by the deed remained unpaid, the long and exclusive possession of the land by the plaintiff and defendant, heirs of John Coley, since his death in 1872, the unexplained delay and negligence of William Bryant since the death of the trustee, Coley, in asserting any equity which he had, are sufficient to justify refusal to grant him any accounting in this action.

The judgment of the circuit court is affirmed.

(64 S. C. 509)

WATFORD v. WINDHAM et al.

(Supreme Court of South Carolina. Oct. 10, 1902.)

ACTION ON NOTE—ANSWER—PARTIES—TRUSTEE.

1. In an action on a note, part of an answer alleging that defendants made it in renewal of a past-due note, and that under legal advice they refused to pay the renewal note, and deposited the amount thereof in a bank to await the result of any litigation between the various claimants to the proceeds, and that other persons interested should have been made parties defendant to the action, was properly stricken out as irrelevant.

2. It is no defense to an action on the note that the proceeds belong to plaintiff as trustee, he being entitled under Code Civ. Proc. § 134, to sue without joining with him the beneficiary.

3. Where a note is indorsed in blank, possession creates a presumption of ownership.

Appeal from common pleas circuit court of Darlington county; Buchanan, Judge.

Action by J. R. Watford against J. K. Windham & Co. From an order striking out parts of defendants' answer, they appeal. Affirmed.

Geo. W. Brown, for appellant. Spears & Dennis, for respondents.

JONES, J. The appeal in this case is from an order of Judge Buchanan striking out portions of defendants' answer as irrelevant. The complaint and answer are as follows:

"(1) That the defendants, J. K. Windham and A. J. A. Perritt, are and were at the times hereinafter mentioned co-partners in trade, trading under the firm name and style of J. K. Windham & Co., at Lamar, S. C.

"(2) That the defendants hereto, at Lamar, S. C., made and executed their promissory note in writing, bearing date on the 1st day of March, 1900, whereby they promised to pay to J. R. Watford, or order, at Lamar, S. C., the sum of \$500, on or before the 1st day of January, 1901; and, although the said note became due and payable before the commencement of this action, yet the defendants have not paid the same.

"(3) That payment has been demanded and refused.

"(4) And the plaintiff further says that he is now the lawful owner and holder of the said note, and that the defendants are justly indebted to him thereupon in the sum of \$500 principal, together with interest at the rate of seven per cent. per annum until paid. Wherefore the plaintiff demands judgment against the defendants for the said principal sum and interest."

The defendants, answering the complaint of the plaintiff in the case above stated, say:

"(1) That they admit the allegations contained in the plaintiff's complaint, numbered 1, 2, and 3.

"(2) That upon information and belief they deny the truth of the allegations contained in paragraph 4 of plaintiff's said complaint, except as hereinafter specifically admitted.

"(3) That for a further defense these defendants allege that on January 5, 1899, they borrowed from Annie Watford the sum of \$484, and gave their promissory note therefor, payable to her order, on or before the 1st day of January thereafter, which said note was indorsed in blank by the said Annie Watford. That on or about the 20th day of February, 1900, these defendants were sent for by plaintiff, and the defendant J. K. Windham went to see him. The plaintiff stated to him that his wife requested that defendant take up said note, and give a new note, payable to the plaintiff. Said defendant went in to see the said Annie about it, but she was then in extremis, and unable to talk about business matters. The plaintiff further stated to said defendant that \$125 of the money belonged to the estate of Henry Munroe Du Bose. That the said Annie had turned over said note to him with the express wish and purpose that he be a father to all her children, and that they be as children to him. That when the money came in on the new note that he pay \$100 each to her two children by her first marriage, Daisy Turner and Bunyan Du Bose, and that he divide the balance between himself and Mary Watford, an infant child born of the second marriage of the plaintiff. That thereafter the plaintiff came to the defendant with the note aforesaid, and delivered it to him, whereupon the defendant, relying upon the statement of the plaintiff, and in ignorance of the legal rights of the parties concerned, executed and delivered the promissory note set forth and described in paragraph 2 of plaintiff's said complaint.

"(4) That the said Annie Watford was twice married. Her first husband was Henry Munroe Du Bose, who departed this life testate in the year 1890. John W. Du Bose was named in said will and duly qualified as the executor thereof. That two children were born of the marriage of the said Annie Watford with the said Henry Munroe Du Bose, to wit, Daisy Turner and Bunyan Du Bose, who are infants under the age of twenty-one years; and on October 1, 1894, the said Annie Watford was duly appointed and qualified as the general guardian of the said minors.

"(5) That after the death of the said Henry Munroe Du Bose the said Annie intermarried with the plaintiff, of which marriage one child was born, Mary Watford, who is an infant under the age of fourteen years. That on the 21st day of February, 1900, the said Annie Watford departed this life intestate, and W. Albert Parrott, Esq., has been appointed by the probate judge for Darlington county as the administrator of her personal estate, and has qualified as such administrator.

"(6) That before the maturity of the note sued upon the defendants were notified not to pay the amount represented by the note sued upon to the plaintiff, and this notice was received from J. L. Michie, probate judge for Darlington county, and from the said Albert Parrott, administrator; whereupon the defendants took legal advice, and, guided thereby, refused to pay to the plaintiff the sum represented by the note sued on, and deposited the money in the People's Bank of Darlington, to answer the result of such litigation as might be had, whereby the interest of the several claimants was determined.

"(7) That the defendants are advised that they made a mistake in executing and delivering the note described in the complaint, and they so allege. They further say that they have acted with entire good faith in the whole matter; that W. Albert Parrott, as administrator of Annie Watford, is a necessary party to the action that the rights of all concerned may in this suit be determined; and that the money owing by the defendants is on deposit in the bank, and will there remain until the court shall determine to whom it belongs.

"(8) The defendants further allege that the said Daisy Turner, by her attorneys, Woods & McFarlan, are now demanding of these defendants certain interests which she claims in the note sued upon; wherefore these defendants pray for an order of this court to make W. Albert Parrott, as administrator of the said Annie Watford, a party defendant to this action, and that he be required to protect the interests of his intestate as he may be advised, and for such other and further relief as to this court may seem meet."

The portions of the answer stricken out were paragraphs 3, 4, 5, 6, 7, and 8 above. We think there was no error. Under section 181 of the Code of Civil Procedure, irrelevant matter in a pleading may be stricken out on motion. The matter stricken out in this case is clearly irrelevant, having no substantial relation to any matter in controversy, and, if proven as alleged, it would not defeat plaintiff's right to recover upon the note, which defendants admit they executed to plaintiff.

If it be true, as suggested in the answer, that plaintiff was charged with a trust in the disposition of the proceeds of said note when collected, that is not a defense that would avail defendants; and under section 134 of the Code a trustee of an express trust, or any person with whom or in whose name a contract is made for the benefit of another, may sue without joining with him the person for whose benefit the action is prosecuted.

It does not appear from anything alleged in the answer that the original note for which the note sued on was given was not the property of the plaintiff; on the contrary, it appears that the old note to Annie Watford was, in the lifetime of Annie Watford, in

the hands of the plaintiff, indorsed by said payee in blank, and was delivered by plaintiff to defendant when the note sued on was executed. The order of the court was favorable to defendants in striking out said portions of the answer and permitting them "to amend their answer by inserting therein such allegations as they may be advised, or sufficient to plead a want of consideration between themselves and plaintiff."

The judgment of the circuit court is affirmed.

(64 S. C. 514)

MYERS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 10, 1902.)

CARRIERS—ACTION BY PASSENGER—EVIDENCE—ISSUES.

1. Where a passenger bought a limited ticket, but missed the connecting train at a junction, and took the next train after the time limit had expired, there is sufficient evidence to go to the jury on the question of exemplary damages, where the conductor, after full explanation, collected fare on threats of expulsion.

2. Where, on threats of expulsion, a passenger pays a fare, but does not leave the car, it is error to submit the question of expulsion to the jury in an action against the railroad company for damages.

Appeal from common pleas circuit court of Barnwell county; Benet, Judge.

Action by Essie Myers, by her guardian, T. S. Myers, against the Southern Railway. From judgment for plaintiff, defendant appeals. Reversed.

B. L. Abney, Joseph W. Barnwell, and Robert Aldrich, for appellant. Davis & Best, for respondent.

JONES, J. The plaintiff, a young woman between 14 and 18 years old, bought a ticket for passage over the defendant's railroad from Allendale to Orangeburg by way of Blackville and Branchville, limited by its terms to 12 p. m. on the 3d day of February, 1901. When she reached Blackville, the connecting train at that point between Augusta and Branchville had left, and the plaintiff stayed at Blackville with a friend, without expense, the night of the 3d day of February. The next morning, after expiration of the time limit, she boarded the first train to Branchville. When she presented said ticket, the conductor refused to receive it, saying that, if the plaintiff did not pay the fare, he would have to put her off; and when she explained the circumstances under which she had failed to use the ticket before its expiration, as stated above, the conductor replied that he could not help that. Thereupon she paid the fare demanded from Blackville to Branchville, and on boarding the train from Branchville to Orangeburg was compelled to pay the

fare between said points, both fares amounting to about \$2. The complaint was for both actual and exemplary damages, and, after alleging facts substantially as above set forth, charged that the action of the defendant company was willful, wanton, and malicious, and that by reason of the aforesaid facts the plaintiff had been greatly outraged, humiliated in her feelings, and caused to suffer great mental anxiety, to her damage \$1,500. The jury rendered a verdict for \$237.50. The defendant offered no testimony, and in open court, before the jury were instructed, admitted liability for actual damages to the amount of \$2, the car fares paid to the conductor as stated.

The appellant's exceptions are to the charge of the court to the jury, and relate to the question of exemplary damages, as follows: "(1) That it is respectfully submitted that his honor the presiding judge erred in instructing the jury, as requested in part by plaintiff: 'That if the jury believe that if the plaintiff presented her ticket to the conductor while traveling on the aforesaid train for Orangeburg, and the conductor refused to receive it, and demanded additional fare to Orangeburg, threatened to eject plaintiff unless such additional fare was paid, then, in that case, in addition to actual damages, plaintiff would be entitled to recover exemplary damages; provided the jury find that the plaintiff was treated with indignity, insult, or contempt; and in adding thereto the words: 'I do say that, if the conduct of the conductor amounted to insult or contempt, it would be a basis for exemplary or punitive damages.' Whereas it is submitted that there was no evidence on the part of the plaintiff showing indignity, insult, or contempt, or from which the jury were authorized to infer such indignity, insult, or contempt, or for which they would be authorized to give exemplary or punitive damages. (2) In charging the jury that: 'If the plaintiff was entitled by her ticket to be taken from Allendale to Orangeburg, and if she was ejected, or threatened to be put off, and if, under the influence of such a threat of being put off, she did pay the fare to prevent being put off, then it will be left for you to say whether that would amount to a technical ejection or not; and if the conduct of the conductor, in so threatening, was, in the language of the complaint, willful or wanton, then it would be a ground of punitive damages in whatever amount you might think justifiable, not more than the amount claimed or more than in your opinion ought to be granted.' Whereas it is submitted that there is no evidence on the part of the plaintiff from which wanton or willful conduct could reasonably be inferred by the jury, no evidence that plaintiff was ejected, or any other evidence warranting the jury in finding punitive damages. (3) In refusing to charge the first request submitted by defendant, in the following words: 'That the

damages which plaintiff could possibly recover in the present suit for any delay in making connection is limited to the expense incurred by her by reason of such delay,' without adding any other words thereto; and in further adding thereto the words: 'That does not, of course, prevent the jury from considering the question of punitive damages.' Whereas it is submitted that there is no evidence on the part of the plaintiff from which the jury were authorized to find punitive damages for the delay alleged in the complaint and referred to in the evidence. (4) In refusing to charge the second request submitted by defendant: 'That, even if the jury find that the plaintiff was wrongfully compelled to pay her fare from Blackville to Orangeburg, the only damages they could find for the plaintiff is the amount paid by her for her ticket from Blackville to Orangeburg, admitted by defendant to be \$2.00, inasmuch as no physical injury was inflicted upon plaintiff nor any insult nor indignity;' and further, in adding to the said request the following words: 'I cannot so charge you. The last part would ask me to say what is or is not in evidence. If there was no evidence whatsoever on the question of willful conduct on the part of the conductor, I might charge you that; but, as I have said to counsel before, where there is any evidence, no matter how slight, tending to show willful or wanton or malicious conduct on the part of a conductor of the railway company, the court is not allowed to say to the jury that it was not sufficient, and I cannot say here that there is none. Therefore the request is refused.' Whereas, it is submitted that there was no evidence whatsoever from which the jury were authorized to infer willful, wanton, or malicious conduct on the part of the conductor. (5) In charging the jury as follows: 'I have to say to you that you must look into the testimony, and see whether she [the plaintiff] has made a good claim for vindictive or punitive damages. Was the conduct of the railway conductor, if he, as alleged, threatened to put her off unless she paid,—was that a willful act on his part, or a wanton or malicious act? Was it such an act as subjected her to indignity,—such as would humiliate her in the presence of others? If so, then you would have to say whether, on that account, she should have vindictive damages. There is no doubt that railway companies are liable in damages when their servants, through whom they act, subject passengers, who are in their cars, to indignity or oppression, or conduct themselves towards them in a way that shows utter disregard of their feelings or their rights, and humiliate them in the presence of others.' Whereas, it is submitted that there was no evidence on the part of the plaintiff from which the jury were authorized to infer indignity, or oppression, or disregard of the feelings of the plaintiff, or tending to humiliate her in the

presence of others, or showing that the conduct of the conductor was willful, wanton, or malicious."

It will be observed that these exceptions all make the point that there was no evidence to go to the jury on the question of exemplary damages. The testimony was to the effect stated above, and, in our opinion, was such as to warrant submitting the issue to the jury. The defendant conductor was informed by plaintiff of the circumstances under which she claimed the right to use said ticket as passenger. The defendant makes no exception to the charge of the court to the effect that, as matter of law, plaintiff, in the circumstances stated, if true, had the right to use said ticket for passage on said train; and, indeed, on the trial defendant admitted liability for actual damages. It was fairly left to the jury in other portions of the charge to determine whether defendant's agent was merely negligent in his conduct or whether he was acting willfully or wantonly. If defendant's agent, conscious of plaintiff's right as passenger, nevertheless invaded that right by exacting and coercing an unlawful payment of money under threat of expulsion from the train, his conduct was willful or wanton, such as would subject defendant to exemplary damages.

In addition to the matter just considered, the second exception involves another point. It is complained that the court left it to the jury to say whether the conduct of defendant's agent amounted to a "technical ejection." Respondent argues that there was a technical ejection, and cites as authority

Railroad Co. v. Eskew, 83 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 492. The case does not sustain respondent's view. The language of the court is: "Although the conductor neither used physical force to expel the plaintiff from the train nor was immediately present when the plaintiff left the train at Conyers, yet it was in fact an expulsion if the plaintiff alighted against his own will, and as an act of obedience to the conductor's previous command." This has no applicability to a case where the passenger does not leave or is not put off the train. In the case before us the passenger never left the train under threat or command or otherwise, and we are at a loss to conceive how the matter of ejection from the train could, in any view, be submitted to the jury. Plaintiff's case was not based upon any unlawful ejection from the train, but was based upon an unlawful and wanton coercion of the payment of money under threat of expulsion from the train. Such an issue was not only foreign to the case as alleged and proven, but it was harmful to submit it to the jury, because under such instruction the jury may have supposed that they were at liberty to treat the case as one in which there had been, in effect, an unlawful ejection from the train. It is true, the verdict of the jury was not very large, but we are unable to ascertain the extent the jury were influenced by the erroneous charge by any consideration of the amount of the verdict.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(131 N. C. 234)

MOTT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 11, 1902.)

RAILROAD EMPLOYEE—ASSUMPTION OF RISK.

1. Priv. Laws 1897, c. 56, which provides that any "servant or employee of a railroad company" who shall suffer injury in the course of his employment by any defect in machinery shall be entitled to maintain an action against such company, renders inapplicable the doctrine of assumption of risk in case of a servant injured while assisting in the removal of a tire from an engine, through defendant's negligence; the statute not being limited to employees running trains, but embracing all servants of railway companies.

Appeal from superior court, Iredell county; Shaw, Judge.

Action by Chas. D. Mott against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Long & Nicholson, Armfield & Turner, and W. G. Lewis, for appellant. F. H. Busbee, for appellee.

CLARK, J. The plaintiff was injured while in the employment of defendant company. He was ordered by one who had a right to command him to aid a foreman to take a tire off an engine, which tire weighed 800 or 1,000 pounds, and had to be heated red hot to obtain the expansion necessary to secure its removal. The plaintiff alleges that while he was engaged in helping to remove this tire it slipped by the negligence of defendant and its servants, as specified in the complaint, and fell upon the iron bar the plaintiff was using, crushing him and injuring him seriously. The jury found, upon issues submitted to them, that the plaintiff was injured by the negligence of the defendant as alleged in the complaint, and that the plaintiff did not by his own negligence contribute to his injury, and assessed the plaintiff's damages at \$500. The court submitted, over plaintiff's objection, another issue: "Did the plaintiff assume the risk of injury when he accepted service of the defendant?" To the submission of this issue, the plaintiff excepted. The jury responded "Yes" thereto, and by reason of such response the judge rendered a judgment in favor of defendant, and plaintiff appealed.

The submission of the issue as to assumption of risk was error, the finding of the jury thereon is immaterial, and the plaintiff is entitled to judgment upon the findings upon the other issues. The case of *Coley v. Railroad Co.*, 128 N. C. 534, 39 S. E. 43, and same case on rehearing, 129 N. C. 407, 40 S. E. 195, are conclusive of this. Those cases have been cited as authority in *Thomas v. Railroad Co.*, 129 N. C. 392, 40 S. E. 201; *Cogdell v. Railway Co.*, 129 N. C. 398, 40 S. E. 202; *Ausley v. Tobacco Co.*, 130 N. C. 34, 40 S. E. 819; *Springs v. Railway Co.*, 130 N. C. 186, 41 S. E. 100; besides other cases at this term. In *Cogdell's Case*, supra, the point was made, and so ruled, that

42 S.E.—38½

the judge, under the authority of *Coley's Case*, properly refused to submit an issue as to assumption of risk when the cause of action was for injury sustained in the course of his employment by a railroad employee.

The act ratified February 23, 1897 (printed, for some reason not yet made public, as chapter 56 in the Private Laws of that year), is as follows:

"Section 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such employee, who shall have suffered death, in the course of his services or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, expressed or implied, made by an employee of said company to waive the benefit of the aforesaid section shall be null and void."

In *Coley v. Railroad Co.*, 128 N. C. 534, 39 S. E. 43, Furches, C. J., after an able and full discussion of the above statute and its bearing upon the doctrine of assumption of risk, says, at page 541, 128 N. C., and page 46, 39 S. E.: "The greater part of the record, consisting of prayers for instruction and the judge's charge, is predicated upon the first issue, the assumption of risk, which are eliminated by the view we have taken of the case. * * * The prayers of the defendant, mainly, if not all of them, are addressed to the assumption of risk, and it is not necessary for us to discuss them, after taking this view of the act of 1897." After full argument, and most careful consideration on rehearing, the court reaffirmed (129 N. C. 407, 40 S. E. 195) the view expressed by the Chief Justice; Douglas, J., saying (page 409, 129 N. C., and page 196, 40 S. E.) that our statute is "an unconditional abrogation of the kindred doctrines of fellow servant and assumption of risk, as applied to railroad companies"; and on page 410, 129 N. C., and page 197, 40 S. E., "We have, therefore, no hesitation in holding the act of February, 1897, valid in its entirety, and that it deprives all railroad companies operating in this state of the defense of assumption of risk, whether resting in contract, express or implied, and whether pleaded directly, or under the doctrine of fellow servant." No case has ever been more thoroughly argued and more carefully and deliberately considered than *Coley v. Railroad Co.* It was argued before us by able counsel three times,—first at September term, 1900,—and was carried over under an advisory to the spring term, 1901, when it was reargued by leave of the court; the opinion affirming Judge Hoke, who tried the cause below, being written by Chief Justice Furches. It was again argued on rehearing at fall term, 1901; the court reaffirming its former decision in a

well-considered opinion by Mr. Justice Douglas. And these opinions have since been approved in several cases, as already cited.

It was suggested here that the act applied only to employes running the trains, but the language of the statute is both comprehensive and explicit. It embraces injuries sustained by "any servant or employee of any railway company * * * in the course of his services or employment with said company." The plaintiff was an employe, and was injured in the course of his service or employment.

The issue and finding thereon as to assumption of risk being irrelevant and immaterial, the cause must be sent back, with directions to enter judgment in favor of the plaintiff in accordance with the findings upon the other issues. *House v. House* (at this term) 42 S. E. 546.

Reversed.

(131 N. C. 238)

RALEIGH HOSIERY CO. et al. v. RALEIGH & G. R. CO. et al.

(Supreme Court of North Carolina. Nov. 11, 1902.)

RAILROADS—FIRES—PRESUMPTION—RES IPSA LOQUITUR—FUEL—SELECTION—INSTRUCTIONS—DUTY OF RAILROAD COMPANY.

1. Where, in an action against a railroad company for loss by fire, it is proved that the fire was communicated by one of defendant's engines, a presumption of negligence arises therefrom; and the burden is then shifted to defendant to show that it used approved appliances, and that the damage was from some extraordinary cause, beyond defendant's control.

2. In an action against a railroad company for damages from fire caused by sparks emitted from an engine, an instruction that, if the use of anthracite coal lessened the danger of throwing sparks from the smokestack, it would be negligence not to use such coal, was properly refused.

Appeal from superior court, Wake county; Allen, Judge.

Action by the Raleigh Hosiery Company and others against the Raleigh & Gaston Railroad Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Battle & Mordecai, Womack & Hayes, Busbee & Busbee, and Shepherd & Shepherd, for appellants. Day & Bell and F. H. Busbee, for appellees.

DOUGLAS, J. This was an action originally brought by the hosiery company to recover damages for losses by fire alleged to have occurred through the negligence of the defendants. Upon their own motion, the insurance companies were made parties plaintiff, for the purpose of participating in the recovery to the extent to which they may have paid the losses. The determination of this appeal practically depends upon a single point,—whether the presumption of negligence arises from the fact, found or admitted, that the defendant's engine set fire to the property. This point is directly decided

in *Hygienic Plate Ice Mfg. Co. v. Raleigh & G. R. Co.*, 122 N. C. 881, 29 S. E. 575, frequently called the "Ice Company Case," where Furches, J., speaking for a unanimous court, says on page 888, 122 N. C., and page 577, 29 S. E.: "When the origin of the fire is fixed on the defendant, the presumption then arises that it was guilty of negligence, and the burden rests upon it to show that it used approved appliances in the operation of its road to prevent the emission of sparks and cinders, or that the damage was caused by some extraordinary cause over which defendant had no control." Citing 2 Shear. & R. Neg. § 676; *Lawton v. Giles*, 90 N. C. 374; *Ellis v. Railroad Co.*, 24 N. C. 138; *Aycock v. Railroad Co.*, 89 N. C. 321. To these authorities may be added *Moore v. Parker*, 91 N. C. 275; *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Wood, Ry. Law*, 1580; 2 *Thomp. Neg.* §§ 2284, 2285; 18 Am. & Eng. Enc. Law (2d Ed.) 498. *Ellis' Case*, cited by the court in *Hygienic Plate Ice Mfg. Co. v. Raleigh & G. R. Co.*, supra, is the leading case, in which Gaston, J., for the court, lays down the rule of presumed negligence as follows: "We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendant. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless." In *Lawson, Pres. Ely.*, the rule is thus stated: "Rule 19b. But when the thing is under the management of the defendant, and the accident is such as ordinarily does not happen if those who have its management use proper care, a presumption of negligence arises from the happening of the accident." In subsection 2 the author says: "A's property is destroyed by sparks from the locomotive of a railroad company. The presumption is that the sparks were negligently emitted." Numerous cases are cited. The rule in *Ellis' Case* is further strengthened by the practically universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof. *Selma, R. & D. R. Co. v. U. S.*, 139 U. S. 560, 567, 11 Sup. Ct. 638, 35 L. Ed. 266; *Mitchell v. Railroad Co.*, 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; *Hinkle v. Railway Co.*, 126 N. C. 932, 938, 36 S. E. 348, 78 Am. St. Rep. 685, and cases therein cited. The condition of the engine was peculiarly, and in fact exclusively, within the knowledge of the defendant.

The court below charged the jury as follows: "If the jury should find from the evidence that the fire originated from the defendants' engine, this would not of itself cast the burden on the defendants to prove that the engine was properly equipped with

spark arresters and skillfully operated." In this there was substantial error, for which a new trial must be ordered.

There is one other exception which we will briefly notice. The plaintiffs requested the court to charge as follows: "That if the jury shall find that the use of hard or anthracite coal in an engine lessens the danger of throwing sparks or fire from the smokestack, it is negligence not to use such coal." This instruction his honor properly refused. The courts have no powers of legislation. They cannot say that railroads shall use certain fuel or appliances. The most that courts can say is that if a railroad company or any one else fails to use such reasonable care in the selection and use of its fuel and machinery as a man of ordinary prudence, dealing with his own affairs, and having a due regard for the rights and safety of his fellow men, would use, then such failure becomes actionable negligence. This is but an exemplification of the ancient maxim, "*Sic utere tuo ut alienum non lædas.*" We are not prepared to say, as a matter of law, that a man of ordinary prudence would, under present conditions, adopt the use of anthracite coal if he could conveniently burn any other kind of fuel.

New trial.

(131 N. C. 241)

LAMB v. ELIZABETH CITY.

(Supreme Court of North Carolina. Nov. 11, 1902.)

EMINENT DOMAIN—DAMAGE TO PROPERTY—ACTION TO RECOVER—EVIDENCE—INSTRUCTIONS—ISSUES—SET-OFF.

1. Where plaintiff sued to recover damages for an alleged wrongful taking of a strip of land by a city, and for injuries by careless removal of buildings, and on its appearing at the trial that the property had been legally condemned, and damages assessed and tendered, plaintiff obtained leave to amend by striking out the allegation of wrongful taking, evidence that the special benefit to plaintiff's property was greater than the value of the strip taken became irrelevant.

2. Where, in an action to recover for negligence in removal of buildings by a city from land condemned, there was no allegation of damages for the cost of raising the buildings after removal, the court properly refused to charge the jury to consider such cost as an element of damages.

3. Where, in an action to recover damages for negligence in the removal of buildings from a strip of land appropriated by the city, there was no showing that the special benefit from the improvement had not been considered in making the award of damages in the condemnation proceedings, such special benefit, if any, could not be set off against the damages to the buildings.

Appeal from superior court, Pasquotank county; Allen, Judge.

Action by E. F. Lamb against Elizabeth City. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Busbee & Busbee and J. Heywood Sawyer, for appellant. E. F. Aydtlett and G. W. Ward, for appellee.

CLARK, J. In this action the plaintiff asked damages (1) because the defendant had wrongfully entered and appropriated a strip of land 8 feet at one end and 4 feet at the other, and 293 feet long, taken off the front of plaintiff's lot in widening the street, which was paved and otherwise improved; (2) because the defendant moved back "the buildings and improvements from said land in a negligent and careless manner, to plaintiff's damage \$300."

It appeared in evidence that the strip had been regularly and legally condemned, and the damages assessed and tendered. The plaintiff thereupon obtained leave, and amended his complaint by striking out the allegation of wrongful taking. There was a great amount of evidence tending to show that the special benefit to plaintiff's property, separate from the general benefit common to others, was very much greater than the value of the strip taken. In view of the amendment abandoning the cause of action for wrongful taking the strip, and the adjudication in the condemnation proceedings (from which no appeal was taken), and tender of the damages assessed, all this evidence becomes immaterial and irrelevant.

As to the other ground of damages,—for removal of the buildings in a careless and negligent manner,—the plaintiff testified that the injury "to the land and buildings was about \$300" by reason of such negligence. It was in evidence that the defendant paid for their removal, and paid plaintiff the rent for the same during the time they were necessarily unoccupied. The court rightly refused to instruct the jury, as prayed by plaintiff, to consider as an element of damages the cost of raising the houses after they were removed, for there was no allegation of such damages in the complaint.

But the court erred in instructing the jury to deduct the value of the special benefit to the plaintiff's land by reason of the improvement. This was a proper matter for consideration in the proceedings for condemnation, and in assessing the amount of plaintiff's damages therein. They were probably so considered, as the damages assessed in that proceeding were only \$30. Such damages were not a proper subject for consideration in this action, which is, after amendment of complaint, solely for injury sustained in the negligent and careless manner of removal of the buildings, unless it had been affirmatively shown that the benefit to the plaintiff's land by reason of the public improvement had not been considered in assessing the damages for taking the land.

Error.

(131 N. C. 250)

PALMER v. WINSTON-SALEM RY. & ELECTRIC CO.

(Supreme Court of North Carolina. Nov. 11, 1902.)

STREET RAILROADS—MOTORMAN—SCOPE OF AUTHORITY—ASSAULT—PROVOCATION—EFFECT.

1. In an action for assault by a motorman on plaintiff, who had been a passenger on a street car, the fact that plaintiff provoked the assault was not a defense, but was relevant only to mitigate damages.

2. Where a passenger on a street car got into an altercation with the motorman, and after alighting from the car and depositing certain bundles, which he carried on the sidewalk, returned to the car, whereupon the motorman left the car and assaulted plaintiff in the street, plaintiff was not entitled to recover, as against the company, for such assault; it not being committed by the motorman while he was acting within the scope of his employment on the car.

Appeal from superior court, Forsyth county; Coble, Judge.

Action by Alfred Palmer against the Winston-Salem Railway & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Glenn, Manly & Hendren and Watson, Buxton & Watson, for appellant. Jones & Patterson, for appellee.

CLARK, J. The plaintiff, while a passenger on the street car of the defendant, and somewhat intoxicated, used grossly insulting words to the motorman. Arrived at his destination, the plaintiff got out, deposited his bundles on the sidewalk, returned to the car, again got into an altercation with the motorman, turned, and left the car, whereupon the motorman followed him up, and, two or three steps from the car, struck the plaintiff on the back of the head with the lever which controlled the car, knocking him down.

The fact that the plaintiff invited the assault by insulting language or provoking conduct would not bar recovery in a civil action, not even when the parties fight by consent. *Bell v. Hansley*, 48 N. C. 131; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Cooley, Torts* (2d Ed.) pp. 183, 187, 190. The rule in criminal actions is that no words, however violent and insulting, justify a blow, but, if a blow follows, both are guilty, though the party giving the insult strikes no blow. The insult is not a defense, but matter in mitigation of punishment. In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages; and, if the amount is less than \$50, the plaintiff recovers no more costs than damages. Code, § 525 (4). In the civil as in the criminal action, the provocation is a mitigation, not a defense.

The only question which remains is as to the liability of the defendant for the as-

sault upon the plaintiff. If the plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left the car at his destination, the employé had immediately followed the passenger up and assaulted him, the defendant concedes that there would be no question as to the liability of the company. *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Strother v. Railroad Co.*, 123 N. C. 197, 31 S. E. 386. Here the passage had terminated for the passenger had deposited his bundle and then returned to the car. *Railway Co. v. Peacock* (Md.) 14 Atl. 709, 9 Am. St. Rep. 425; *Railroad Co. v. Boddy* (Tenn.) 58 S. W. 646, 51 L. R. A. 885; *Creamer v. Railroad Co.* (Mass.) 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Railway Co. v. Bates*, 103 Ga. 333, 30 S. E. 41. But the plaintiff insists, however, that the defendant is liable, notwithstanding, if the motorman assaulted the plaintiff while acting in the scope of his employment. The court so charged, and the exception is that the evidence as above stated did not justify submitting that matter to the jury. In *Pierce v. Railroad Co.*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, the fireman threw a lump of coal at a boy stealing a ride on the tender of a switching engine, in violation of a town ordinance, knocking him from the engine or frightening him so that he fell and was run over and killed by the engine, which was running backwards. In *Cook v. Railway Co.*, 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride under a car. A flagman and a brakeman threw rocks at him, striking the rod under him, frightening him and causing him to get off while the car was in motion, whereby his foot was caught and he was badly hurt. In *Brendle v. Spencer*, 125 N. C. 474, 34 S. E. 634, the plaintiff was watering his team at a stream; and the engineer on a train passing on a bridge above wantonly blew his whistle for the purpose of frightening the plaintiff's horses, which ran away, throwing the plaintiff out of his wagon and injuring him. In none of these cases was the plaintiff a passenger, and in the first two he was a trespasser, and in all three the company was held responsible. But this was because the servant of the company was "acting in the scope of his employment" (i. e., on duty as servant) when the tort was committed. But here the plaintiff was neither a passenger, nor was the employé acting within the scope of his employment. The court should have told the jury that, taking the evidence most strongly for the plaintiff, they should answer the first issue, "No." The employé in this case had left the car, and was not engaged in any work or employment for the company at the time of the assault. He had, for the time being, abandoned his post, and was not doing service for the company, as in each of the three cases last cited. The assault was not made while the motorman was in the line or in the dis-

¶ 1. See *Assault and Battery*, vol. 4, Cent. Dig. § 4, 42.

charge of his duty. 20 Am. & Eng. Enc. Law 168, note 1; Id. 169; 1 Thomp. Neg. §§ 525, 526. If the plaintiff's contract of passage had not terminated, and the plaintiff had been assaulted, while on the car or upon leaving it, by an employé, then the company would be liable, whether the employé was acting within the scope of his employment at the time or not; for, as was said in *Cook v. Railway Co.*, 128 N. C., at page 336, 88 S. E. 925, it can never be in the scope of an employé's service to assault any one wrongfully. "Acting within the general scope of his employment" means while on duty." Id. This is the limitation upon the liability of the company for torts of its employés towards those not passengers or under the protection of the contract of safe carriage at the time of the tort. The law can hardly be better summed up than in the following extract from the brief of the learned counsel for the defendant: "To render the defendant liable, (1) the plaintiff must have been a passenger on defendant's car at the time he was stricken, or still within the sphere of its protection; or (2) the employé must have been acting at the time within the scope of his employment on defendant's car."

New trial.

(131 N. C. 248)

SINCLAIR et al. v. HUNTLEY et al.
(Supreme Court of North Carolina. Nov. 11, 1902.)

EJECTMENT—DEEDS—PRIOR CONVEYANCES—COMMON SOURCE—ESTOPPEL.

1. Where plaintiff's mother conveyed land in controversy to defendants' prior grantor, such conveyance operated as an estoppel as against plaintiff to claim the land under a deed from her mother, subsequently executed.

2. Where, in ejectment, plaintiff failed to prove a valid title as against defendants, it was not necessary for defendants to establish their title.

Appeal from superior court, Anson county; McNeill, Judge.

Action by Mary E. Sinclair and another against Nancy J. Huntley and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

H. H. McLendon, for appellants. Jas. A. Lockhart, for appellees.

FURCHES, C. J. This is an action of ejectment, and we are not certain upon what right the plaintiffs claim the land in controversy. It is admitted that both plaintiffs and defendants claim under Nancy Rickets, who seems to have been the mother of the feme plaintiff, who, she alleges, died intestate, and that she (the feme plaintiff) "is one of her heirs at law." But in addition to this allegation, she offers in evidence a deed from her mother, Nancy Rickets, to herself, for the land in controversy, dated the 9th of March,

1875. This makes a *prima facie* case for the plaintiffs, as both plaintiffs and defendants claim under Nancy. But the defendants offer in evidence a deed from the said Nancy Rickets to Daniel Gatewood, dated December 22, 1878; a deed from Gatewood to E. A. Edwards, dated February 19, 1876; and a deed from E. A. Edwards to the defendant N. J. Huntley (the feme defendant), dated October 1, 1886; and the evidence tends to show that Gatewood, Edwards, and the defendant Huntley have had continuous possession under these deeds. And while there was much evidence as to the possession of the defendants and those under whom they claim, and while the court below seems to have considered that a material question, we do not. The only title the plaintiffs have is derived from Mrs. Rickets, as an heir at law, or under the deed dated the 9th of March, 1875; and Mrs. Rickets having conveyed the land to Daniel Gatewood, December 22, 1873, she had nothing to convey to the plaintiffs in 1875, nor did she have any estate in this land to descend to the feme plaintiff, as one of her heirs at law. As the plaintiffs claim to derive their title from Mrs. Rickets, the deed to Gatewood was an estoppel upon them, and they could not proceed without first removing it, upon the ground of fraud or some other cause. This they attempted to do, but were not successful. As the plaintiffs' title failed, their action failed, and it was not necessary for the defendants to establish their title; and, for that reason, it is not necessary to discuss the question of possession of defendants and those under whom they claim.

The plaintiffs' exceptions have been considered, and, if any of them could be sustained, they could not affect the result, under the view of the case the court has taken.

Affirmed.

(131 N. C. 264)

PARKER et al. v. BROWN.
(Supreme Court of North Carolina. Nov. 11, 1902.)

PRINCIPAL AND AGENT—CONTRACTOR—PURCHASE OF MATERIAL—AUTHORITY—EVIDENCE—RATIFICATION.

1. Where a contractor altering a building for a specified price purchased lumber from plaintiffs therefor, his declarations that he was buying the lumber for the defendant were not competent to prove his authority to buy the lumber on defendant's credit.

2. Where a contractor had agreed to remodel defendant's building, the fact that lumber furnished the contractor was used in repairing the building was not evidence of a ratification of the contractor's representations as to authority to purchase the lumber for the owner.

3. Where the agency of a contractor to purchase lumber for the owner was disputed, a question asking the agent if he was the agent of the owner for the purchase of the lumber was properly excluded.

4. Where a contractor agreed to remodel a building for a certain price, a statement by the contractor to the owner that he expected the latter to pay the bills for material, to which the owner made no reply, and which neither

¶ 1. See Estoppel, vol. 19, Cent. Dig. § 67.

party acted on, was no evidence, as against the owner, of the contractor's agency to purchase the material.

5. Where a contractor had agreed to remodel a building for a specified price, the fact that the owner paid the difference between the grade of lumber stipulated for and that furnished, and had the lumber charged to the contractor at the price charged for the cheaper grade, was not evidence that the owner agreed to be liable for the lumber so furnished.

6. During the performance of the contract, plaintiff, who had furnished materials, was told by the owner that, if he would get an order from the contractor, the owner would pay the same. Plaintiff failed to do this, however, until after the contractor had abandoned the contract, and until there was nothing due him thereunder, whereupon the owner refused to pay the same. *Held* to negative an alleged agency of the contractor to purchase the lumber for the owner.

Appeal from superior court, Granville county; McNeill, Judge.

Action by S. W. Parker and another against J. S. Brown to recover for materials furnished. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

H. M. Shaw and J. W. Graham, for appellants. T. T. Hicks and A. A. Hicks, for appellee.

COOK, J. The bare representations or declarations made by Spencer, the contractor, to plaintiffs, that he was buying the lumber for defendant, were not competent to prove agency for that purpose (*Jennings v. Hinton*, 128 N. C. 214, 38 S. E. 863; *Summerrow v. Baruch*, 128 N. C. 202, 38 S. E. 861; *People v. Dye*, 75 Cal. 108, 16 Pac. 537; *Hubback v. Ross*, 96 Cal. 426, 31 Pac. 353; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 689, 46 Pac. 738), and were, therefore, properly excluded. So the second, third, fourth, and fifth exceptions cannot be sustained. Spencer was a contractor, and had contracted to repair and remodel defendant's dwelling house for a lump sum,—\$1,383.50,—and to furnish all the material; so the single fact that the lumber was used in repairing the house for defendant would not be any evidence of a ratification of such representations as Spencer may have made to plaintiffs.

Whether the relation of principal and agent had been created depended upon the authority or power delegated. What that authority was is a question of fact; its effect a question of law. Therefore the court properly excluded the plaintiffs' question (to which the first exception is taken), "If he [Spencer] was the agent of Brown for the purchase of the lumber." The agency being in dispute, the express or implied authority to act must be shown. The facts being shown, then whether the relation of principal and agent is created becomes a question of law for the court to declare, and not for the witness.

We think his honor properly sustained defendant's motion to nonsuit under the statute (to which exceptions 6 and 7 were taken). It was a "turnkey" job. Spencer was his

own principal in the purchase of lumber. He quit the job before completing it, leaving nothing due to him by defendant. No authority appears from the evidence to have been given Spencer to purchase lumber for Brown. "Brown asked me [Spencer] if I [Spencer] expected him to pay the bills for material which I was buying. I replied that I had no money to pay for the same, and would expect him to do it." To which Brown made no reply. This is relied upon by plaintiffs as some evidence to show agency, but we do not think it does. Brown did not consent to do so. His silence was not an assent. Neither party acted upon it, for he completed the job (except about \$40 worth of work to be done), and Brown did not buy or pay for a single item; nor was he requested to do so.

Parker, one of the plaintiffs, testified that Spencer desired to use a cheaper grade of lumber. Plaintiffs, from whom he was buying, had none of that kind on hand, but informed the defendant and Spencer that they had a better grade of the same kind of lumber which they would furnish at an advance price. Spencer objected to paying for the better grade at the advance price, and Brown thereupon put his hand in his pocket, took out some money, and tendered and paid to plaintiffs the difference between the price which Spencer wanted to pay for the lumber and the price plaintiffs charged for lumber furnished; and this high-priced lumber was charged against Spencer at the price asked for the cheap lumber. This is no evidence that Brown had agreed to pay the bills of lumber, but tends to show the contrary.

The conversation between plaintiffs and Brown about the bill in suit negatives the alleged agency. Brown told plaintiffs to get an order from Spencer, and he would pay it. Plaintiffs (Parker) told Brown that Spencer was fractious, and he did not want to offend him; that one Turner, a lumber man, had followed Spencer up too closely with a bill, and that Spencer had quit trading with him, and that he (Parker) did not desire to lose him as a customer. Nor does it establish any liability against Brown on account of such promise. The promise was to pay Spencer's order if plaintiffs would get one. This they did not then do, while Brown was in debt to him, which was in November. But on the 28th of March following, after Spencer had quit the job, and when defendant did not owe him anything, they got an order, and this defendant refused to pay. His liability on this account, however, is not seriously pressed, and, as such contention could not be sustained, we will not discuss it.

There being no error in the ruling of the court in excluding the evidence excepted to, and no evidence tending to show that defendant was liable for the bill sued upon, his honor properly sustained the motion to nonsuit under the statute.

No error.

(131 N. C. 287)

WILLIAMS v. IRON BELT BUILDING & LOAN ASS'N.

(Supreme Court of North Carolina. Nov. 11, 1902.)

NONRESIDENT CORPORATIONS—SERVICE OF SUMMONS—USURY—ACTION FOR PENALTY—LIMITATIONS.

1. Code, § 874, providing that no justice shall enter a judgment, where one of the defendants is a resident of another county, against a defendant who is a nonresident of his county, unless process was served on him 10 days before the return day, does not apply to a nonresident corporation whose secretary was served in another county, pursuant to Pub. Laws 1901, c. 5; it not having appointed an agent in the state on whom service could be made.

2. Code, § 3836, authorizing an action within two years after payment of usury to recover a penalty, is to be read with section 162, providing that, when the defendant departs from or resides out of the state, the time of his absence shall not be deemed part of the time limited for commencement of the action.

Appeal from superior court, Durham county; Neal, Judge.

Action by A. B. Williams against the Iron Belt Building & Loan Association. Judgment for defendant. Plaintiff appeals. Reversed.

Winston & Fuller, for appellant. Manning & Foushee, for appellee.

CLARK, J. If it be conceded, as defendant claims, that all previous proceedings were discontinued by the failure to issue aliases, this action to recover the penalty for usury, "double the amount of interest paid" (Code, § 3836), began by the issue of a summons by a justice of the peace May 25, 1901. This was served in Durham county upon the secretary of the corporation commission, as provided by chapter 5, Pub. Laws 1901; the defendant being a nonresident corporation doing business here, and not having appointed an agent in this state upon whom service could be made. This summons was returnable May 30, 1901, when the plaintiff obtained judgment for \$200. Upon appeal to the superior court, Shaw, Judge, at September term, 1901, set aside the judgment as irregular because summons had not been served 10 days before trial (Code, § 874), and remanded the case to the justice, and the plaintiff's exception was entered on the record. On January 4, 1902, the justice dismissed the action "in deference to the ruling of Judge Shaw," and plaintiff appealed. On May 30, 1901, the plaintiff began his action in the superior court, alleging the judgment for \$200 he had that day obtained before the justice of the peace, as above stated; that the defendant held a mortgage against the plaintiff, claiming a balance due thereon of \$150, under which the property had been advertised for sale; asking for a cancellation of the mortgage and an injunction. A restraining order was granted. These two actions were consolidated, and at January term, 1902, a jury trial being waived by con-

sent of parties, the facts were found by Neal, Judge, who found, in addition to the above recitals, and sundry matters that are immaterial in the view we have taken, that the defendant had collected usury. It was admitted that the last payment of interest was made January 4, 1898, and that the defendant was then, and has been ever since, a nonresident corporation, upon whom service could not then, nor at any time since, have been made (it having no agent in this state), until the enactment of chapter 5, Pub. Laws 1901, ratified March 15th of that year. His honor, being of opinion that the action was barred, not having been begun within two years from the last payment of interest, decided against the plaintiff, and authorized a sale of plaintiff's property for the balance due under the mortgage.

Code, § 874, on its face, applies only to cases in which a justice's summons has been issued against a defendant residing in another county, and has no application to a case like the present. There was error in the judgment at September term, 1901, setting aside the judgment for irregularity, and remanding the case to the justice. The plaintiff preserved his right to have such judgment reviewed by causing his exception to be noted on the record. Under chapter 69, Pub. Laws 1895, action to recover the penalty for usury may be brought within two years after payment in full of the indebtedness; but this debt, having been contracted prior to that act, under its terms, falls under Code, § 3836, by which action must be brought within two years after the payment of the usury complained of. *Smith v. Association*, 119 N. C. 257, 26 S. E. 40. But this two-year prescription is subject to the provisions of section 162 of the Code, that if, when a cause of action accrues against a person, he shall be out of the state, or shall thereafter depart therefrom and reside out of the state, "the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action." "The time herein limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347. It was contended that this was an enabling statute, and not a statute of limitations. We see no reason why section 162 does not apply to this action, as to any other. It is true that the statute (Code, § 3836) created the liability; but that is true of a great many causes of action as to which, as here, the statute prescribes a term of years within which the action must be brought. Code, § 1498, gives the personal representative a right of action for wrongful death of his testator or intestate, provided

the action is brought within a year. In *Meekins v. Railroad Co.* (at this term) 42 S. E. 333, we held that this section was subject to the provisions of Code, § 166, authorizing a new action within one year after a nonsuit. By the same reasoning, the two years within which an action may be brought under Code, § 3836, is to be construed in connection with the provisions of section 162, which provides that, if the defendant departs from or resides out of the state, such action may be brought within two years after process can be served upon him; otherwise the statute would be illusory and partial in favor of nonresidents. *Armfield v. Moore*, 97 N. C. 38, 2 S. E. 347. Since the enactment of chapter 5, Pub. Laws 1901, will now expose such corporations to service of summons, cases like the present will very rarely, if ever, arise hereafter.

Error.

(131 N. C. 245)

BELL v. WYCOFF, Sheriff.

(Supreme Court of North Carolina. Nov. 11, 1902.)

**SHERIFFS--PROCESS--SERVICE--RETURN--
DELAY--PENALTIES.**

1. Where a summons was issued June 27, 1901, returnable at the July, 1901, term of the court, and recited that it was returnable on the fifth Monday before the first Monday in September, 1901, and it was not in fact returned until August 6, 1901, it was no defense to an action to recover the penalty prescribed by Code, § 2079, for the sheriff's failure to return the same within the time required, that it was his impression that the summons was returnable at a later date, and that his failure was occasioned by endeavoring to obtain service.

Appeal from superior court, Rockingham county; Coble, Judge.

Action by Ida L. Bell against J. H. Wycoff to recover a penalty against defendant, as sheriff, for his failure to return a summons within the time required. Judgment for plaintiff, and defendant appeals. Affirmed.

After the failure of the defendant sheriff to make due return of the summons issued to him in the action of Ida L. Bell against Wm. T. Bell, upon motion of the plaintiff, judgment nisi was entered against him, under section 2079 of the Code, by the court, and sci. fa. issued. Upon the return of the sci. fa., his honor found the facts from the evidence submitted by plaintiff and respondent, and thereupon entered judgment in favor of the plaintiff, and defendant appealed. The court found the following facts: "That the summons was issued June 27, 1901, returnable to July term, 1901, which began July 29, 1901. That the summons was received by Wycoff, sheriff, July 1, 1901. That said term of court to which the summons was returnable adjourned sine die August 1, 1901. That said summons was returned by said sheriff, Wycoff, August 6, 1901. That the clerk of the court received the said summons from said sheriff August 7, 1901. That

sci. fa. was served on Wycoff, sheriff, on November 29, 1901. That immediately on receipt of said summons by said sheriff he placed the same in the hands of one of his deputies, W. C. Wooten, who lives in the section of the county where the said sheriff had been informed that the defendant in the said action of Ida L. Bell against William T. Bell had resided. That the said defendant sheriff gave his said deputy instructions to make diligent search for the said defendant Bell, and, if found, to serve the paper on him at the earliest possible moment. That some time during the month of July the said sheriff met said deputy sheriff, and asked him about said summons. That the said deputy informed him that the said defendant, Bell, was not and had not been a resident of the state for nearly a year, as he had learned upon inquiry, but that one Thomas Bell, the father of said defendant, Bell, and who resided in Iredell county, had informed him, the said deputy, that said defendant Bell would pay a visit to his father's home the latter part of July or first of August of said year 1901, and that, if he should be allowed to hold the said summons a while longer, then he could secure service upon the said defendant Bell. That afterwards, when the said sheriff received a letter from A. J. Benton, attorney for the plaintiff in said action, he, the said sheriff, caused the said deputy to bring said summons in, when he was informed that the deputy had learned from the father of the said defendant, Bell, that he was unable to come on the expected visit, on account of sickness in his employer's family. That thereupon the said sheriff caused the said deputy to make the return which appears on the back of said summons, and to return the same unexecuted, at the same time returning the sixty cents fees which had been advanced to the said sheriff by the plaintiff. That when the said deputy sheriff, Wooten, received the said summons, he was under the impression that the said summons was returnable at a later day, to wit, the latter part of August of said year. That the said summons, on its face, stated that it was returnable at the courthouse in Wentworth on the fifth Monday before the first Monday in September, 1901. That, as soon as the said Wooten received said summons, he made diligent inquiry for the said defendant, William T. Bell. That he inquired of five or six persons who, in the opinion of the said deputy sheriff, Wooten, were likely to know the said defendant's whereabouts, and that all of the said people told the said Wooten that they did not believe that the said defendant, Bell, was in the state of North Carolina; but that the said deputy sheriff, being anxious to further discharge his duty in the premises, went to the father of the said William T. Bell, who lived at the distance of some three miles, and inquired of him of the whereabouts of his said son, at the same time informing him that he had a summons

for him in a suit commenced by his wife, Ida L. Bell, in the superior court of Rockingham county. That the father of the said defendant, Bell, informed the said Wooten, deputy sheriff, that his said son was not a citizen or resident of the state of North Carolina, and had not been for nearly a year, but that he was then a citizen and resident of the state of West Virginia, and that he had received a letter from his said son in which he stated that he intended to make a visit to his said father and mother in Iredell county, in the latter part of July or the first of August, 1901, and that if the said Wooten, deputy sheriff, would hold said summons until said time, that he could recover service of the same. That the said deputy, desiring to accommodate the plaintiff and secure service for her, held said summons until the 1st of August, when he learned that said defendant Bell was not in the county of Iredell, and that he would not probably be in said county. That the said deputy sheriff held said summons solely for the purpose, as he conceived, of performing his duty and accommodating the plaintiff." It is prescribed by section 2079 of the Code that "every sheriff by himself or his lawful deputy shall execute all writs and other process to him legally issued and directed within his county * * * and make due return thereof under penalty of forfeiting one hundred dollars for each neglect, where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved by order of the court, upon motion and proof of such delay, unless such sheriff shall show sufficient cause to the court," etc.

Armfield & Turner, for appellant. A. J. Burton, for appellee.

COOK, J. (after stating the case). We sustain his honor in holding that the cause of his delinquency, as stated in the facts found, was insufficient to excuse defendant from the penalty imposed by law. The impression that the summons was returnable at a later date, to wit, the latter part of August, was not made by his reading the summons, as he should have done, for the word "August" does not appear therein. The "fifth Monday before the first Monday in September" cannot come the latter part of August, so his impression was not obtained from the summons which he received and was "commanded" to serve. Before undertaking to obey the precept, he should have read and learned its contents, and known what he was commanded to do. This he neglected and failed to do, for which he was inexcusable, and will have to bear the burden of his own (or his deputy's) carelessness. His diligence in undertaking to locate the defendant and to serve the summons upon him when he should reach the county was incumbent upon him, and in doing so he only discharged

his duty to that extent. But holding the summons after the return day, for the purpose, as he conceived, of performing his duty and accommodating the plaintiff, was a misconception of duty, and does not protect him against the penalty. To accommodate the plaintiff was no part of his duty. An officer should discharge his duties faithfully and impartially, and accommodate his acts and doings to the requirements of law and his oath of office, and not to aid friends and favorites, or to incur the favor of any particular person or persons. Why a case so utterly devoid of merit should be taken by appeal to this court, we are unable to conceive.

• Affirmed.

(121 N. C. 375)

McLEAN et al. v. BULLARD.

(Supreme Court of North Carolina. Nov. 18, 1902.)

BOUNDARIES—QUESTION FOR JURY.

1. Where testator's will attempted to divide his land between two sons, and in an action by one of them to recover his share the dispute was not as to the boundaries of the land itself, but the question was where it was situated with respect to the dividing line between the two brothers, as mentioned in the will, the question was one for the jury.

Appeal from superior court, Scotland county; McNeil, Judge.

Action by Mary B. McLean and others against W. W. Bullard. From a judgment for defendant, plaintiffs appeal. Reversed.

John D. Shaw, Jr., for appellants. Jas. A. Lockhart, for appellee.

MONTGOMERY, J. The testator in his last will and testament devised the whole of his real estate to his two sons, and undertook to make a particular division of it between them. The language of that part of the will is in these words: "Unto my sons, Malcomb and Daniel, I also give and bequeath all the lands which I now possess, to be divided between them in the following manner, to wit: Malcomb shall have the hundred acres granted to Daniel McCay, lying between the Big Bay and the Little Shoe Heel; also the fifty acres called the 'Watson Tract,' together with all the land I own on the east side of the branch rising in the Hoop Pole Branch, except eight acres of the last-mentioned land, which I hereby give and bequeath to my said daughter Flora, to be located by the side of said branch. My son Daniel shall have my home plantation, together with all the land I own on the west side of the branch, except eight acres to be located on the said branch, which I give and bequeath to my daughter Isabella."

If the dividing line between the brothers of a certain portion of the testator's land, to wit, "the branch rising in the Hoop Pole Branch," is to stand, then there will remain

a considerable portion of the land devised to Daniel and Malcomb not embraced in the attempted partition in the will; for, according to the evidence of the witnesses and from the map introduced, there is no branch rising in the Hoop Pole Branch. There is a body of water, a little north of the center of the Watson tract, called the "Hoop Pole Pond," and there is a branch issuing out of the pond and running southwardly through another tract, called the "Williams Tract," upon which was the home settlement of the testator. If it could be held that the testator inadvertently wrote "Hoop Pole Branch" for "Hoop Pole Pond," we are met with the difficulty that with such construction the pond would be the source of Hoop Pole Branch, and in that case the land in dispute would lie to the north of the branch, and not to the west of it, or touching it, and therefore it would not have been allotted in the partition attempted under the will to Daniel, but would have remained under the general devise, to be partitioned between the brothers. The plaintiff represents Malcomb's interest, and she could bring the action to recover the whole of the tract of land, for the benefit of the tenants in common. There was error in the judgment of nonsuit.

It does not appear that there is much, if any, dispute as to what are the boundaries of the land, the recovery of which is sought in the action; nor was there any trouble in fixing the description to the land itself. The only question is, where is it situated with respect to the dividing line between the two brothers as is mentioned in the will? and that matter is for the consideration of the jury under instructions from the court.

Error.

(131 N. C. 277)

KECK v. AMERICAN TELEPHONE & TELEGRAPH CO. et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

SERVANT-INJURIES—UNLOADING CAR OF TELEPHONE POLES—EVIDENCE—SUFFICIENCY.

1. Plaintiff was injured while unloading a car load of telephone poles, and there was evidence that the method of unloading was the usual one, and it did not appear that there was any lack of the necessary hands, or that the standards on the cars which broke were inferior. *Held*, that a nonsuit should have been granted.

Appeal from superior court, Guilford county; Neal, Judge.

Action for personal injuries by J. G. Keck against the American Telephone & Telegraph Company and another. Judgment for plaintiff as against the defendant named, and it appeals. Reversed.

A. B. Andrews, Jr., for appellant. J. A. Barringer, for appellee.

MONTGOMERY, J. A judgment upon the verdict was entered in favor of the defendant

the Atlantic & Yadkin Railway Company, and, the jury having found the issues in favor of the plaintiff against the other defendant, the American Telephone & Telegraph Company, judgment was rendered against that company for the amount of the recovery.

The circumstances connected with the incident or transaction connected with which the negligence of the defendant the telephone company was imputed were substantially these: The defendant railroad company brought on its cars a lot of telephone poles from Wilmington to a point a little north of Greensboro, shipped to the defendant telephone company. N. O. Wood, alleged by the plaintiff to have been the superintendent of the defendant telephone company (which was denied by the defendant), employed the plaintiff to assist in the unloading of the cars. The plan adopted for unloading was to cut the standards on one side of the cars about halfway through, and then to send hands on top of the poles and cut the wires which ran across the top of the poles, and fastened together the standards on both sides of the cars. Usually, in unloading in that way, when the wires were cut the poles would give way, and easily roll off on that side where the standards were cut. When the plaintiff, however, had cut the last wire, and had gotten back on the other side of the car, the standards on the opposite side (those that had not been cut, as well as those that had been cut) gave way, and the plaintiff, together with the poles, rolled off and was hurt. A witness (Goodman) testified that he had had experience in unloading poles, that he was employed at the same time, and that Keck stood where it was usual to stand. He said further that the poles were loaded in the usual way. "No usual way to unload them. You can unload them any way. You can either derrick them or unload them with skids. * * * Both Mr. Wood and myself instructed Keck how to cut the wires." John Rives testified that "he and Keck cut wires on the top of the standards. * * * That was the usual way of unloading poles. There might have been a little curve. The side we fixed for them was a little higher than the other." There was no evidence that there was any lack of hands to properly unload the cars, nor was there any evidence tending to show that the standards were inferior or unsound, or were too small in size. Everything, apparently, was in proper condition and no mishap or danger anticipated. It seems to have been an accident,—“an event from an unknown cause,”—and the defendant's motion for judgment of nonsuit against the plaintiff ought to have been granted.

Ordinarily we would consider the matters concerning the other defense set up by the defendant, viz., that the telephone line of the defendant was being constructed by an independent contractor at the time of the acci-

dent. But as it appeared in evidence that there was a contract in writing between the defendant telephone company and the Southern Bell Telephone Company concerning the construction of the line, in the possession of the defendant, though not before the court, it will be better to await the production of that paper, in case there is another trial and that defense is relied on. The contents of that contract were not allowed by his honor to be given in evidence, but there was evidence to the effect that Wood was in the employment of the Southern Bell Telephone Company at the time of the accident, and that that company was doing the work. In what capacity it was doing the work,—whether as agent or as an independent contractor,—must be determined by the written contract.

New trial in behalf of the defendant the American Telephone & Telegraph Company, for the error pointed out. New trial.

(131 N. C. 770)

STATE v. HINTON.

(Supreme Court of North Carolina. Nov. 18, 1902.)

ROADS—ROAD DUTY—RESIDENCE—EVIDENCE.

1. On a prosecution for failing to do road duty in a certain township it appeared that at the time defendant was summoned he was working and residing in the township, and had been there about 3 weeks under an agreement to stay 60 days; that he had a regular position in a city, where he voted and paid taxes. His wife was with him in the township, and had moved her belongings there. *Held*, that defendant was not liable to road duty.

Appeal from superior court, Wake county; O. H. Allen, Judge.

Ivey Hinton was convicted of refusing to do road duty, and he appeals. Reversed.

Thos. M. Argo, for appellant. The Attorney General, for the State.

DOUGLAS, J. The defendant was convicted of refusing to work the public roads in Wake Forest township, he being a resident of the city of Raleigh. But one point need be considered for the determination of this case, as it strikes at the root. On the trial the court below was asked by the defendant to instruct the jury that, "if they believed the evidence as a whole, the defendant was entitled to a verdict of not guilty." This was refused by the court, who, in lieu thereof, charged the jury that, "if they believed from the evidence beyond a reasonable doubt that the defendant left Raleigh with his wife and went to Mr. Haywood's, his wife taking all of her things with her from Mr. Adams', and the defendant having a sleeping room at the Baptist University, where he slept as a servant, but lived with his wife, and during the vacation at the college they went to Mr. Haywood's under an agreement, she to cook for an indefinite period and he to work as a laborer for two months unless called back sooner,

and he was not so called back, and while he was so working he was summoned to work the road, being one of the hands on Haywood's plantation, and had willfully refused to work, they should find the defendant guilty." In the charge, as well as the refusal to charge, there was error. It appears from the evidence that the defendant had permanent employment in the city of Raleigh, where he worked for at least 10 months in the year, and where he paid taxes and voted. He worked at the Baptist University, where he also slept; but says that he lived with his wife at Mr. Adams'. Whether he meant that he took his meals at the latter place, or merely considered it his home, does not clearly appear; nor do we think it material, as both places are in Raleigh. During the vacation at the university he was permitted to work elsewhere, and he made a contract to work on Mr. Haywood's farm for 60 days, unless sooner recalled to the university, to pay off an old debt. His wife also worked at the same place, and for the same purpose, she receiving \$3 per month, with board, for her services, and he \$7. That they should both work during their vacation at such moderate wages to pay off an old and uncollectible debt, is to their credit. We say "uncollectible" because he appealed in forma pauperis. The defendant did not acquire a residence in Wake Forest township, where he had been only three weeks when summoned to work the road; nor is there any evidence tending to show that he had any such intention. On the contrary, all the evidence tends to prove that he was there purely for a temporary purpose, with the expressed intention of returning to Raleigh on or before the expiration of the 60 days. But it is contended that he acquired a temporary residence at Haywood's, still retaining his domicile in Raleigh. Suppose he had worked around by the week or day; would he have been liable to work on every road near which he happened to be when the road hands were called out? Again, it is urged that his wife "moved her things to Mr. Haywood's." Whether she carried them on her head or in a two-horse wagon does not appear. In any event, we are not prepared to say that the temporary location of a wife's personal belongings draws to them, in law, the residence of the husband. We have decided this case upon the reason of the thing, which does not seem to be in conflict with any authorities or precedents called to our attention. We do not think that the law intends to impose upon any one the double burden of working the roads in different districts at the same time; and, as the defendant had paid taxes for working the streets of Raleigh,—admittedly the place of his domicile,—we do not think he could be required to work the roads in any or every district where he happened to be temporarily employed.

New trial.

(131 N. C. 254)

DORSETT v. CLEMENT-ROSS MFG. CO.
(Supreme Court of North Carolina. Nov. 11, 1902.)**RELEASE—PERSONAL INJURIES—FRAUD—NEG-
LIGENCE—QUESTIONS FOR JURY—EVIDENCE
—PLEADING—ASSUMPTION OF RISK.**

1. In an action by a servant for injuries, it appeared that defendant's agent prepared a release without plaintiff's knowledge; that the agent and defendant's physician, who attended plaintiff, went to plaintiff's house to get him to sign it; and that plaintiff could neither read nor write. According to plaintiff's testimony, the paper was not all read to him, or was incorrectly read, so that he did not know he was signing a release, but understood that he was to sign it so that the doctors could get their pay, and plaintiff \$15 for lost time. The release was stated to be in consideration of \$95 paid to plaintiff, and it was admitted that only \$15 was paid. *Held*, that the question of fraud in procuring the release was properly left to the jury.

2. While inadequacy of consideration may not, alone, be sufficient to set aside a release, it is proper evidence to be considered on an issue of fraud in obtaining it.

3. In an action by a servant for injuries, it was proper, on cross-examination, for the purpose of impeachment, to ask defendant's physician, who attended plaintiff and participated in procuring a release, whether he had not witnessed several other releases of the same character for defendant.

4. The defense of assumption of risk by the servant must be pleaded.

5. Plaintiff, standing in an open space, 4 feet long and 18 or 20 inches wide, was required to work a sweep to which was attached a block and tackle by which he was to raise heavy logs. It was in evidence that a person could work there without getting hurt, but also that five other persons had been injured. *Held*, that the question whether the place was reasonably safe was properly left to the jury.

6. In an action by a servant for injuries due to his coat sleeve being caught in uncovered cogwheels, testimony that five other persons working at the same place and at the same work had been caught in the same manner was admissible.

Appeal from superior court, Davidson county; Shaw, Judge.

Action by Arthur Dorsett against the Clement-Ross Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. H. C. Cabell and Glenn, Manly & Henderson, for appellant. Emery E. Raper, for appellee.

FURCHES, C. J. The defendant is a corporation engaged in manufacturing veneering, and the plaintiff was an employé of defendant at the time he received the injury complained of, and this action is brought for damages. The plaintiff alleges that his business at the time of the injury, as it had been for the past four or five days, was to hoist logs or blocks by means of a sweep, to which was attached a block and tackle; that the blocks were raised in this way from the floor of the building, a distance of some 4

feet, swung around to the machine, and then fastened; that it was also a part of his duty to sweep them off with a broom, which was kept hanging on the post of the sweep or crane for that purpose; that he had just hoisted a block, placed it upon the machine, swept it off, and was in the act of hanging up the broom, when he was injured. This machine consisted of a large knife or blade that cut or pared the veneering from the blocks as they were made to revolve by means of powerful cogwheels. These cogwheels were on a piece of shafting, 4 feet and 1 inch from each other, and about 17 inches in diameter, and worked by other smaller cogwheels. The evidence further tends to show that the space in which the plaintiff had to stand to do his work was about 4 feet long and about 18 or 20 inches wide, and in this space stood the post of the crane on which the broom hung. These cogwheels were not boxed or covered, and, as the plaintiff turned and was in the act of hanging up the broom, his coat sleeve was caught in the exposed cogwheels, which had been put in motion, and his arm drawn in and so badly mangled that it was necessary to amputate it near the shoulder joint. It was no part of the plaintiff's duty to start or run the machine. The plaintiff alleges that his injury was caused by the negligence of the defendant, and without fault or negligence on his part. The principle ground complained of as negligence on the part of the defendant was the limited space the plaintiff had to work in, and the uncovered condition of the cogwheels, which, he says, could have been easily covered, without affecting the running or the efficiency of the machine. The defendant answered the complaint, and admits the injury, and that the cogwheels mentioned in the complaint were uncovered, but denies that it was due to the carelessness or the negligence of the defendant that they were not covered, and alleges that it was neither carelessness nor negligent not to have them covered, and that the plaintiff was injured by reason of his own carelessness and negligence. The defendant also pleads in discharge of any right of action the plaintiff may have had against it on account of said injury a release and discharge given the defendant by the plaintiff since he received the injury. To this release the plaintiff replied, and alleged that it was procured by fraud, deception, and undue influence.

This presents the first question for our consideration, as it is a bar to the plaintiff's right to recover, whatever the merits of his case may be, unless it is set aside. And it is not for us to say whether it was properly procured or not. This was a matter for the jury, if there was such evidence as to authorize the court in submitting the question to them, and as to whether evidence was allowed to go to the jury over the objection

¶ 4. See Master and Servant, vol. 24, Cent. Dig. § 558.

of the defendant that ought not to have been allowed, or that the judge erroneously instructed the jury as to the law involved in the trial of the issue, or refused properly to instruct the jury when requested to do so. And it is not our duty to undertake to reconcile conflicting testimony, nor to say what weight or credit should be given to such testimony. Indeed, in considering this question as to whether there was evidence reasonably tending to establish fraud in procuring the release, we can only consider that which tends to show fraud, as the jury might have believed it, and not have believed that tending to disprove the fraud. But this evidence must be more than a scintilla,—more than to raise a suspicion or belief; but it must be such, if believed, as ought to satisfy a reasonably fair mind that the release was not obtained fairly and was not without consideration. *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775. It therefore becomes our duty to examine this question upon the evidence in the case which tends to show fraud in its procurement. The plaintiff says it does not have the appearance of a business transaction, in which parties are expected to deal on equal terms; that the plaintiff was not consulted as to the terms of this contract (release); that it was prepared in Thomasville by the agent of the defendant without his knowledge, and that the terms were fixed by the defendant or its agent without the knowledge or consent of the plaintiff; that, the release being prepared on the 18th of March (the plaintiff having been injured on the 5th day of February), the superintendent (Finney) of defendant's factory and Dr. Julian, the physician of the defendant who amputated the plaintiff's arm and attended him while sick from the injury, go to the plaintiff's house, 2½ miles in the country, to get him to sign it. When they got to plaintiff's, he was at the barn, and the following is the plaintiff's statement of what occurred: "Finney did not ask me what doctor I wanted. I told him I wanted Dr. Mock. I live two and a half miles from Thomasville. Was in the barn, pushing back hay. Julian and Finney came in Julian's buggy. Julian spoke and said, 'What are you doing up here?' and I spoke and said a few words, and one of them said, 'Come down. I want to talk with you.' And I went down, and we went up to the bars, and Finney said, 'You were up the other day to get money to get clothes,' and I said, 'Yes, sir,' and he said, 'We have a paper here for you to sign, so the doctors can get up their money.' And Dr. Julian said, 'Yes; Dr. Hill is pushing on me. So is Dr. Bird. You will sign the paper, so we can get our money, and they will pay you \$15 for your time.' I said I would rather not do that now,—would rather see Mr. Clement, the man that owned the factory; and Dr. Julian said, 'There is Mr. Finney. He will do as well,' and he did

not think Mr. Clement would do any better than that, and pay me my time, like he had done all the rest of the boys; and we talked on awhile, and I said I would rather go and see my wife. Dr. Julian said, 'Aren't you 21 years old? She has nothing to do with it.'" He says nothing was said to him about its being a release, and he thought it was a paper to enable Dr. Julian to get his money, and to pay him \$15 for lost time when he was not able to work. He says the paper was partly read over to him, and he will not say it was not all read; but, if it was, he did not understand it to be a release of defendant's liability to him for damages; that he is an ignorant man, and cannot read or write, except his name. This paper was not required to be probated and registered, but after the plaintiff had signed it, and Finney and Julian had witnessed it, they would not pay him the \$15 until he went before a notary public and acknowledged the same. The release is stated to be in consideration of \$95 paid the plaintiff, when it is admitted that he was only paid \$15. This they undertake to explain by saying that the other \$80 was paid Dr. Julian for medical services in amputating the plaintiff's arm and attending him while sick from the injury. But Dr. Julian says that his bill was against the defendant; that plaintiff owed him nothing, and he thought Finney would have paid him any bill he would have presented to him. Taking this evidence to be true,—treating it as uncontradicted, as we must do in passing upon this question,—we cannot say it should not have been left to the jury to say what it proved. *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848; *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775. We say this, recognizing the law to be, as contended by defendant, that an instrument of writing should not be set aside for fraud unless the fraud is fully established, and that where a party to the writing can read, and has the opportunity, and does not do so, no other circumstances occurring or connected therewith, the party signing cannot have the instrument set aside upon the ground that he was deceived as to its contents; and the party that cannot read, and does not ask that the paper be read, is in the same fix as if he could read and did not do so. But where a party cannot read, and the paper is read to him incorrectly,—falsely,—the signer may have it set aside for fraud. *Cutler v. Lumber Co.*, 128 N. C. 477, 39 S. E. 30. In this case the plaintiff cannot read, and, taking his evidence to be true, the paper was not all read to him, or it was not correctly read, as he says that he heard nothing said about a release, and thought from what he heard that he was signing a certificate to enable the doctor to get his pay, and to get \$15 pay for the time he had lost on account of the injury. The fact that the release was prepared upon the terms fix-

ed by the defendant, without the knowledge or concurrence of the plaintiff, and sent out there by the defendant's agent, Pinney, and Dr. Julian, who had so recently successfully treated the plaintiff,—an ignorant man, likely to be influenced by the doctor,—and the fact that the doctor participated in urging him to sign the paper in order that he might get his pay, when he admitted his bill was against the defendant, and he thought the defendant would pay any bill that he would present to it, and the fact that he objected to the plaintiff seeing his wife before he signed the paper, and that they had him to go and acknowledge it before a notary public before they would pay him the \$15, are such things as do not ordinarily take place in open, fair, and even-handed transactions. And while we are of the opinion that written contracts, entered into with deliberation, where the parties are at arm's length and on even terms with each other, should not be disturbed upon slight evidence, we must hold (looking at the plaintiff's evidence as we should) that the court committed no error in submitting this issue to the jury.

Nor do we see that the court erred in its instructions to the jury, or in refusing to give instructions not substantially given in the charge. The court charged the jury that the plaintiff admitted he signed the release, and "unless the plaintiff has shown by the greater weight of the evidence that its execution was fraudulently procured by the defendant's agents, you will find this issue, 'No.'" This, we think, taken in connection with the rest of the charge, was a correct instruction, and substantially covered that part of the defendant's prayers upon this issue that were proper and were not given.

It is true that inadequacy of consideration alone is not sufficient to set aside a written instrument, "unless the consideration is so inadequate as to shock the moral senses, and cause reasonable persons to say he got it for nothing." But it is proper evidence to be considered upon an issue of fraud, and may, in connection with other evidence and circumstances tending to show fraud, be sufficient to establish the fraud and to set aside the instrument. *McLeod v. Bullard*, 84 N. C. 515. And the rule to be observed in cases where the validity of the instrument is attacked upon the ground of fraud is the preponderance or the greater weight of the evidence. *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, where the distinction is drawn between cases for the reformation of the instrument and those sought to be set aside for fraud. But taking the plaintiff's evidence to be true, it would seem that there was no real consideration to support this release. He says that \$80 was to be paid to Dr. Julian for his medical services; and Dr. Julian testified that the plaintiff owed him no medical bill; that he was employed by the defendant, and his bill was against the defendant; and the

plaintiff says that the \$15 he got was for the time he lost on account of the injury.

Dr. Julian, a witness for the defendant, who participated in procuring the release, was asked on cross-examination if he had not witnessed several other releases of this character for the defendant. This question was allowed, and the defendant excepted. It was evidently intended as an impeaching question, and for that purpose it was not improperly allowed.

This leaves the question of negligence to be determined. The court refused to submit an issue, or to give the defendant's prayer for instruction as to the voluntary assumption of risk by the plaintiff, upon the ground that it was not pleaded. It has been held by this court that the voluntary assumption of risk is like contributory negligence in this respect; that it is a plea in the nature of confession and avoidance. *Bolden v. Railway Co.*, 123 N. C. 614, 31 S. E. 851. And this being so, like contributory negligence it must be pleaded, and the burden of proof to sustain it is on the defendant. We do not think this conflicts with *Rittenhouse v. Railway Co.*, 120 N. C. 544, 26 S. E. 922. It is not held in that case that it was not necessary to plead voluntary assumption of risk, but this defense might be submitted in the same issue with that of contributory negligence. But this practice has since been condemned by the court, with a suggestion that it is better to submit a separate issue as to assumption of risk, when it is pleaded. The decision in *Rittenhouse's Case* upon this point was only a ruling as to a matter of practice, and not as to the substance of the matter at issue. Only such issues should be submitted as are raised by the pleadings. And this defense was not pleaded, and there was nothing in the pleadings upon which to base such an issue. If it had been pleaded, it would have been the duty of the court to submit the issue, but it cannot be error not to do so when it was not pleaded. What effect it would have had upon the trial if it had been pleaded, and an issue submitted, we cannot say, as the court charged the jury "that, when one person enters into the employment of another, he assumes such risks as are ordinarily incident to his employment." All such machinery as this was is to some extent dangerous, but this alone does not make the owner and employer liable for damages, but it is the negligence of the defendant in not providing safe machinery and a reasonably safe place for the employé to work. And the general rule is that, if the employer furnishes such machinery as is in general use, this is sufficient. He is not bound to provide the latest and most improved machinery. It was not shown that this was such machinery as was in general use, but it was shown that it was a "standard machine," which may mean that it was such as was in general use. But the question does not entirely depend upon this.

(131 N. C. 271)

Standard machinery may be more than ordinarily dangerous, if not properly or suitably located so as to enable the employes to do their work with reasonable safety, and it is the duty of the employer to do this. *Myers v. Lumber Co.*, 129 N. C. 252, 39 S. E. 960. It is difficult for us to understand this so well as the jury who heard the evidence and tried the case. The evidence discloses the fact, as we understand it, that there was an open space, some 4 feet long and 18 or 20 inches wide, for the plaintiff to stand in to work a sweep or crane to which was attached a block and tackle by which he was to raise heavy logs or blocks, and to swing them over and upon the veneering machine, run by these powerful cogwheels. It was in evidence that a person could work there without getting hurt, but it was also in evidence that five other persons, working in this place and doing the same work the plaintiff was doing, had been caught in these cogwheels. A man engaged in such work cannot always be on special guard against such danger. It seems to us that the five similar cases which had occurred before would have been sufficient notice to an ordinarily prudent man that there was something wrong, and would have caused him to provide against it by enlarging the space or covering the cogwheels. The evidence, we think, tends to show that it was not a reasonably safe place to work, with those powerful cogwheels uncovered. And this is all we have to decide,—that there was evidence tending to show this,—and then it was a question for the jury. *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848.

This case is easily distinguished from *Ausley v. Tobacco Co.*, 130 N. C. 34, 40 S. E. 819. There voluntary assumption of risk was pleaded, and the case is put upon that ground, but the facts in that case are entirely different from this. The cogwheel in that case was seven feet above the floor,—put there by the plaintiff, who was employed to superintend and run the machine. The plaintiff stumbled his toe and fell on the wheel, and it was but an accident, if he had not voluntarily assumed the risk.

The defendant objected to the question asked by the plaintiff to show that other persons had theretofore been caught by these cogwheels, working at the same place and at the same work the plaintiff was. But we think this evidence was competent for the purpose of showing the dangerous location and situation of the place furnished the plaintiff to work in, and to fix the defendant with notice of such danger. The plaintiff says that he had not been there long, and had not heard of the others being caught by these wheels when he was hurt.

It seems to us that the question of contributory negligence was fairly submitted to the jury, and upon a review of the whole case we see no error. The judgment is affirmed.

FINCH v. FINCH et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

EJECTMENT—EVIDENCE—JUDGMENT ROLL—JUDGMENT—PERSONS BOUND—COMMISSIONER'S DEED—INSTRUCTIONS.

1. In ejectment, plaintiff claimed that F. purchased the land from the common source of title, and had it conveyed to his son to defraud creditors, while defendant, F.'s wife, claimed that the deed was not made to the son, but was made to her. Plaintiff claimed title under a commissioner's deed in pursuance of a sale of the land in an action against F. and his son to have the conveyance to the son set aside as a fraud on F.'s creditors, in which plaintiff recovered judgment. Held, that the commissioner's deed and the judgment roll in the prior action were admissible as an estoppel as against defendants F. and his son, and as a link in plaintiff's chain of title.

2. An instruction that the burden was on plaintiff to show that the deed was from the common source to the son, and that, if the jury found such to be the fact, they should find that there was no deed from the common source to the wife, and that plaintiff was entitled to recover, was proper.

3. Where, in ejectment, it was not contended that defendant's husband had ever had title, but the issue was whether the deed from the common source was made to the defendant's son or his wife, it was not error to exclude a sheriff's deed to the wife purporting to convey the property in pursuance of a sale under an execution against the husband.

4. Where defendant's wife was not a party to a suit to have an alleged conveyance to defendant's son set aside as a fraud on creditors, an instruction, in a subsequent action of ejectment against him, that she was not "bound" by the judgment entered in such suit, was not error.

Appeal from superior court, Davidson county; Shaw, Judge.

Action by S. J. Finch against J. W. Finch and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Walser & Walser and Long & Nicholson, for appellants. E. E. Raper, for appellee.

FURCHES, C. J. This is an action of ejectment, in which S. J. Finch is plaintiff, and J. W. Finch, E. Lee Finch, B. H. Finch, Joshua Copple, and Samuel Copple are defendants. The plaintiff claims his title under a deed from a commissioner appointed by order of court to sell the land, in an action in which S. J. Finch and E. J. Finch were plaintiffs, and J. W. Finch, B. H. Finch, and H. F. Warren were defendants. The defendant E. Lee Finch is the wife of J. W. Finch, and answers and denies the plaintiff's title, and claims that she is the owner of the land. The plaintiff claims that the land was once owned by Alvira Copple, wife of Joshua Copple, and that J. W. Finch bought it from the Copples, and had the deed made to his minor son, B. H. Finch, for the purpose of defrauding his creditors, and, for that purpose, did not probate and register the deed from the Copples; that S. J. Finch and E. J. Finch, being creditors of J. W. Finch, brought suit in the superior court of Davidson county against said J. W. Finch,

B. H. Finch, and H. F. Warren, alleging said fraud, and asking that said land be sold to pay their debt, and in that action it was found that the land was bought by J. W. Finch, the deed made to B. H. Finch in fraud of the creditors of the said J. W. Finch, and a sale was ordered, at which the plaintiff bought. The defendant E. Lee Finch denied that the deed from the Copples was made to B. H. Finch, and alleged that it was made to her, and that she was the owner of the land, but that said deed had never been registered, and was lost. She also alleged that at an execution sale the said land was sold as her husband's land, and that she bought the same at said sale, and claimed also to hold under that deed; and on the trial she offered in evidence the judgment and execution against J. W. Finch, and a sheriff's deed in pursuance of a sale under said judgment and execution.

It was admitted that both sides claimed under the Copples as a common source, and the question was, who had the Copple title? On the trial the plaintiff offered in evidence his deed from the commissioner, who sold under order of court. He then offered in evidence the judgment roll, containing the order of sale in the action of S. J. Finch and E. J. Finch against the defendants J. W. Finch, B. H. Finch, and H. F. Warren; and the defendants objected, the objection was overruled, and the defendants excepted. This exception cannot be sustained, as this record and judgment were competent evidence, and an estoppel as to the defendants J. W. Finch and B. H. Finch, and a link in the chain of the plaintiff's title from him to the common source,—the Copples. It was the same, in effect, as if he had offered a deed from the Copples to the defendant J. W. Finch, for the purpose of connecting his title with the Copples'. It was one of the links in his chain of title.

The court submitted the following issues: (1) Was the deed from Joshua Copple and Alvira for the land in controversy executed to B. H. Finch? (2) Was the deed from said Copple and wife for said land executed to Mrs. E. Lee Finch? (3) Is the plaintiff the owner and entitled to the possession of the land described in the complaint? The judge, among other things not excepted to, charged the jury that the burden of showing that the deed from the Copples to B. H. Finch was on the plaintiff, and if they so found they should answer the first issue "Yes" and the third issue "Yes." To this the defendants excepted. But we see no error.

The court further charged the jury that the burden was on the defendants to show by a preponderance of evidence that the deed from the Copples was made to the feme defendant E. Lee Finch, and, if the jury answered the first issue "Yes," they should answer the second issue "No"; but, if they answered the first issue "No," and the second issue "Yes," they should answer the third is-

sue "No." The defendants again excepted. But we see no error in this instruction, except a repetition of what he had just charged.

The court further charged that the jury should not consider the sheriff's deed offered in evidence by the defendants, and the defendants again excepted. And we see no error in this instruction, for the reason that she acquired no title under that deed unless the defendant J. W. Finch had title. And, if the contentions of the plaintiff were true, he had none, and this is equally so if the contentions of the defendant E. L. Finch were true; and there had been no evidence offered tending to show that J. W. Finch ever had any title to the land.

The court also charged the jury that, the defendant E. L. Finch not having been a party to the action of S. J. Finch and E. J. Finch against J. W. Finch, B. H. Finch, and H. F. Warren, she was not "bound" by that judgment. We think the word "estopped" would have been better, but do not think the jury were misled, or that this affected the verdict. The jury answered the first issue "Yes," the second issue "No," and the third issue "Yes"; and, judgment being signed for the plaintiff, the defendants appealed.

We have examined the record with care, and, finding no substantial error, the judgment is affirmed.

(131 N. C. 279)

WILKES v. ALLEN et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

LIMITATIONS—MARRIED WOMEN—FREE TRADERS—EFFECT OF REGISTRATION.

1. A married woman is not excluded from the benefit of the exception in the statute of limitations providing that the statute shall not run against a married woman during coverture by reason of the fact that she registered herself as a free trader during coverture, as authorized by Code, § 1827.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Action by Jane R. Wilkes against T. W. Allen and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Clarkson & Dula, for appellants. Burwell, Walker & Cansler, for appellee.

FURCHES, C. J. This is an action of debt upon a judgment of the superior court of Mecklenburg county, recovered by the plaintiff against the defendants at February term, 1886; and this action was commenced on the 9th day of March, 1899, and the defendants pleaded the statute of limitations in bar of the plaintiff's right to recover. This plea imposes the burden upon the plaintiff to show that the action is not barred, as more than 10 years had elapsed between the taking the judgment sued on and the commencement of the action. This the plaintiff undertakes to do by showing that she was a mar-

ried woman at the time the judgment was taken, and has continued to be such ever since. To this the defendants reply by showing that the plaintiff has been a registered free trader, under section 1827 of the Code, continuously since March 25, 1875. It is plain the action is barred if the statute runs against the plaintiff. But married women are excepted from its operation, and the fact that the plaintiff had the right to sue and maintain actions in her own name does not put the statute in motion against her. *Lippard v. Troutman*, 72 N. C. 551; *Campbell v. Crater*, 95 N. C. 156; *Briggs v. Smith*, 83 N. C. 306.

The case, then, depends upon the fact that the plaintiff was a registered free trader; and we do not see that this has any effect upon the case. It is her status that exempts her from the operation of the statute, and the fact that she registered as a free trader did not change her status. This view of the case is supported by *Stubblefield v. Menzies* (C. C.) 11 Fed. 268, 274, 275, *Ashley v. Rockwell* (Ohio) 2 N. E. 437, and many other authorities. But the fact that the plaintiff became a registered free trader did not affect the relations of the parties to this action. She had the right to sue the defendants before she became a free trader, and that is all she had after she became a free trader. Neither did it affect the rights or duties of the defendants. They were under the same obligation to pay they would have been if she had not been a free trader. It is presumed that section 1827 of the Code was passed for the benefit of married women who wish to engage in business, in order to give them credit, as was the right to sue alone given as a benefit to them (*Shuler v. Millsaps' Ex'r*, 71 N. C. 297); but it did not change their status, nor remove the exemption which excluded them from the operation of the statute of limitation (*Lippard v. Troutman*, supra). Neither was the right of married women to sue alone, nor to become free traders, intended for the benefit of their debtors.

We see no error, and the judgment of the court below is affirmed.

(64 S. C. 520)

MURRAY v. NORTHWESTERN R. CO.

(Supreme Court of South Carolina. Oct. 17, 1902.)

PAROL EVIDENCE—COVENANTS IN DEED—SPECIFIC PERFORMANCE.

1. Parol evidence is admissible to explain a covenant in a deed "to establish and maintain a freight and passenger depot," to show the intent of the contracting parties at the time of the execution of the deed.

2. Where a covenant to establish and maintain a depot for freight and passengers was a part of the consideration of the deed to a railroad company, and the building was to be erected on the land thereby conveyed to the company, and of which it was put in possession, equity will decree its specific performance.

Appeal from common pleas circuit court of Sumter county; Hudson, Special Judge.

Action by George W. Murray against the Northwestern Railroad Company. Decree for plaintiff, and defendant appeals. Affirmed.

The following is the decree of the circuit court:

"This case came before me at a special term held for Sumter county, in the week beginning 16th of December, 1901, on exceptions by both plaintiff and defendant to the master's report, to whom all the issues had been referred. The plaintiff owned a large tract of land in Sumter county, which was crossed by the selected route of the Northwestern Railroad from Sumter to Camden, and upon which the defendant had entered for the purpose of grading and track-laying. Disputes arose between Murray and the railroad company, followed by litigation. Murray and certain of his tenants filed petitions for compensation under the right of way statutes, and others were threatened, when the railroad company brought their action to restrain those proceedings, alleging that Murray had given his consent to the occupation of his land by this railroad upon the company's undertaking to establish a station and erect a depot at a point on Murray's land to be called 'Borden.' The complaint in the action of the Northwestern Railroad Company against George W. Murray and others, verified by Thomas Wilson, president, alleged that Murray had agreed to let the railroad company have a right of way through his lands, and one acre of land for depot purposes, in consideration of \$150 in money and the company's agreement to establish a railway station or depot thereon, and that in part performance of said contract the railroad company had purchased and paid for the necessary lumber and building materials for the erection of the necessary station house, depot, and other structures, and caused the same to be placed alongside the said railroad, and was in the prosecution of the completion of said work when the plaintiff was interfered with by the legal proceedings hereinafter referred to.

"On the return to the rule to show cause before Judge Townsend, affidavits by Thomas Wilson and C. C. Dunn were read in the hearing of George W. Murray. Wilson, president, stated in his affidavit 'that the deponent, acting for said company, and in the further pursuance of said contract and agreement, * * * had purchased and paid for the necessary lumber wherewith to erect said depot and station house, and was about to commence the same when the aforesaid restraining order was served.' C. C. Dunn, superintendent of construction of this road, stated in his affidavit, dated 3d of March, 1900, 'that, acting under the instructions of said company, he made out and delivered to Messrs. Seals & Carson, manufacturers of lumber, a bill of lumber for the

¶ 1. See Evidence, vol. 20, Cent. Dig. § 2068.

framework of the depot at Borden, and pointed out the location to the said Seals & Carson where said station was to be established and said lumber used; that this occurred some six weeks or two months ago, since which time the foresaid lumber has been cut and delivered alongside of said railroad, and the same paid for.' Testimony taken before the master in this case now under consideration shows that this lumber was cut and delivered for a depot at Borden of the same plan and dimensions as the depot at Dalzell, the nearest station towards Sumter, and a contract made with a builder to erect a depot at Borden like that at Dalzell. Moreover, that there was an agent of the company at Borden, as there was at Dalzell, discharging the duties of station agent for the sale of tickets and the receipt and delivery of freight; such agent at Borden occupying a box car for these purposes. All these things being known to Murray and the railroad company, and this condition of things still existing, on the 5th of May, 1900, subsequent to Judge Townsend's order granting the interlocutory injunction prayed for by the railroad company, and in settlement of all litigation between the parties then pending, Murray made, and the railroad company accepted, a deed of that date, whereby Murray and his tenants conveyed to the railroad company a lot of land for depot purposes at Borden, and a right of way across his lands. This deed was made upon the consideration of \$150 in money, and 'the covenant and agreement' of the railroad company 'to establish and maintain a freight and passenger depot' at Borden. This deed contains the further stipulations: 'And it is expressly covenanted and agreed that the consideration money hereinbefore named, and the condition of the establishment and maintenance of the said freight and passenger depot at said station called "Borden" by the grantee, its successors and assigns, is in full payment, satisfaction, and compensation for the aforesaid right of way and easement over and through the said tracts of land above described, and also the aforesaid one-acre plot of ground, and including all special injury and damage, past, present, or future, suffered or to be suffered by the grantors hereof, or their heirs, executors, administrators, and assigns, from or by reason of the construction and operation of said railroad over and upon the aforesaid premises. And it is further covenanted and agreed that in the event that the said Northwestern Railroad Company, its successors or assigns, shall not establish a passenger and freight station at said place called "Borden," or, having established such station, shall cease to maintain the same, then and in that event the right of way and easement hereby granted shall revert to the grantor, George W. Murray, above named.' The company paid to Murray the money consideration called for, and have held the depot lot and right of way

ever since, and still use the latter as a part of their railroad line between Sumter and Camden. But soon after the acceptance of this deed, the company changed its plans, removed its present agent, otherwise disposed of the lumber so cut and delivered for the Borden depot, made Borden a prepay flag station, procured a merchant there to act as agent to the extent of keeping its so-called depot locked, and of delivering freight, without authority to receive freight or sell tickets, and erected a building ruder and smaller than that which was in contemplation when the deed was delivered, and with no accommodation for passengers, other than an open, uncovered platform, without seats. The depot at Remberts, next beyond Borden from Sumter, was afterwards built just like the one at Dalzell.

"The plaintiff in this case prays for a specific performance of the contract made by his deed and the acceptance thereof, and for damages for the defendant's delay, or that the value of the property so held by the railroad company be adjudged to him for the failure of the defendant to erect and maintain such depot accommodations at Borden as were contemplated by the parties. Defendant contends that the phrase 'freight and passenger depot' means such a depot as would answer the demands of freight and passenger traffic at that point, and that parol testimony is inadmissible to reform the deed or to vary or add to the deed. But I hold that parol testimony is admissible of such facts as will show the surrounding circumstances at the time, and so reach the meaning of that phrase as understood by both grantor and grantee, under which the railroad company acquired its long right of way. Therefore the master properly received and considered the facts above recited, and, in the light of those facts, properly held that a freight and passenger depot at Borden meant accommodations equal to those at Dalzell, and, I will add, equal to those at Remberts.

"The contract being thus certain, definite, and specific, and the depot accommodations at Borden not being such as the deed called for, the next question is, can the defendant be required to specifically perform its contract, and so discharge the consideration for which it obtained the property rights so acquired and now held? Upon this question there may be some conflict of authority. I have been referred to no case from the courts of this state that decides this point, in my judgment. But it seems to me that specific performance should be decreed, and that it would not be proper to permit the defendant to accept all of the rights acquired by it under this agreement, and withhold the mandate of the court requiring it to perform its part of this same agreement. I find strong authority in support of this conclusion. In *Storer v. Railway Co.*, 2 Younge & C. Ch. 48, the court compelled the defendant to

construct and maintain an archway and its approaches; the court saying there was no difficulty in enforcing such decrees. In 2 Beach, Mod. Cont. § 883, the author says: 'The rule is not universal that courts of equity will never assume jurisdiction to enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time.' Citing in note 3 several such cases. Lewis, Em. Dom. § 296, says: 'Agreements by a railroad company to build crossings or fences, or to locate and build a depot, or to do other things for the benefit of the grantor, may be specifically enforced.' In *Stuyvesant v. Mayor, etc.*, 11 Paige, 426, there was a grant of land on the condition that the city of New York should make certain improvements. Chancellor Walworth thus declared the law: 'The true rule on the subject of decreeing the specific performance of a covenant in such cases is that where, from the nature of the relief sought, performance in specie will alone answer the purpose of justice, this court will compel a specific performance, instead of leaving the complainant to a remedy at law, which is wholly inadequate. The court has jurisdiction, therefore, to compel the specific performance by the defendant of a covenant to do specified work, or to make certain improvements or erections upon his own land for the benefit of the complainant, as the owner of the adjoining property, who has an interest in having such work done, or such improvements or erections made, and where the injury to the complainant from the breach of covenant is of such nature as not to be capable of being adequately compensated in damages.' In the case of *Ross v. Railway Co.*, 1 Woolw. 37, Fed. Cas. No. 12,080, the court refused to direct specific performance of a contract for the construction of a railroad which would require years to be completed. But in that case Mr. Justice Miller reviews the cases, citing *Errington v. Aynesly*, 2 Brown, Ch. 341, and *Lucas v. Commerford*, 3 Brown, Ch. 166, and 1 Ves. Jr. 235, where the court refused to order specific performances because, 'if one person would not build, another might be found who would,' and because the court could not undertake to superintend the construction of a building. Judge Miller then calls attention to several cases where specific performance was decreed of a contract by a railroad company, 'in consideration of a right of way, to make an arched way under its roadbed' (*Storer v. Railway Co.*, 2 Younge & C. Ch. 48); in consideration of a sale of land to build a street and erect a fish market (*Price v. Mayor, etc.*, of Penzance, 4 Hare, 506); for the grant of a piece of land for a park, a contract to grade, inclose, and improve the premises (*Stuyvesant v. Mayor, etc.*, 11 Paige, 414); to complete a hotel (*Birchett v. Bolling*, 5 Munf. 442). And Judge Miller calls attention to the fact that in these latter cases

'the building was to be done on the land of the person who agreed to do it.' 'The consideration of the agreement was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already, by such conveyance on his part, executed the contract, and the building was in some way essential to the use or contributory to the value of adjoining land belonging to the plaintiff,'—all of which conditions exist in this case. Other authorities in the master's report and in the argument submitted to me by counsel for plaintiff seem to support the view I have taken. It is a definite and certain contract, the consideration for which defendant received and now enjoys; and unless defendant perform his undertaking to build a freight and passenger depot, as understood by the parties, it will be impossible for the plaintiff to get that in exchange for which he granted the right of way. Nor can I see any difficulty in carrying out a decree for the specific performance of defendant's agreement.

'I further hold that no damages should be decreed to plaintiff for the delay up to this time in establishing and maintaining the proper depot accommodations at Borden required by the deed. The pecuniary damage to plaintiff does not appear to me to be serious, and the railroad had been in operation less than a year when this action was commenced.

'It is therefore ordered and decreed that plaintiff's fourth exception to the master's report be sustained, and the others overruled; that so much of defendant's fifth and sixth exceptions as charges error to the master in awarding \$500 damages to the plaintiff be sustained, and its others overruled; and that the master's report, with these changes and modifications, be confirmed. It is further ordered and decreed that the defendant do cause to be erected by May 1, 1902, a freight and passenger depot at Borden, like to that now at Dalzell, a station on its road, with like facilities for the receipt and delivery of freight and for the convenience and accommodation of passengers. Let notice of the filing of this decree, with a copy of its directions, be served forthwith on the defendant or its attorneys.'

The defendant appeals on the following exceptions:

'(1) Because his honor erred, it is respectfully submitted, in not construing the alleged contract set up in the complaint by its terms alone, and without resorting to parol and extrinsic evidence.

'(2) Because his honor erred, it is respectfully submitted, in receiving and considering extrinsic and parol evidence in determining the meaning and effect of the contract set up in the complaint as the basis of the plaintiff's action, and in that he did not confine himself alone to the terms employed by the grantor in his said deed.

'(3) Because his honor erred, it is respect-

fully submitted, in holding and deciding as follows, 'But I hold that parol testimony is admissible of such facts as will show the surrounding circumstances at the time, and so reach the meaning of that phrase, "freight and passenger depot," as understood by both grantor and grantee, * * * and in further holding 'that a freight and passenger depot at Borden meant accommodations equal to those at Dalzell, and, I will add, equal to those at Remberts,' for that thereby his honor permitted the deed of the plaintiff to be added to, enlarged, and varied by parol testimony, and, in effect, constituted a new and different contract from that set out in the complaint.

"(4) Because his honor erred, it is respectfully submitted, in not sustaining defendant's first exception to the master's report, and in overruling the same; said first exception being as follows: 'Because the master erred in admitting parol testimony to explain the plaintiff's deed set out in the complaint as a basis of plaintiff's action, and to add to the same by extending and enlarging the terms of the alleged contract of the defendant therein set forth, and, in effect, making a new contract for the parties to the same, and in finding that a depot such as existed at Dalzell, another station on said railroad, should have been built and maintained by defendant at Borden, in that thereby the master permitted the plaintiff by parol to add to, vary, and enlarge and explain an instrument in writing, the terms of which are plain and unambiguous, and in that he thereby disregarded the rule of the law that the said deed should be taken most strongly against the grantor therein, and in that he thereby disregarded the further rule of the law that in actions for the specific performance of contracts it is the duty of plaintiff to show and prove a contract on the part of defendant, clear and definite in its terms; and, furthermore, because the records of the previous action and other evidence thus erroneously admitted in testimony related to the establishment of the station at Borden, on the line of said railroad, and not to any particular kind of depot, for that thereby the written contract set up in the complaint was allowed by the court, by the aid of parol testimony, to be varied, added to, and explained, and, in effect, a new and different contract to be made out and established as the contract of the parties to the cause.'

"(5) Because his honor erred, it is respectfully submitted, in holding and deciding as follows: 'It is further ordered and decreed that the defendant do cause to be erected * * * a freight and passenger depot at Borden, like to that now at Dalzell, * * * with like facilities for the receipt and the delivery of freight and for the convenience and the accommodation of passengers,'—for that such holding is not warranted by the terms of the deed set up in the complaint, and the terms of said deed could not lawfully be added to and enlarged by parol testimony.

"(6) Because his honor erred, it is respectfully submitted, in overruling the defendant's second exception to the master's report, as follows: 'Because the master erred in finding that defendant had not established and did not maintain a freight and passenger station and depot at Borden on the line of said railroad, and in that he should have found the contrary, and should have found the defendant had established and was maintaining in everyday use a freight and passenger station and depot at Borden; that four trains stopped at Borden every day when necessary to receive and discharge all freight and passengers destined to or from that station; that the trains on said railroad ran only in the daytime; that the said station was duly entered upon all the time-tables and schedules of the defendant company; that the hours for the daily arrival and departure of all of the defendant's trains at Borden were duly published in the newspapers of the county, and full notice of same given to the public; that passenger tickets to the station called "Borden" were regularly kept on sale, and were habitually sold to all passengers requiring the same; that all freight destined for Borden was duly received by the defendant, transported to and delivered to the consignees thereof at said point; that regular bills of lading were issued to that station for all freight shipped thereto; that bills of lading were duly issued at Borden for all freight shipped from that point; that the plaintiff himself had shipped freight from said station; that a duly appointed agent of the defendant company was located there; that one Samuel Folk, a member of the firm of R. C. Folk & Co., merchants doing business at Borden, and located a few yards from the depot building, was the duly appointed agent of the defendant company at Borden, and had charge of its depot there; that the defendant had erected and was habitually using a serviceable and substantial building immediately along its side track at Borden, consisting of one full-size room for freight and passengers, with an overhanging shed to same, with platforms adjoining the same, and also a standard umbrella shed for the greater convenience of passengers, and other structures, which were ample for the accommodation of all freight and passengers at said depot; that said depot and other structures were much more complete and commodious than the facilities established at other stations on said railroad doing a very much larger business than at Borden; that said station called "Borden" was situated in the back country, surrounded by plaintiff's property, and with no public roads leading to the same; that the business at said station called "Borden" did not average one passenger a day, and only a very small volume of freight; that ample depot room and facilities had been established and were being maintained by the defendant at Borden; and that the defendant company had substantially and for all practical purposes complied with and

performed its agreement as set forth in said deed.' And from the facts found by the master and the circuit judge, he should have held that the defendant had complied with the terms of said deed, and had erected and was maintaining a freight and passenger depot at the station called 'Borden.'

"(7) Because neither the contract set up in the complaint, nor the parol testimony, warranted the court in ordering 'that the defendant do cause to be erected * * * a freight and passenger depot at Borden like that now at Dalzel, * * * with like facilities for the receipt and delivery of freight and for the convenience and accommodation of passengers.' And his honor erred in so holding, for that such order and decree involves and requires, inter alia, the employment and retention of a resident freight and passenger agent at Borden, a telegraphic operator there, the keeping of tickets on sale, and other like matters not within the contract of the parties to the action.

"(8) Because his honor erred, it is respectfully submitted, in holding and deciding that the contract set up in the complaint, to wit, the contract to 'erect and maintain a freight and passenger depot at the station called "Borden," was one capable of being enforced by the court of equity, for that such a contract requires the perpetual supervision of the court, is wholly inconsistent with the functions of the court of equity, and is incapable of specific performance under its decree.' And his honor erred in not so deciding.

"(9) Because that in ordering and decreeing that the defendant 'do cause to be erected * * * a freight and passenger depot at Borden like that now at Dalzell, * * * with like facilities for the receipt and delivery of freight and for the convenience and accommodation of passengers,' the court exceeded its jurisdiction, for that the contract set up in the complaint is one in perpetuity, is incapable of being specifically performed, and the remedy of the plaintiff is an action at law for damages, and his honor erred in not so holding and deciding.

"(10) Because his honor erred, it is respectfully submitted, in sustaining the plaintiff's fourth exception to the master's report, as follows: 'Because the master held, as a conclusion of law, that the contract between plaintiff and defendant was such a contract as a court of equity cannot enforce.' And his honor should have overruled said exception, and sustained the master's report in that respect, for that said contract is one in perpetuity, requiring the constant supervision of the court, is wholly inconsistent with its functions, and is incapable of being specifically performed under its decree.

"(11) Because his honor erred, it is respectfully submitted, in not holding and deciding, as matter of law, 'that the contract between the plaintiff and the defendant was such a

contract as the court of equity cannot enforce.'

"(12) Because the said decree is indefinite, inconclusive, and uncertain, in that neither the report of the master nor the decree of the court defines or describes with particularity the depot directed to be constructed."

Lee & Moise, for appellant. Moise & Clifton and R. W. Shand, for appellee.

POPE, J. The object of plaintiff's action was to require the defendant to specifically perform its agreement to erect a proper depot at a station called "Borden," on its railroad, on the acre of land conveyed by plaintiff to the defendant by deed, and to have defendant pay to plaintiff \$1,000 for damages for defendant's failure to do so at an earlier date, or that, upon its failure to erect said depot, the defendant shall be required to pay to plaintiff the sum of \$14,850 as damages for breach of its contract. The defendant denied by its answer that plaintiff was entitled to any relief as prayed for. All the issues of law and fact were referred to the master, H. F. Wilson, Esq., who, after taking a great deal of testimony and after full argument, reported that (referring to the deed executed by plaintiff and others to the defendant on the 5th May, 1900):

"At the time of the execution of said deed there was some litigation pending between the plaintiff and defendant relating to compensation for the lands of the plaintiff then being occupied by defendant for its right of way. In compromise, adjustment, and settlement of this litigation, the said deed was executed by the said George W. Murray and others, and accepted by the said defendant company, who produced it under notice in this case. The consideration set out in said deed is as follows: 'For and in consideration of the sum of \$150 to us in hand paid by the Northwestern Railroad Company of South Carolina, a railroad corporation duly chartered under the laws of said state, and its covenant and agreement to establish and maintain a freight and passenger depot at a station called "Borden," on said railroad, in said county.' There is also the further stipulation set out in said deed: 'And it is further covenanted and agreed that in the event that the said Northwestern Railroad Company, its successors or assigns, shall not establish a freight and passenger station at said place called "Borden," or, having established such station, shall cease to maintain the same, then and in that event the right of way and easement hereby granted shall revert to the grantor, George W. Murray, above named.'

"It is conceded that the \$150 was paid to the said plaintiff by the said defendant, but it is contended that the freight and passenger depot has not been established and maintained at the station called 'Borden,' and it is for the specific performance of this

part of the agreement that this action is brought, and for damages for such nonperformance of the contract. The defendant contends that the terms of the contract have been complied with. Some of the witnesses for the defendant testify that there are many kinds of depots and stations, from a mere flag station, where there are no buildings at all,—only a place usually a public highway crossing or a railroad side track, where passengers or freight or both are put off and taken on, and where there is no agent to attend to the company's business,—to the most modern depot, with all its equipments and conveniences, and that the expression in the deed above referred to, 'freight and passenger depot,' might mean either the one or the other, or any intermediate kind. The plaintiff offered parol testimony to explain the meaning of the expression used in said deed, 'freight and passenger depot,' and to show what kind of a freight and passenger depot was intended by the parties plaintiff and defendant at the time the said deed was executed and delivered by the plaintiff, and received by the defendant. I allowed this testimony to come in under the authority of the case of *Rapley v. Klugh*, 40 S. C. 145, 18 S. E. 680, and other authorities cited by plaintiff. This parol testimony showed that the freight and passenger depot to be established and maintained at the station called 'Borden' was to be similar to the freight and passenger depot then established and being maintained, with a resident freight and passenger agent, at a station called 'Dalzell,' on said railroad, some five miles from the said station called 'Borden'; that soon after the execution of said deed the defendant company built at the station called 'Borden' a freight wareroom some 15 feet by 16 feet in dimensions, with platforms extending the length of same in front and rear, such platforms being six feet wide; that subsequent to the commencement of this action the said defendant company built at the station called 'Borden' an 'umbrella shed' for the accommodation of passengers; that the station called 'Borden' was known as a 'flag station,' where trains only stop upon signal, or for the discharge of passengers or freight; that tickets were sold to the said station called 'Borden' from other points, and that freight, when the charges were prepaid, was billed to Borden, but that no tickets were sold at Borden for other points; that there was no resident bonded agent of the defendant company at Borden, some arrangements having been made with Mr. Folk, who kept a store a few yards from the said wareroom, when there to deliver freight to parties calling for same. This service was paid for by defendant company by a free pass over its said road. The testimony also shows that the plaintiff, George W. Murray, has brought out all the reversionary interests of the parties other than himself who signed the deed

above referred to, and marked in evidence 'Exhibit S.'

"The plaintiff offered testimony as to the value of the land of the plaintiff occupied by the defendant company as a right of way. This testimony was objected to by the defendant upon the ground that it was irrelevant. I sustained the objection of the defendant for the reason that the pleadings in this case confined the proof to the fact as to whether or not the defendant company has complied with its contract as set out in the deed. Even if such testimony is relevant to the issues in this case, that offered was so vague and indefinite that I have been unable from the testimony to arrive at any satisfactory conclusion as to the value of such right of way.

"I find as matter of fact from the testimony that the plaintiff has bought all the reversionary interests of the parties other than himself who signed the deed in evidence in this case, marked 'Exhibit S.'

"I find as matter of fact from the testimony that the expression 'freight and passenger depot,' as used in said deed in evidence, Exhibit S, was intended to mean and did mean such a freight and passenger depot as was then established and maintained, with a resident freight and passenger agent at Dalzell, a station on the said Northwestern Railroad.

"I find as a matter of fact from the testimony that the said defendant company has not established and maintained such a freight and passenger depot, with a resident agent, at the station called 'Borden,' on the said Northwestern Railroad.

"I find as a matter of fact from the testimony that the plaintiff, George W. Murray, has been damaged by the failure of the said defendant company to establish and maintain such a freight and passenger depot at the station called 'Borden,' and that the amount of such damage has been the sum of \$500, up to the date of this report.

"The defendant claims, as matter of law, that the complaint should be dismissed, for the reason that the contract as set up in the complaint and in the deed in evidence, Exhibit S, is such a contract as the court of equity cannot and will not enforce by specific performance. This brings up the only question of law in the case, as I see it. It seems to be the general rule in this state and elsewhere that courts of equity will not enforce by specific performance contracts to construct buildings and make repairs, for the reason that it would be impracticable, if not impossible, for an officer of the court to carry out such decree. 22 Am. & Eng. Enc. Law. p. 996; *McCarter v. Armstrong*, 32 S. C. 225, 10 S. E. 953, 8 L. R. A. 625; *Columbia Water Power Co. v. City of Columbia*, 5 S. C. 255. This rule, however, that courts of equity will never assume jurisdiction to enforce a contract which requires some building to be done, is not universal. They have enforced such

contracts from the earliest days to the present time. A few cases may be referred to as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar. In *Storer v. Railway Co.*, 2 Younge & C. Ch. 48, the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree. In *Wilson v. Railway Co.*, L. R. 9 Eq. 28, the defendant was compelled to erect and maintain a wharf. See, also, *Wat. Spec. Perf. Contr.* §§ 11, 28-30; *Lewis, Em. Dom. par.* 296. Agreements by a railroad company to build crossings or fences, or to locate and build a depot, or to do other things for the benefit of the grantor, may be specifically enforced. It is no answer to suit for specific performance that a specific description of the thing to be done is not contained in the deed or contract. That which is reasonably suitable under the circumstances to answer the purpose intended is what the contract implies. 'L. granted the right of way to a railroad company over his premises, in consideration of which the company agreed to erect and maintain bridges over certain crossings, and also to erect at or near Excelsior Spring a neat and tasteful station building, to be called "Excelsior Spring," at which all regular trains should stop. The company entered and built its road, but refused to comply with its agreement.' On a bill for specific performance, it was contended by the company that the agreement was too indefinite to be enforced; that the style and plan, size, and materials of the structure were not specified. But the court held otherwise. 'To insist that the railroad cannot build a bridge, because they do not know whether it should be of wood or iron, or gold or platinum, is a poor excuse. A bridge suitable for a highway crossing is what was intended, and that is definite enough.' In *Bisp. Eq.* (6th Ed.) p. 501, it is said: 'If within the power of the court to supervise the performance of the contract, and the equities which justify its specific enforcement exist, the agreement will be enforced. And of late the supervisory power of the court has been extended to cases which it formerly might not have been thought to cover. Thus courts of equity have assumed jurisdiction to enforce the performance of contracts to operate railways, for the enforcement of agreements between railroad companies for the use of their tracks, and the like; and this advancement in remedial equity must be deemed not only serviceable in the interest of the business affairs of men, but justified by the inherent elasticity of chancery powers.' The authorities above cited, while tending to show 'advancement in remedial equity,' and may be 'justified by inherent elasticity of chancery powers,' still none of them go to the extent of enforcing by specific performance such a contract as the one at bar. Here the court is called upon to specifically enforce the establishment and maintenance

of a freight and passenger depot. Granting that the contract is made definite by the parol evidence making the freight and passenger depot to be established and maintained at Borden similar to that established and maintained at Dalzell, still it would be impracticable, if not impossible, for an officer of the court to carry out its decree requiring such a freight and passenger depot to be established and maintained. To do so would require the supervision first of the building, and then of the daily recurring duties of the agent, and that for an indefinite period of time. It is asking the court to go a long way towards assuming, if not the direction and control, at least the supervision, of the defendant company's business. This, it seems to me, the court will not undertake to do. I have with great reluctance reached the conclusion that the contract in this case, even as explained by the parol testimony, is such a contract as the court of equity cannot enforce by a specific performance, yet I so find as matter of law. All of which is respectfully submitted."

Both sides excepted to this report. The exceptions came on to be heard by his honor J. H. Hudson, as special judge, who sustained the plaintiff's exception, and also so much of defendant's exceptions as related to a recommendation of the master that defendant should pay plaintiff \$500 damages. The circuit judge held that it was competent to introduce testimony to show what the surrounding circumstances were when the defendant covenanted to erect a freight and passenger depot at Borden, so as to show what was in the minds of the parties to this action at that time, to wit, the deed of the plaintiff made in May, 1899. He also held the contract was to be enforced specifically by requiring the defendant to erect at once a depot for freight and passengers at Borden like that of defendant at Dalzell and at Remberts, two stations on defendant railroad, and also to have an agent to sell tickets at Borden. The defendant has appealed from Judge Hudson's judgment on 12 separate grounds. The reporter will incorporate in his report of this the 12 exceptions, as well as the decree of Judge Hudson. These exceptions may be grouped as follows: The first five exceptions, relating, as they do, to the alleged error of the circuit judge in holding that it was competent to receive and consider testimony going to show the circumstances surrounding and moving the parties in the execution of the contract to erect a freight and passenger depot at Borden, on defendant's railroad; the sixth exception, relating, as it does, to whether the defendant's building at Borden was such as was agreed upon by and between the parties to this action in May, 1899, when the deed and covenant were made; and, lastly, the seventh, eighth, ninth, tenth, eleventh, and twelfth exceptions, relating, as they do, in one form or another, to the power of the court of equity to decree that a contract to build a depot on

its road should be specifically executed, including in this question whether the decree was sufficiently definite in its directions.

1. It seems to us that this court has already settled the question as to the competency of testimony addressed to the making clear an agreement whose terms need definiteness. It has long been settled law in the courts of this state, as well as in the United States supreme court, that it is competent to show by evidence outside of a deed or other instrument in writing what was the true consideration as between the parties thereto. It is a matter of frequent occurrence in our courts that testimony is competent, allude the deed, to show that a deed of conveyance absolute on its face was simply a mortgage to secure the loan of money. *Campbell v. Linder*, 50 S. C. 169, 27 S. E. 648. So, in regard to the use of the word "dollars" in a contract, the value of those dollars may be ascertained by testimony outside of the terms of the contract itself. *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196. All these things have been allowed, not as adding to or varying a written instrument, but in the light of the surrounding circumstances, to show what was in the minds of the contracting parties. As was remarked at the beginning of our consideration of this point, our own decisions seem conclusive of this point. In this case at bar the question is what did the parties mean by the use of the words "a freight and passenger depot" to be erected by the defendant at the station called "Borden"? As was remarked by the appellant, great latitude exists as to the structures known as "freight and passenger depots," ranging by his argument from the fine Union Station at Columbia, S. C., to the "umbrella shed" at present standing at Borden. These words can be explained by extrinsic verbal testimony. *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680; *Willis v. Hammond*, 41 S. C. 153, 19 S. E. 310. Another apt illustration is furnished by the case of *Stoops v. Smith*, 1 Am. Rep. 85, when the court in Massachusetts received parol testimony to show that "advertising chart" meant a chart of a certain material, to be published in a certain manner, as verbally agreed upon by the parties. In the case at bar the plaintiff was shown the lumber on the ground requisite for a depot just like that erected by the defendant at Dalzell station. The object of the plaintiff was to secure an attraction to outsiders to settle on his lands around Borden. We overrule these exceptions.

Sixth Exception. We cannot sustain this exception. It is patent to the eye that the unpretentious erection at Borden can scarcely be dignified as a depot for passengers. An "umbrella shed" is scarcely a depot for passengers. This exception is overruled.

2. Lastly, the master held that a court of equity could not undertake the task of a specific performance of the contract to erect

a "depot for freight and passengers" at "Borden," with a resident ticket agent, etc. The circuit judge held otherwise, and so decreed. Was he in error? It is asserted that the text-writers and decisions vary on this subject. Whenever decisions are opposed to each other, it is always well to ascertain the grounds of the varying opinions of judges, so as to learn if there is a principle upon which they are divided. The respondent, in his suggestive argument on this point, thus states his position: "There is a distinction in the cases between the two classes of contracts for construction: (1) Building contracts, where one agrees, for a money consideration, to build a house for another on that other's land. Such contracts are not generally specifically enforceable, for the reason that the injury done by a breach is easily measured, and can be fully compensated in money. See note on pages 996 and 997 of 22 Am. & Eng. Enc. Law, where we read, 'The rule is almost universal that a covenant to build may not be enforced specifically, for the execution of such contract would be impracticable, if not impossible, for a court to supervise, whereas the remedy of damages would afford a full redress.' That is to say, the court cannot act as architect, and another builder may be had, and damages for the increased cost and delay recovered in action at law for damages. The second class is where one gets land from another upon the consideration of the grantee's erecting at his own expense a building on land actually conveyed upon the conditions that such building should be erected thereon. Miller calls attention to the fact that in these latter cases the building was to be done on the land of the person who agreed to do it, as in the case at bar. 'The consideration for the agreement was the sale or conveyance of the land on which the building was to be erected, and plaintiff had already, by such conveyance on his part, executed the contract [as in the case at bar], and the building was in some way essential to the use or contributory to the value of adjoining land belonging to the plaintiff' (as in the case at bar). This decision was in 1863. So that 22 Am. & Eng. Enc. Law, p. 996, shows the law to be just what we claim it to be. Section 296, Lewis, Em. Dom. (1st Ed.), also sustains us. In *Hubbard v. Railroad Co.*, 63 Mo. 68, cited by Lewis, the court held that a plaintiff who relinquished his right of way for the location of a depot thereon might, after entry by the railroad, have his remedy in equity for a specific performance of the agreement to erect the depot; citing *Aiken v. Railroad Co.*, 26 Barb. 289. The case of *Lawrence v. Railway Co.*, 86 Hun, 467, is strong in support of plaintiff's contention. It held that where a railroad enters upon land, and constructed tracks and structures, so that it could not be restored to its original condition, the railroad company's contract to build a bridge at the east line, and a 'neat and good overhead bridge

near my west line,' and 'erect a neat and tasteful station for the accommodation of passengers,' would be enforced, and was sufficiently explicit. And see Blsp. Eq. (6th Ed.) p. 501; Blsp. Eq. (4th Ed.) p. 140; and 5 S. C. 255. *McCarter v. Armstrong*, 32 S. C. 204; 10 S. E. 953, 8 L. R. A. 625, is inapplicable, because the case was clearly one that could be compensated in damages,—and, indeed, stipulated damages were fixed,—and because the proper drainage of lands was a matter difficult of ascertainment on rule to show cause why the decree had not been carried out. But in our case a decree directing defendant to erect at Borden a freight and passenger depot like that now at Dalzell, a station on its own railroad."

To our mind, the case at bar presents the case where the plaintiff has conveyed the land whereon the depot is to be erected; that the consideration moving to this conveyance was the erection by the defendant of a depot for freight and passengers, which the plaintiff reasonably expected would enhance the value of his surrounding lands; whereas the inferior depot erected, with no ticket office or resident agent there located, was not calculated to enlist the persons desirous of locating there to do so. We think Justice Miller pointed out in the quotation of his opinion the true grounds for an interference by the court of equity of specific performance. We do not see any ground upon which to base a criticism of Judge Hudson's decree as indefinite. There are the two depots, the one at Dalzell and the other at Remberts, as models for the depot. An agent is easily supplied. These exceptions are overruled.

It is the judgment of this court, that the judgment of the circuit court be, and hereby is, affirmed.

GARY, J., concurs in the result.

(51 W. Va. 624)

NEWBERGER et ux. v. WELLS et al.*

(Supreme Court of Appeals of West Virginia.
June 7, 1902.)

EQUITY—LIMITATIONS—STALE CLAIMS—DEMURRER.

1. In matters of concurrent jurisdiction, equity, by analogy, applies to stale claims the bar of the statute of limitations, and recognizes the same exceptions to its operations that are allowed in courts of law.

2. When a bill in equity discloses on its face laches, or the facts alleged show that the cause of action is within the statute of limitations, the bill is for that reason demurrable, unless sufficient facts are set forth in it to avoid laches or take the case out of the statute.

(Syllabus by the Court.)

Appeal from circuit court, Wood county; L. N. Tavenner, Judge.

Bill by Samuel Newberger and wife against Charles E. Wells and another. Decree for defendants, and plaintiffs appeal. Affirmed.

*Rehearing denied.

¶ 2. See Equity, vol. 19, Cent. Dig. § 498.

42 S.E.—40

W. N. Miller, for appellants. D. H. Leonard, for appellees.

POFFENBARGER, J. In June, 1896, Samuel Newberger and Dora Newberger filed their bill in equity in the circuit court of Wood county against Charles E. Wells and D. H. Leonard, trustee. They allege that prior to June 1, 1876, Samuel Newberger was engaged in the mercantile business at Parkersburg, and was the owner of a large stock of merchandise, and a large and valuable tract of land, situated on Fishing creek, in Wetzel county, containing between 3,500 and 4,000 acres, and being the residue of a tract of 6,000 acres, out of which previous owners had conveyed certain portions; that on June 1, 1876, he made a general deed of assignment to D. H. Leonard, trustee, for the benefit of his creditors; that, in the administration of said trust, Leonard and Newberger settled, by compromise or otherwise, practically all of the debts out of the proceeds of the property and the collections of the accounts; that on the 6th day of July, 1887, they negotiated a conditional sale of said tract of land to the defendant Charles E. Wells, and put the contract in writing; that they agreed to sell said land to Wells, describing it in the contract as containing 3,000 acres, more or less, at \$2.50 per acre. "the quantity to be ascertained by a survey to be made at the expense of the party of the second part"; that the contract was an option to purchase the land for a period of 60 days from its date, and, if Wells should decide to close the option by purchasing the land, he should deposit with Leonard the sum of \$500 on the purchase money, and then the Newbergers agreed to join Leonard, the trustee, in a deed conveying the land to Wells; that Wells did not make the deposit within the 60 days, but at his instance and request the option was extended for another period upon the same terms; that it was understood and agreed at the time that the difference between the amount for which the property might sell at public sale and the contract price of \$2.50 per acre should be paid to Dora Newberger in consideration of her joining in the deed, and the relinquishment of her dower in the land; that, after accepting the contract and depositing the \$500, Wells caused a survey of the land to be made, but, before it was completed, complainants procured Leonard to take the necessary proceedings to sell the land, and at the February term of the circuit court of Wetzel county, in some suit there pending, of the nature of which complainants say they are not advised, Leonard, trustee, was directed to sell the land as special commissioner, and did so, and the same was purchased by Wells for the sum of \$4,050, he paying part of the money in cash, and executing his notes for the residue, and the court having confirmed this sale in June,

1888, Leonard, on the 16th day of July, 1888, executed a deed as special commissioner, conveying the land to Wells; that about the 8th day of May, 1888, Wells and one H. L. Wilcox, who had surveyed the land for Wells, pretended and represented to complainants, "either through fraud, mistake, or ignorance, or both, that there were included within the boundary, excluding the exceptions mentioned in the title papers, only 2,020 acres"; that complainants, still relying on the representations aforesaid as to acreage, on the 10th day of July, 1888, executed a deed whereby, in consideration of the sum of \$1,800, they conveyed the land to Wells with covenants of general warranty, thereby confirming the sale made by Leonard, trustee, as special commissioner, and by mistake, occasioned by the representations aforesaid, describing the quantity to be 2,000 acres, more or less; that they are informed and believe that Wells has fully paid to Leonard the residue of the purchase money, and they represent and charge that all of Newberger's debts, for which the property could be bound, have been compromised and paid, or should have been paid, out of the money in the hands of Leonard as trustee, to be paid to Samuel Newberger; that they believed that at the time of said sale said land was valuable for oil, and it has become valuable oil territory, having many wells thereon, producing many thousands of barrels of oil annually; that they "recently discovered that, as a matter of fact, there was a mistake in the survey as aforesaid made by the said Wilcox, and in his calculations of the acreage of said land; that they are informed and believe that some time ago the said Wells had the said land resurveyed, and ascertained the quantity to be three thousand and eight hundred (3,800) acres, and not two thousand and twenty (2,020), as he and his former surveyor, Wilcox, represented when complainants conveyed said land to him, and not 2,000, as recited in complainants' deed to him; that they have just recently discovered that in February, 1892, the said Wells and others, to whom he had conveyed interests in said land, made leases thereof to the South Penn Oil Company, in which they described the quantity of land in said tract to be 3,800 acres"; that they had no knowledge of said lease, nor of the quantity of land described therein, until just before the institution of this suit; that Wells had recently stated to the complainant Samuel Newberger and to others that there is not less than 3,800 acres of the land; that, since he purchased said land, Wells has recovered in the circuit court of Wetzel county a judgment wherein the boundary recovered is recited to contain 3,800 acres, the exclusion from which of the excepted boundaries described in the judgment would leave about 2,900 acres, or 900 acres more than Wells settled and paid for in his contract; that, as soon as they

discovered the mistake and error, complainants called the attention of Wells to the same, and asked him to correct the mistake and settle with them for the land according to the actual acreage, and Wells at first seemed disposed to settle the matter with them, but they were never able to get him to do so, and he continues to neglect to correct the error and pay complainants what they are justly entitled to receive from him; and that they believe and charge that he should be required to account to them for the difference, namely, 1,680 acres, at the rate of \$2.50 per acre, which amounts to the sum of \$4,200, with interest thereon from July 10, 1888, until paid. As exhibits, there were filed with the bill a deed from Edward Braiden and wife to Samuel Newberger; a deed from P. L. Gambrill and wife to Edward Braiden; a deed from Isaac Hoge and others to Gambrill; a deed of trust from Samuel Newberger to D. H. Leonard, trustee; the agreement between Newberger and wife and Charles E. Wells; the deed from Leonard, special commissioner, to Wells; the deed from Newberger and wife to Wells; the agreement between Wells and others and the South Penn Oil Company; and a copy of the order in the ejectment suit, in which judgment is confessed by Smith and others in favor of Wells and others. Wells filed his separate demurrer to the bill, and the complainants so amended their bill, with leave of the court, as to show that the contract was made in the city of Parkersburg, and that the plaintiffs and the defendant Leonard resided there. The defendants then demurred to the amended bill, and the plaintiffs joined in the demurrer; and on December 1, 1900, the court sustained the demurrer, and, the plaintiffs not desiring to amend their bill, it was dismissed, and the cause is now in this court on appeal.

The prayer of the bill is "that the defendants, named as such in the caption of this bill, may be made defendants hereto, and required to answer the same, and each and every allegation thereof, on their respective oaths, and, the premises being considered, that the said mistake in the execution of said contract of sale, and the mistake of quantity named in their aforesaid deed to said Wells, may be corrected; that said deed may be reformed and corrected in accordance with the facts now appearing; that the contract of complainants with the said Wells may be specifically executed in relation thereto, and that complainants may have a money decree against the said Wells for the said sum of \$4,200, with interest thereon as aforesaid"; and that complainants may have other, further, and general relief.

The contract of July 6, 1887, giving Wells an option to purchase the lands in question, and which he afterwards accepted and acted upon, is perfectly clear in its terms and provisions; but the complainants found their

bill upon the contention that Wells has not fully executed it upon his part, and that his failure to execute it, and the failure of complainants to require full payment of the purchase money, are due to the fraudulent conduct of Wells in representing to complainants that the quantity of land was only 2,020 acres, when in fact it is 3,800 acres. Whether the contract required Wells to make the survey or not, the bill alleges that he did undertake and cause the survey to be made, and made a false representation as to the result of that survey. If it was his duty, under the contract, to make the survey, his false representation, after making it and informing himself and agreeing in his contract to ascertain the true quantity, was fraudulent. If the contract did not require him to make the survey, and he did it voluntarily, and misrepresented the quantity of land, such conduct was not only fraudulent, but embodied a higher degree of fraud. It was more active, officious, and affirmative in its character than in the other case. The difficulty in this case, on the question of demurrer, does not lie in the sufficiency of the allegation of fraud and mistake. The real trouble is encountered in determining whether the plaintiffs have resorted to the proper remedy, and have brought their suit in time. The plaintiffs have made their deed conveying the land to the defendant, and he has accepted it. The contract of July 6, 1887, has been fully executed, completed, and performed, except that all the purchase money has not been paid, according to the theory of this bill. Under such a contract, the vendee has but two duties to perform: One is to accept a proper deed; the other, to pay the purchase money. Wells has performed the first, but has avoided and neglected, in part, the performance of the other. The equitable doctrine is that the enforcement of terms must be mutual, and that, where the vendee would have a right to the decree compelling the conveyance of the land to him, his vendor must likewise be permitted, in equity, to compel the acceptance of his deed, and the payment of the consideration for it. 23 Am. & Eng. Enc. Law, 947. The vendor may recover his purchase money in an action at law, but he cannot, in such action, compel the vendee to accept a deed. In this bill the vendor seeks only to recover a part of the purchase money. Another principle of law which must not be overlooked is that ordinarily a contract for the sale of land is completed by the execution and delivery of the deed by the vendor, and its acceptance by the purchaser. These acts annul the antecedent executory agreement, and upon it no action can be brought afterwards, even though the amount of land conveyed turns out to be less than was stated in the agreement. 28 Am. & Eng. Enc. Law, 132. At page 140 of the same volume it is said: "The conveyance is a consummation of the

contract. With it all the rights of the vendor in the land cease, and by it there is vested in the purchaser the full legal and equitable titles of the property, subject only to the vendor's lien for purchase money."

This lien for purchase money would not exist in this state, unless reserved in the deed. Section 1 of chapter 75 of our Code provides that "if any person convey any real estate, and the purchase money, or any part thereof, remain unpaid at the time of the conveyance, he shall not thereby have a lien for such unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance." If a lien did exist, that would give equitable jurisdiction to enforce against the land the payment of the purchase money remaining unpaid. Such ground of equitable jurisdiction does not exist in this case. No lien for the purchase money is reserved in the deed. Then, again, we are confronted with the principles announced by this court in *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028, that "a claim for compensation for deficiency in quantity of land conveyed by the deed, where the purchase money has been paid, is a mere demand, not cognizable only in equity, but at law, and is subject to the statute of limitations." It is said in the opinion in that case that a demand for compensation is barred by limitation, and, further, that: "It was a cause of action at once on the execution of the deed from Sadler to Melissa Burbridge. Five years would bar it. It is not like the case of a demand for compensation for excess in quantity where a lien for purchase money exists. There, I think, the lien extends to the amount due for surplus land; but, if there is no lien in the deed of conveyance, compensation for the surplus must be recovered in an action at law. So where there is a deficiency. In either case, like the sale of other property. In case of deficiency, compensation would be by action of trespass on the case, or, waiving the tort, in assumpsit; the liability being based on the theory of fraud and deceit in misrepresenting the quantity." However, in 2 Minor, Inst. 699, it is said that "in cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, equity will rescind the conveyance, if the error goes essentially to the substance of the contract, so that the purchaser does not get what he bargained for, or the vendee sells that which he did not design to sell, or, if the circumstances do not demand a total rescission of the contract, the court will give relief by adjusting a compensation between the parties." At page 702 of the same volume it is said, "Wherever the real quantity turns out to be more or less than what was anticipated by the parties, whether the sale be by the acre or otherwise, equity entertains jurisdiction and gives relief on the ground of mistake." If this be true, such relief will be given upon the ground of fraud,

where it produces the same result, or upon the grounds of mistake and fraud combined. This court has announced the existence of an equitable jurisdiction very similar, if not like that claimed in the plaintiffs' bill, in many cases. In *Kelly v. Riley*, 22 W. Va. 247, it is held that "a court of equity has jurisdiction to decree compensation for a deficiency in the quantity of land sold, although the land has been conveyed by a deed with general warranty, and the purchase money has all been paid," and further that "where, by reason of the fraud of the vendor in misrepresenting the quantity of land sold, the vendee is entitled to compensation or abatement from the purchase money on account of deficiency in the quantity of land, courts of equity and courts of common law have concurrent jurisdiction to grant relief." It was held in *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717, that in case of an exchange of lands in gross, if one party has been misled and deceived by the other as to the quantity of land he was getting, and thus induced to enter into the exchange, equity will decree him compensation. In *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461, it is held that "a court of equity has jurisdiction to abate from the purchase money due from vendee, for a deficiency in sale of land, by which the vendee was injured, through the fraud of the vendor in misrepresenting the quantity of the land on the face of his contract or deed, or orally." In *Nichols v. Cooper*, 2 W. Va. 347, this court holds that "the principle upon which equity gives relief in cases of excess and deficiency in the estimated quantity upon the sale of lands is where there is a mistake, —whether the mutual mistake of the parties, or the mistake of one of them, occasioned by the fraud or culpable negligence of the other." In support of this, the court in that case quoted and approved a part of the opinion in the case of *Blessing's Adm'r v. Beatty*, 1 Rob. (Va.) 287. Somewhat similar to this, in respect to the ground of jurisdiction, are the following cases: *Anderson v. Snyder*, 21 W. Va. 632; *Crislip v. Cain*, 19 W. Va. 438; *Boggs' Ex'r v. Harper's Adm'r*, 45 W. Va. 564, 31 S. E. 943.

In those states in which the implied lien for purchase money of land exists, this bill would no doubt be good as a bill for the specific execution of the contract of July 6, 1887; and, that contract being under seal, the statute of limitations would not apply, because the bill was filed within 10 years from the date of the contract. Nor would the court in such state dismiss the claim as stale on the ground of laches. While the purchaser has accepted the deed, that is a circumstance which only strengthens the case made by the plaintiffs' bill. If he had refused to accept the deed and to pay the purchase money, all a court of equity could do would be to compel him to pay the purchase money; and all the plaintiffs would be required to do,

order to obtain the aid of such court,

would be to tender a sufficient deed, and the purpose of the proceeding in such case would be such as is sought in this bill,—merely a recovery of money. But as no such lien exists here, the bill is not sustainable on the theory of an implied lien for purchase money.

The following considerations conclusively show that this court has been right in grounding equitable jurisdiction in cases of this kind upon mistake and fraud: Except for the mistake or the fraud of the defendant, these complainants, if their bill shall be sustained by proof, would either have received, at the time of the execution and delivery of their deed, \$5,200 for their land, instead of \$1,000, or they would now hold that which is far better, perhaps, than a lien upon the land for \$4,200, namely, the land itself, or they would have accepted the \$1,000 as part payment, and reserved a lien in their deed for the remaining \$4,200 of purchase money, or would have had it secured in some other way. The mistake or fraud has therefore caused them to do that which materially affected their interest, very much to their detriment. It has converted their property into a mere unsecured claim for money, and, if the defendant in this case were insolvent, the result would be irreparable loss and injury to them.

The grave question in this case is whether this suit was brought in time. The demand of the plaintiffs is not purely an equitable one, nor is it purely legal, in its nature. This sufficiently appears from what has already been shown. It is a matter of concurrent jurisdiction, and therefore the question of laches, raised on the demurrer, is exceedingly interesting and intricate, as well as difficult in its solution. In such case, ought the general principle of equity, that there can be no fixed and determined rule as to what will constitute laches, to be applied? Should cases of this kind be determined, as regards laches, by their own peculiar circumstances, in the sound discretion of the court, in each case, or should a court of equity, by analogy, apply the statute of limitations? Where the demand is purely equitable, courts of equity determine the question of laches upon rules and principles of their own, and may hold that the plaintiff is precluded by his laches, without regard to whether the period of delay is longer or shorter than that prescribed by the statute. *Hogg, Eq. Prin.* 415, and cases cited. This court decided in *Thompson v. Iron Co.*, 41 W. Va. 574, 23 S. E. 795, that, "where a cause of action arises out of a fraud, the statute of limitations runs from its perpetration." Speaking of the demand in that case, which was held not to be of equitable cognizance, Judge Brannon said: "But if it could be regarded a trust, it is not cognizable only in equity, but is such a question as admits of legal remedy; and the statute of limitations applies to a trust, unless it be one only in equity enforceable. Counsel for appellant admits that the nature of the demand is one

of common-law jurisdiction; that is, concurrent. That applies the statute by analogy. The trusts not within the statute are direct or express trusts, cognizable only in equity." In support of this the following authorities are cited: Bart. Ch. Prac. 110; 1 Rob. Prac. (New) 458; 2 Wood, Lim. Act. § 200; Shepard v. Turpin, 3 Grat. 373; Spedell v. Henricl, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Landis v. Saxton (Mo. Sup.) 16 S. W. 912, 24 Am St. Rep. 403. Equity, however, in cases of legal demands, or matter of concurrent jurisdiction, recognizes as fully as courts of law those exceptional cases which by reason of fraudulent concealment of the cause of action, or obstruction of the prosecution thereof, are held not to be within the statute. "It is well settled that a subsisting, recognized, and acknowledged trust, as between the trustee and cestui que trust, is not within the operation of the statute of limitations. But this rule must be understood as applying only to those technical and continuing trusts which are alone cognizable in a court of equity; and trusts which arise from an implication of law, or constructive trusts, are not within the rule, but are subject to the operation of the statute, unless there has been fraudulent concealment of the cause of action, and the statute is as complete a bar in equity as at law." 2 Wood, Lim. Act. § 200. At another place in the same section this author says: "Therefore it may be said that a trust, in order to be exempt from the operation of the statute, must be direct and express, and of a nature not cognizable at law, but solely in equity. In Spedell v. Henricl, 120 U. S., at page 386, 7 Sup. Ct. 611, 30 L. Ed. 718, it is said by Mr. Justice Gray that "in the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law." The statutory exception found in section 12, c. 104, Code, provides that "where any such right as is mentioned in this chapter, shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself or by any other indirect ways or means, obstruct the prosecution of such right, * * * the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted." A similar provision is found in the statute of limitations of most, if not all, the states, and circumstances bringing any case within the meaning of that exception may be replied to the plea of the statute therein made.

From the authorities referred to, it is clear that the bill cannot be sustained unless the case falls within the statutory exception. It cannot be brought within that provision unless upon some ground forming an exception to the proposition laid down in Thompson v. Iron Co., holding that where a cause of action arises out of a fraud, the statute runs from

its perpetration. The doctrine there announced proceeds upon the theory that the act of the defendant, obstructing the prosecution of the action, must be subsequent to the act out of which the cause of action arose, and that the fraudulent act which gave rise to the action cannot be considered as performing the further function of obstructing the prosecution. That is generally true, but there seems to be an exception to it. In 19 Am. & Eng. Enc. Law (2d Ed.) 242, a distinction is made between that class of cases in which the basis of the action is the original fraud of the defendant, and cases in which the cause of action arises from some other wrong. In the latter class of cases there must be some affirmative act or conduct by the defendant, separate and distinct from the original cause of action, to justify the postponing of the running of the statute. In the other class the mere silence of the party is regarded as a continuation of the original fraud, and as constituting a fraudulent concealment. As to that class of actions it is said: "When the basis of the action or suit is some fraud committed by the defendant, and the plaintiff does not, and cannot by exercising due diligence, discover it immediately, the original fraud is regarded not only as causing the wrong complained of, and for which the action or suit is brought, but as concealing the wrong, without any special proof as to the concealment, beyond a showing by the plaintiff that, though exercising due diligence, he did not and could not become aware of the original wrong. In this way, causes of action arising out of fraud by the defendant rest upon the same footing, so far as the rule under consideration is concerned, as other causes of action not arising from fraud, but which have been concealed by fraud. In either case the statute begins to run only from the time when the wrong of which the plaintiff complains was or ought to have been discovered by him."

In Wear v. Skinner, 46 Md. 257, 24 Am. Rep. 517, under a statute somewhat different from ours, but, no doubt, intended for the same purpose, the court held: "First, that it was not thereby meant that in all cases a party must commit a fraud distinct from and independent of the original fraud, for the purpose of keeping the injured party in ignorance of his cause of action, nor that the mere concealment of the fraud is insufficient; second, that, where one practices fraud to the injury of another, the subsequent concealment of it from the injured party is in itself a fraud, and, if he is thereby kept in ignorance of his cause of action, he is kept in ignorance by the fraud of the adverse party." Robinson, J., delivering the opinion of the court, said: "It is well settled by such courts [courts of equity] that where a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it with-

out any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. And this is the rule, too, when such courts are dealing with legal demands, in regard to which they obey strictly the very terms of the statute of limitations." In support of this he cites a number of English cases which seem to bear out what he says, and also the case of *Bailey v. Glover*, 21 Wall. 346, 22 L. Ed. 636. He also reviews a number of English and American cases in this connection, and concludes that the position taken by him in that case is not in conflict with the authorities. In *Bailey v. Glover*, cited, Mr. Justice Miller, delivering the opinion of the court, said "We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." In *Quimby v. Blackey*, 63 N. H. 77,—an action of assumpsit,—it was held that the fraud by which a cause of action is concealed need not be other than that which caused the original injury, in order to prevent the operation of the statute of limitations. Smith, J., said: "The defendants' neglect to give information to the plaintiff in December, 1871, of the finding of his money, and to restore it to him, knowing it was the plaintiff's money, was a fraud upon him. By their silence and inaction afterwards the original fraud was kept on foot. Their willful silence was a fraudulent concealment of the plaintiff's cause of action, constituting a sufficient answer to the plea of the statute of limitations." For this he cites *Way v. Cutting*, 20 N. H. 187; *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636; *Bowman v. Sanborn*, 18 N. H. 205; *Douglas v. Elkins*, 28 N. H. 26; *Coolidge v. Alcock*, 30 N. H. 352; and a number of other cases. In *Haywood v. Marsh*, 6 Yerg. 69, it was held that, "where the fraud alleged was not discovered or known until within a few months before the bill was filed, it prevents the statute of limitations from barring the claim in equity." There, as in the other cases referred to, the cause of action arose solely out of the fraud of the defendants. To the same effect is *Bank v. Harris*, 118 Mass. 147. The court of appeals of Virginia, in *Rice v. White*, 4 Leigh, 474, intimated the same view, although the question was not sufficiently presented to enable the court to pass upon it definitely. The plaintiff did not plead his ignorance of the fraud, and that the cause of action had been fraudulently concealed, and for that reason the plea

of the statute was held good against him. The second point of the syllabus reads as follows: "It seems that if the fraud was not discovered till some time after it was practiced, and within the time of limitation, this would suffice to take the case out of the statute; but, to enable the plaintiff to avail himself of such matter, he must plead it specially in his replication." Judge Carr said in that case: "I do not undertake to decide how the question would have been, if to the plea of the statute the plaintiff had replied that the defendant had fraudulently and deceitfully concealed from him the cheat he had practiced upon him, and that the suit was brought within five years after the discovery. In that case there must have been either a demurrer, which would confess the fact, and put the case upon the law, or an issue, and then the fact would be directly in issue." He directed that the judgment be reversed, and the cause sent back for a new trial. Tucker, P., said: "But it is said he did not know it, that it does not appear that the fraud was discovered more than five years before the suit brought, and that therefore the bar of the statute does not apply. Had the plaintiff replied that matter, I should have been unwilling to disturb the verdict on the ground of the statute." He opposed a reversal because of the failure of the plaintiff to plead his ignorance of the fraud. The judgment was reversed. The same principle is recognized in *Vanbibber v. Belrne*, 6 W. Va. 168.

These cases seem to establish the principle laid down in 19 Am. & Eng. Enc. Law (2d Ed.) 242, and this case undoubtedly falls within that principle. The cause of action set up in the plaintiffs' bill is based mainly upon the alleged fraud of the defendant. That fraud, if any, was an affirmative, positive act, apparently designed and intended, and certainly well calculated, to prevent an investigation on the part of the plaintiffs as to the quantity of land. It not only induced them to make the deed in consideration of less money than the defendants had agreed to pay them, but it had the further effect of lulling them to sleep, giving them an assurance that there were not over 2,020 acres of land, and blinding them to their detriment and injury. The misrepresentation just as clearly and effectually obstructed the prosecution of the cause of action after that cause of action had been created as it produced the right of action itself. It was not only a misrepresentation as to the quantity of land, but that representation purported to be the result of a survey. The falsity of it could not be known to the plaintiffs. Nothing short of another survey, at considerable expense, would have revealed the fraud. The sale having been completed, the deed made, and Wells put into possession of the land, the plaintiffs had no right to go upon it and survey it without his permission. True it is that, out of mere suspicion, fear, or curios-

ity, they might have questioned the truth of the statement and the bona fides of Wells' conduct, but that is all they could have stood upon in bringing a suit against him before they made the discovery. But it is useless to pursue speculations as to what the plaintiffs might have done. It is enough that they had the right to rely upon the defendant's representation until they discovered that it was false. He had thrown them off their guard in the most formal and effectual manner. "There is also a wide distinction between a case where the action is predicated upon the fraud of a party in the sale of property, or where he has fraudulently thrown a person off his guard, has prevented such an investigation as would have revealed the truth, and one which is predicated upon a breach of contract of warranty, however false the warranty may be. In the former case the statute would not begin to run until the fraud was, or reasonably could have been, discovered." 1 Wood, Lim. Act. § 155, p. 415.

But to avoid the statute of limitations in such case as this, the bill must allege that the cause of action was fraudulently concealed, or that the prosecution of it, in the language of the statute, has been obstructed; specifying the means of obstruction, which in this instance could be nothing other than fraudulent concealment of its existence. Had the plaintiffs amended their bill in this respect, it might, under the principles adverted to, be good, but they failed to do so. Laches is apparent on the face of the bill, and no sufficient excuse for the delay appears. It is clearly not enough that they failed to discover the mistake or fraud. They must allege that by some act or conduct of the defendant they were prevented from so doing, or the prosecution of their right was obstructed, and the want of such allegation is cause of demurrer. *Vanbibber v. Beirne*, 6 W. Va. 168; *Jackson's Adm'r v. Hull*, 21 W. Pa. 601; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765; *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507; *Van Winkle v. Blackford*, 33 W. Va. 584, 11 S. E. 26; 1 Barb. Ch. Prac. 84; *Story, Eq. Pl. § 484*, and notes; 12 Enc. Pl. & Prac. 832. That the nature of the matter to be set up in the bill in avoidance of laches is such as is above indicated is shown by the book last above cited, at pages 834, 835, 836, and 837. "Where ignorance of rights or wrongs is relied on to account for laches, this fact must be plainly alleged in the bill. The plaintiff must also allege why he was so long in ignorance, and the means used to keep him so. * * * The foregoing rules are peculiarly applicable to cases where excuse for laches may be founded upon fraud, mistake, concealment, or misrepresentation, and in such case it is necessary to allege these facts in avoidance

in the bill. The particular acts of fraud or concealment should be set forth by specific and distinct averments, and it will not be sufficient to allege their occurrence in a general or vague way." *Id.* pp. 836, 837. Where the statute is applied by analogy, the excuse made in the bill must be of the same nature and be set up with the same particularity as in a replication to a plea of the statute of limitations.

Thus, treating the bill as one sufficiently charging fraud, it is insufficient for want of allegations excusing laches or taking the case out of the statute of limitations. But is fraud sufficiently alleged? The bill says the execution of the deed in consideration of less money than the grantors were entitled to receive according to the terms of the contract was due to "either fraud, mistake, ignorance, or both." When it appears on the face of the bill that sufficient time has elapsed to apply laches to the demand set up, and fraud and concealment are relied upon, must not the fraud be charged with certainty, and without equivocation? But this is not the only source of doubt as to sufficiency. The survey was made, not by Wells, but by Wilcox, his agent. If Wilcox, by mistake or fraud, misrepresented the quantity to plaintiffs, without the knowledge of Wells, or to Wells, and he, relying upon the representation in good faith, innocently misrepresented the quantity to plaintiffs, the fraud on the part of Wells was constructive only, and did not prevent the running of the statute. It is not charged that Wells was aware of the fraud. Hence it cannot be said that he committed an act which worked a fraud upon plaintiffs, and at the same time a concealment of it. Assuming that there was such constructive fraud, and Wells afterwards discovered it and then remained silent, the bill presents no charge of an affirmative act on the part of Wells working an obstruction to the prosecution of the cause of action. Something of an affirmative nature so operating is undoubtedly required, as has been shown. But a careful reading of the statement of the substance of the bill given above carries conviction that the theory of the bill is mistake, and not fraud. "Mistake" is used frequently; "fraud," but once, and then in the most uncertain manner. The demand is one of concurrent jurisdiction, and enough has been said to clearly show that, in the absence of some obstruction postponing the running of the statute, it begins to run as soon as such cause of action arises. When it arises from mistake only, there is no obstruction, unless there is a subsequent act of obstruction. None is alleged here. Hence the statute began to run at the date of the mistake.

For the foregoing reasons, the decree complained of must be affirmed.

(51 W. Va. 545)

WEBSTER LUMBER CO. v. KEYSTONE LUMBER & MINING CO.*(Supreme Court of Appeals of West Virginia.
March 15, 1902.)**CONDITIONAL SALE—RECORD—DELIVERY OF POSSESSION.**

1. Section 3 of chapter 74 of the Code, requiring notice of a reservation of title to goods and chattels sold upon condition precedent to be recorded in the clerk's office of the county court of the county where the property is, does not apply unless possession of the property be delivered to the buyer.

2. When the property so sold is a structure upon the real estate of the vendor, capable in its nature of being made a fixture, and it is agreed between the parties that it shall not be removed until paid for, there is no delivery of possession, although the buyer, as tenant or licensee upon the land, has the use of such property.

3. The W. L. Co., being the owner of a tract of timbered land, contracted with the owner of a mill to saw the timber, and with W. & M. to log it. By the original contract, W. & M. were to construct a railroad on the lands of the company, at their own expense, for the logging of the timber; but, finding themselves unable to buy the materials, the W. L. Co. bought and paid for them, and had them shipped to the land in its own name, and laid down by W. & M., with the understanding that they were to be and remain the property of the W. L. Co. until paid for by W. & M. After the road was thus completed, the new contract was reduced to writing, and it was therein stipulated that the W. L. Co. was to hold and own all materials purchased by it in its own name until further transfer by a sufficient bill of sale therefor. W. & M. becoming indebted to the K. L. & M. Co., said company, in an action at law, attached the railroad, and had it sold as the property of W. & M., at which sale it became the purchaser. Held that, although there was a sale of the railroad materials by the W. L. Co. to W. & M., there was not a delivery of the possession thereof to the buyers, and, although no notice of the reservation of the title was recorded, the K. L. & M. Co. acquired no title to the materials by its purchase, and equity would enjoin it from removing them.

Brannan, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Webster county;
W. G. Bennett, Judge.

Action by the Webster Lumber Company against the Keystone Lumber & Mining Company. Judgment for defendant, and plaintiff appeals. Reversed in part, and injunction made perpetual.

Henry M. Russell, W. W. Brannon, and W. E. Haymond, for appellant. Mollohan, McClintic & Mathews and Linn & Byrne, for appellee.

POFFENBARGER, J. The Webster Lumber Company, a West Virginia corporation, being the owner of a tract of land situated in Webster county, and containing about 4,000 acres, having upon it a large amount of timber, contracted with one person or firm to saw this timber, and on the 22d day of October, 1895, entered into a contract with

Joseph L. Wheeler and Harry A. Miller, by which said Wheeler & Miller agreed to construct a standard-gauge railroad from a point near Glade Station, on the West Virginia Central & Pittsburg Railroad, up to the timber standing on the company's land, at their proper cost and expense, and all roads and tramways through said tract of land necessary to the removal of the timber therefrom, and also to furnish at their own expense all necessary appliances, locomotives, tools, trucks, etc., needed to operate said railroad. They were to have, free of charge, all rights and privileges necessary to construct and operate the railroad in delivering the timber at the mill. They agreed to cut, fell, and deliver all the timber on that tract of land to the milldam to be located near Glade Run Station, cleaning up all the saw timber as they should go. They were thus to deliver logs to make not less than 30,000 feet of lumber for each working day for at least eight months in the year, or a total of not less than 5,000,000 feet annually, until the timber should all be taken off the land, unless prevented by accident, strikes among men, or other causes over which they could have no control. For this service Wheeler & Miller were to receive \$4.50 for each 1,000 feet of timber, except the beech, birch, and maple, and for each 1,000 feet of beech, birch, and maple that they should cut and deliver as aforesaid, they were to have \$4. The contract contained a provision by which, in case the Webster Lumber Company should fail to find a market for the sale of their timber, and thus render it impossible for Wheeler & Miller to continue their operations under the contract, and they should desire it, the Webster Lumber Company might purchase the railroad, its equipments, appliances, and all the improvements necessary for the cutting and removal of said timber in the manner and upon the terms set forth in the contract. It also contained a clause by which the lumber company bound itself to furnish enough timber to make 35,000,000 feet of lumber. If so much could not be found upon the tract of land mentioned, they were to make up the timber from other lands near said tract. Under this contract Wheeler & Miller began the construction of the railroad soon after the contract was made. Along in December, 1895, as stated by the president of the lumber company, Miller, whose deposition is not taken in the cause, began writing letters to the president of the company, who was also vice president of a national bank at Connellsville, Pa., wanting to know if Wheeler & Miller could not borrow some money from that bank. The bank refused to make the loan, and Miller went to Connellsville and told the officials of the company that unless the company would buy the rails, splice bars, spikes, and ties, and put them in the road, it would be impossible for them to go on with their con-

*Rehearing denied November 18, 1902.

tract. Mr. Kilpatrick, president of the company, says they told Mr. Miller they would not buy the rails and the material for them, and that, if they did buy them at all, the purchase would be made for the company, and that finally it was agreed between Miller and the company that the company would buy the material necessary to complete the road at its own cost, and would own the material until such time as Wheeler & Miller would be able to buy it from them. Wheeler & Miller were to pay a rental of 50 cents per thousand feet on the timber they should deliver, and also to pay the interest on the money to be invested in the materials; the rental to be deducted from the money to become due them for the timber cut and delivered at the contract price. This occurred in January, 1896, and at the time of the making of this arrangement and agreement the company gave Mr. Miller \$400, to be used in the purchase of ties for the road, the receipt for the payment of the ties to be taken by Wheeler & Miller in the name of the Webster Lumber Company, and the money was so expended and the receipts taken. Afterwards \$500 more was paid by the company to them, and used in the same way. These two items are carried into the accounts between the lumber company and Wheeler & Miller in such way as to leave it uncertain as to the exact nature of the transaction. Kilpatrick and J. B. Balsley, secretary of the company, attribute that to the carelessness or incompetence of their bookkeeper. There is no doubt whatever that the money was paid and handled in the manner stated by Kilpatrick. Wheeler was put upon the stand as a witness against the company, and admitted that the money was received and expended in that way. All the rails and other materials that went into the road were purchased by and in the name of the Webster Lumber Company. They were consigned to the company. The company purchased them, but Kilpatrick gave his personal guaranty that they would be paid for by the company. They were paid for by the company. These materials were all placed in the road by Wheeler & Miller by February 15, 1896. The rolling stock of the road, consisting of a locomotive, some log trucks or cars, and all the other tools used by Wheeler & Miller, were purchased by them. The company furnished no money for that purpose. The engine and cars cost \$5,600, on which Wheeler & Miller paid \$1,500 or \$2,000 cash, and the balance of the purchase money was secured by articles of agreement reserving title to the property until the performance of the conditions in respect to payment of the purchase money, in the form or nature of rental rates. On the 19th day of August, 1896, a new contract was made, reciting the inability of Wheeler & Miller to comply with their agreement of October 22, 1895, in respect to the purchase of the rails,

ties, and other materials for the construction of the railroad, and the investment by the Webster Lumber Company of \$7,874.52 in said materials, in consideration of which it was understood and agreed that Wheeler & Miller should be paid only the sum of \$4 per thousand feet for the timber stocked, except beech, birch, and maple, and \$3.50 per thousand feet for the beech, birch, and maple, being 50 cents less on the thousand for each kind than was provided by the original contract; that no part of the track should be removed from the section in which it was until the lumber company should be satisfied that their interests there had been fully developed; and that Wheeler & Miller were to pay to the lumber company 6 per cent. interest on the sum of money so invested, and when the total amount of timber, at 50 cents per thousand, and the interest paid, should amount to the money invested by the lumber company, a good and sufficient bill of sale for the railroad should be made to Wheeler & Miller. An explanatory clause of the agreement is to the effect that the 50 cents per thousand feet should be charged as rental for the property purchased by the lumber company until such time as Wheeler & Miller's credit for rent and interest should aggregate the amount invested by the lumber company, and all moneys deducted prior to the date of the agreement were to be considered rental for the rails purchased, and, when the rental and interest should amount to the total sum invested by the lumber company, this agreement was to become void, and thereafter \$4.50 and \$4, respectively, should be paid for stocking timber, as set forth in the agreement of October 22, 1895. The last clause reads as follows: "And it is understood and agreed that said party of the first part is to hold and own all materials purchased by them in their own name until full transfer to said parties of the second part has been executed according to the terms herein set forth." Wheeler & Miller became involved in debt, and the Keystone Lumber & Mining Company brought an action of assumpsit in the circuit court of Webster county against them, in which an attachment was issued and levied upon the railroad, including the roadbed, right of way, the metal rails, cross-ties, fish plates, bolts, spikes, and all other parts of the road, and also upon the rolling stock and other property of the defendants. In this action the Keystone Lumber & Mining Company recovered a judgment for \$1,974.37, and the court ordered a sale of the railroad and the locomotive and the logging trucks, and appointed W. E. R. Byrne to make such sale. As to the locomotive and logging trucks, the Lima Locomotive & Machine Company consented to the sale, but the proceeds of said last-mentioned property were to be held subject to the future order of the court, and the Lima Locomotive & Machine Company was

granted leave until the next term to file its petition and show such claim as it might have to said proceeds, or any part thereof. The order of sale was executed on the 4th day of May, 1897, and at the sale the rolling stock was purchased by the Webster Lumber Company, and the railroad by the Keystone Lumber & Mining Company. The locomotive was sold first, and then the trucks were sold. Before the railroad was sold, the Webster Lumber Company, by Kilpatrick, its president, gave notice to the commissioner and to the public, by proclamation, that it claimed the railroad as its own property, and that it would hold and defend such property. The following written notice was read to the public and to the commissioner, and then handed to the latter: "To Commissioner Byrne and the Public at Large: You are hereby notified that the property now being offered for sale as the property of Harry A. Miller and Joseph A. Wheeler, partners as Wheeler & Miller, is the property of the Webster Lumber Company, and that the Webster Lumber Company hold articles of agreement and deed for the right of way, dating back to the year 1895, and that they purchased all the material for said road, for which they have bills and receipts, in the name and for the Webster Lumber Company; and you are all hereby notified and warned that we will hold and defend said property to the full extent of the law. Webster Lumber Company, per Worth Kilpatrick, President." After said sale the Webster Lumber Company began using the railroad, and the sale was not confirmed until the 5th day of August, 1897. The order confirming the sale directed that possession of the railroad be delivered to the Keystone Lumber & Mining Company by a writ to be issued for that purpose. A copy of the order was made and certified, and delivered to the deputy sheriff of said county; and on the 16th day of August, 1897, he went to the superintendent of the Keystone Lumber & Mining Company, and informed him that the railroad was then the property of his company, and directed him to take charge of it. He also went to the superintendent of the Webster Lumber Company, and notified him to exercise no further control over it, and not to use it. Whether this order was obeyed by the Webster Lumber Company is not entirely clear, but there is no evidence that the Keystone Lumber & Mining Company ever occupied or in any way made use of the railroad. It is also certain that, if the Webster Lumber Company did cease to use it, such cessation was for the period of not more than one week. On the 9th day of August, 1897, the Webster Lumber Company presented its bill in equity to the judge of the circuit court of said county, who granted an injunction restraining and inhibiting the Keystone Lumber & Mining Company from suing out a writ of possession or writ for the possession of the Webster Lumber Company,

and from disturbing its possession therein in any manner whatever. The Keystone Lumber & Mining Company filed its demurrer and answer to the bill, and such proceedings were had that on the 9th day of August, 1899, the cause came on to be heard upon the bill and exhibits, the demurrer and answer to the defendant, and general replication to the answer, exhibits filed with the answer, former orders and decrees, depositions for the plaintiff and the defendant, and exhibits and affidavits filed, and a final decree was made and entered. By this decree it was determined that the rolling stock, cross-ties, spikes, splices, and other materials used in the construction of the road were not the property of the Webster Lumber Company; that the contract of August 19, 1896, was a conditional sale of said materials, and was void, as to the attaching creditor, because it had not been recorded in pursuance of section 3 of chapter 74 of the Code; that by virtue of the sale under the attachment the Keystone Lumber & Mining Company became the owner of the materials in said road; and that it should have a reasonable time in which to remove said materials, which time was given in the decree. The injunction was therefore dissolved. Upon the petition of the Webster Lumber Company, complaining of this decree, a judge of this court allowed an appeal and supersedeas.

There is but one question in the case, and that is whether, as to the railroad, except the roadbed, there was a sale by the lumber company to Wheeler & Miller, such as is contemplated by section 3 of chapter 74 of the Code. The portion of that section which is said to apply reads as follows: "And if any sale be made of goods and chattels, reserving the title until the same is paid for, or otherwise, and possession be delivered to the buyer, such reservation shall be void as to creditors of, and purchasers without notice from, such buyer, unless a notice of such reservation be recorded in the office of the clerk of the county court of the county where the property is." In order to determine whether there was a conditional sale in this instance, so as to make this property, by virtue of said statute, the property of Wheeler & Miller, as regards their creditors, it becomes necessary to inquire whether all the conditions mentioned in that statute have been complied with. Was there a sale? Was it a sale of goods and chattels? Was there a reservation of title? Was possession delivered to the buyer? These questions must be answered upon the following facts, as well as upon the terms of the contract: At the time the materials were paid for by the lumber company, they were mere chattels. They were put into the railroad long before the contract of August 19, 1896, was made. They were purchased and put into the railroad under a verbal contract between the parties by which it was expressly understood to be the

property of the lumber company until paid for by Wheeler & Miller. These materials were shipped to the Webster Lumber Company at the place at which they were to be used. Wheeler & Miller were permitted to put them into the road. Said materials were all put upon the land belonging to the Webster Lumber Company; part of that land being only a strip wide enough for the construction of the railroad through the land of one H. S. Kunst, about a mile long, and running from the mill out to the land of the lumber company. It cannot be doubted that there was a contract or sale between the parties. In that contract there is undoubtedly a reservation of title, for the railroad was not to become the property of Wheeler & Miller until fully paid for in the manner specified in the contract of August 19, 1896. But this is not enough to make the property liable to creditors as the property of Wheeler & Miller. Before it could become so liable, possession must have been delivered. If there was any delivery of possession, when did it occur, and how? It cannot be reasonably contended that the contract of August 19, 1896, passed the possession of the property, for it was upon and attached to the real estate of the lumber company, and clearly intended by both parties not to be detached or removed until all the timber on the land should be stocked. As regards possession, that contract shows upon its face that possession was not to be delivered, or, rather, at that time possession was not delivered. In that respect the contract was executory, for it provides that thereafter, upon full compliance with its terms by Wheeler & Miller, a bill of sale would be executed by the lumber company. Why was that? To assure Wheeler & Miller that upon full payment they might take up and remove the railroad, and have possession of it. At the time the contract was made, the materials had gone into and become a part of a structure upon the land of the lumber company; and there is no evidence of any act done at that time affecting the status of the property, except the mere execution of the contract. The property was such, it is true, that manual delivery of possession could not be made. But looking to the terms of the contract, it is seen that it was not the intention of the parties that any change should be made in the control of the road until after payment should be made. At that time the road was upon the land of the lumber company, and it was beyond the power of Wheeler & Miller to remove it from the land, or to do anything with it except to use it upon the land of the Webster Lumber Company for the purpose of stocking its timber. That is what it was built for. It was built and put upon the land practically at the expense of the Webster Lumber Company. That company did not buy nearly \$8,000 worth of material, and unqualifiedly deliver it into the posses-

sion of Wheeler & Miller. It purchased these materials, and had them shipped to its own land, and in its own name, to be built into a railroad for the handling of its own timber, and permitted Wheeler & Miller to do nothing more with them than merely take them from the cars and put them down into the road. This was all done before the contract of August 19, 1896, was entered into. From the time that was done until the contract was entered into, Wheeler & Miller had no right or authority to remove these materials from the land. During that time the materials were within the control, so far as possession is concerned, of the Webster Lumber Company, because they could not be removed from the land without its permission. A court of equity would have been quick to enjoin the taking up of that railroad by Wheeler & Miller, not because the purchase money had not been paid, not simply because its removal would have been in violation of the contract to log the timber, resulting in irreparable injury to the lumber company, but because the railroad was on the land of the lumber company, and the materials had been purchased and paid for by it,—had not passed out of its possession. That being the status of the property in respect to possession, it was not changed by the contract of August 19, 1896, for in that contract there is not a word, a line, or a clause conferring upon Wheeler & Miller the right to remove a rail or a tie of it from the land. By its terms their right to change its possession on the land is restricted and qualified.

A structure put upon a man's premises at his own expense, and used by a mere licensee, cannot be taken off of the premises, in the absence of an express agreement giving authority so to do; and it cannot be said to be out of the possession of the landowner, or in the possession of the licensee, within the meaning of the statute here relied upon. "By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." Bouv. Law Dict., "Possession." Property upon a man's land, and especially property annexed to the land,—a structure which cannot be removed without the consent of the landowner,—cannot be held to be beyond his possession.

The principal question argued in this case is whether the railroad in question is real or personal property. The doctrine of fixtures is one which has given the courts much perplexity, and the decisions on that question are numerous, but no case has been found which stands upon the state of facts presented here. It is true that this road was constructed for the purposes of trade, and generally such structures may be removed by the tenant or licensee; and for that reason they are considered not a part of the realty,

but of personal property, although if the same structures were put upon the land for a different purpose, namely, with the intention of making them permanent, they would be annexed to and become a part of the realty. *Kerr, Real Prop.* § 135, and numerous cases there cited. These principles apply in the absence of any special agreement between the parties. But the agreement of the parties supersedes the law. "When there is a special agreement between landlord and tenant regarding fixtures, that overrules and supersedes the general rules of law regulating their mutual rights and obligations." *Wall v. Hinds*, 64 Am. Dec. 64, 4 Gray, 256. "It is a well-settled rule of law that the parties between whom the question as to fixtures arises may by express agreement fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement in this respect, the court will enforce, as between themselves." *Kerr, Real Prop.* § 144. "The agreement of the parties supersedes the law, and is binding alike upon the original parties and subsequent mortgagees or purchasers with notice." *Id.* § 144. Under the head of "Limitations" of this rule, the same author says, in section 145, "In the third place, such agreements are invalid as against the rights of the third person, as bona fide purchasers of the land." The only other qualifications he puts upon the doctrine are that the property must be such as is capable of becoming personal property; that such agreements are subject to the statute of frauds. It is nowhere intimated in his work that such an agreement would not be binding upon an execution creditor of the tenant or licensee. In a case somewhat similar to this, the supreme court of Indiana said: "Proceeding now to the question whether the engine and mill fixtures were real or personal property, it may be asserted that, if *Risinger* would have been entitled to remove these fixtures from the premises of *Dorsh* during the term of his right of occupancy of the premises, they would, as between *Dorsh* and *Risinger*, be personal property; and, if personal property as between them, they might be liable to be taken on execution against *Risinger*, the owner of them, though the execution was a joint one against *Risinger* and others." *State v. Bonham*, 18 Ind. 231. In disposing of this case it is not necessary to go so far as does the Indiana court, nor to hold absolutely that the railroad in question became a part of the realty. This case must stand upon its own facts. The property in question was bought and paid for by the owner of the land, and caused by it to be put upon its own land. In all these cases in which tenants and licensees are permitted to remove structures put upon land for the purposes of trade, such

structures are built by the tenants and licensees. Such is not the case here. It is true that *Wheeler & Miller* graded the roadbed, but it cannot be said that by so doing they acquired the real estate,—the ground itself. That part of the road, concededly, belongs to the lumber company, notwithstanding the fact that *Wheeler & Miller* graded it. All the balance of that railroad, except the labor and expense of laying it down, was furnished by the *Webster Lumber Company*. Not a rail nor a tie of it was paid for by *Wheeler & Miller*. They laid the *Webster Lumber Company's* materials upon the ground in the form of a railroad upon its own ground, under an express verbal agreement that that railroad was the property of the *Webster Lumber Company*, and would remain so until they should pay for it. To say that under such circumstances that railroad did not become a part of the realty, if the *Webster Lumber Company* desired that it should be such, subject only to be converted in the future into personal property by the purchase of *Wheeler & Miller*, would be carrying the doctrine of fixtures beyond the limits of any case yet noted, or any principle laid down in the books. Under such circumstances, it would be conforming to reason, and not violating any principle of law, to hold that the railroad is a fixture, and a part of the realty. It is true, there is a contract under which, upon compliance with conditions, it may be removed. But it never can be removed by *Wheeler & Miller* until these conditions are complied with. It is like any other piece of property upon a man's land, which he agrees may be removed upon the payment of a certain price. Can it be said that until the price is paid, and the right to remove it acquired, it becomes legally detached from the land, and becomes personal property? If not, this railroad must be a part of the realty. If the oral and written contracts were not conclusive of the question of the nondelivery of possession, as has been shown, it would be exceedingly narrow to determine it otherwise than from all the circumstances and conditions attending the transactions between the parties, as well as the purposes they had in view. Over all others stands the fact that the lumber company had this tract of 4,000 acres of land, and had contracted with the owner of a mill to saw the timber; binding itself, under penalties and forfeitures, to furnish certain quantities of timber within certain periods, so as to keep the mill running. *Wheeler & Miller* had agreed to build the railroad and stock the timber, but, for want of money, were unable to obtain the materials for the construction of the road. The lumber company being thus compelled to furnish the materials itself, the original contract in respect to the building of the road was abrogated, and nothing was left for *Wheeler & Miller* to do in that connection but the grading and the laying of the track. This is claimed to

have cost them about \$4,000, but it is not pretended that they were to own the road-bed. There was no source from which this expenditure could be reimbursed, except the profits from their logging contract. The roadbed thus graded remained the property of the company. When it put the materials upon it at its own expense, the entire road became its property, subject to the use of it by Wheeler & Miller in logging the timber. When it was decided that the company should furnish the materials, an abatement of 50 cents per thousand from the price for logging the timber was made, which was probably reasonable and fair, as the materials cost nearly \$8,000, the equivalent of 50 cents per thousand on about 16,000,000 feet of timber. Such being the circumstances, it is beyond belief that the company intended to, or did in fact, sell said materials to Wheeler & Miller, and deliver to them the possession thereof, without any security whatever. It would be difficult to believe they thought they had any right to do more than place these materials in the road. The company certainly would not have permitted any other use of them.

Enough has been stated to show that the possession of this property cannot be considered to have passed unequivocally into the hands of the purchaser, viewing the matter from the standpoint of a creditor who is not presumed to have known all that took place between the parties. He must be held to have known the railroad was on the land of the Webster Lumber Company, and was used by Wheeler & Miller. To him its situation was far different from that of a horse, cow, wagon, or other property incapable of annexation to real estate, which has been sold and delivered into the hands of the purchaser. But however it may have appeared to third parties, it is perfectly clear that there was no delivery of possession of the materials or of the railroad to Wheeler & Miller, and the statute relied upon has no application to a conditional sale, without delivery of possession.

So much of the decree of the circuit court of Webster county, made and entered on the 9th day of August, 1899, as dissolves the injunction awarded on the 9th day of August, 1897, in so far as the same restrains and enjoins the defendant from taking possession of the rails, spikes, splices, cross-ties, and other materials in said railroad, and determines that said rails, spikes, splices, and other materials are the property of the defendant, is reversed, and in all other respects said decree is affirmed. And this court proceeding to make such decree as the circuit court should have made and entered, it is adjudged, ordered, and decreed that said injunction, as awarded on the 9th day of August, 1897, be, and the same is, made perpetual.

BRANNON, J., dissents.

(51 W. Va. 559)

CHILDERS v. LOUDIN et al.*

(Supreme Court of Appeals of West Virginia.

March 15, 1902.)

JUDGMENT—VACATING—APPEAL—REVERSAL —PARTITION—PARTIES—SALE IN— TEREST OF CO-TENANTS.

1. When a circuit court, being about to end without dispatching all its business, is adjourned by the judge thereof to a future day, by an order entered of record, as provided in section 4 of chapter 112 of the Code, all judgments, orders, and decrees rendered and made by such court before or during the day on which such court adjourns to such future day become final on such adjournment, as if the adjournment itself were final, and cannot be set aside at the adjourned term.

2. On an appeal or writ of error the whole record is before the court, and it will reverse the proceedings in whole or in part if prejudicial error thereon is perceived against the appellee or defendant in error; and such error may be cross-assigned.

3. Judgment creditors and other incumbrancers are not necessary parties to a bill for partition, even where a sale of the premises is decreed, unless they be creditors of a deceased person who was a tenant in common, joint tenant, or coparcener. In other cases it is proper to sell the land subject to the liens.

4. It is the duty of the court, before decreeing a sale in a partition suit, to judicially determine the rights and interests of the co-tenants in the land, and failure to do so is ordinarily reversible error.

5. When real estate is sold in such suit without a judicial ascertainment of the interests of the parties, and is purchased by a co-tenant who never appeared in the cause, nor in any way aided in bringing the property to sale, and the sale is confirmed without objection, his title is protected by section 8 of chapter 132 of the Code, notwithstanding the error in the decree of sale, and the co-tenant parties must resort to the fund arising from the sale.

(Syllabus by the Court.)

Appeal from circuit court, Webster county; W. G. Bennett, Judge.

Bill by Anna Childers against J. W. Loudin and others. Judgment for plaintiff, and defendant J. N. Johnson appeals. Reversed.

W. T. Talbott, E. A. Brannon, and J. M. Hoover, for appellant. Lynn & Byrne and J. S. Coger, for appellee.

POFFENBARGER, J. Hezekiah Sargeant died in June, 1885, being then the owner of a tract of land situated in Webster county, containing 188 acres, which he disposed of by will, devising to his wife, Anna Sargeant, one-third of it, and to his three sons, Granville, Melville, and Perry, and his daughter, Lydia Conrad, the other two-thirds, to be equally divided among them, except that Lydia Conrad was to receive \$100 less out of the real estate than the sons were each to receive; and the will further provided that there should be paid Cora Sargeant, the testator's granddaughter, \$100, when his real estate should be sold. Some time afterwards Granville Sargeant died intestate, without having disposed of his interest in the land,

*Rehearing denied November 19, 1902.

¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 653, 672.

and without leaving any children or widow surviving him. His father had been twice married, and Perry Sargeant was his half-brother, while Melville Sargeant and Lydia Conrad were his full brother and sister, and Anna Sargeant was a stepmother. Hence Anna Sargeant took no part of his interest in the land, and Perry Sargeant, being only his half-brother, inherited only one-half as much of his interest as Melville Sargeant and Lydia Conrad. Granville Sargeant's interest in the whole tract of land under the will having been one-sixth, Lydia Conrad inherited two-fifths of said one-sixth, or two-thirtieths of the whole tract. Before the death of Granville Sargeant, Lydia Conrad conveyed to Perry Sargeant the one-sixth which was devised to her, but she never disposed of the two-thirtieths which descended to her from Granville Sargeant; but before the bringing of this suit she died, and said two-thirtieths descended to her children, Rosa M. Gillisple, Hetty Conrad, Geo. P. Conrad, John B. Conrad, and Clever O. Conrad, the last four of whom are infants, who are made parties to the amended bill filed in this cause, and for whom a guardian ad litem was appointed and filed an answer. Melville Sargeant conveyed his interest by devise, descent, and purchase to G. M. Fleming, trustee, to secure a debt. Fleming afterwards sold the land, and it was purchased by said Loudin, but Fleming retained a lien upon it for the purchase money. Afterwards Fleming caused the said Perry Sargeant interest to be sold, to satisfy said vendor's lien, and it was purchased by John N. Johnson, so that Johnson and Loudin became the owners of all the two-thirds not devised to the widow, except the two-thirtieths which belonged to the children of Lydia Conrad. Anna Sargeant, who afterwards married William N. Childers, conveyed to J. W. Loudin her one-third, retaining a vendor's lien upon it, which she afterwards enforced, and repurchased her said one-third. Then she brought this suit for partition of the land, and for sale of the land in case it should prove to be not susceptible of partition, averring in her amended bill that the \$100 bequeathed to Cora Sargeant is not a charge upon her one-third of the land, and that she is not responsible for the payment of any part of said \$100. Cora Sargeant filed her answer, claiming that she has a valid lien upon the whole of the real estate for the said sum of \$100; showing that she has not been a party to any suit, sale, or conveyance affecting the land, and praying that it may be sold, and said sum of \$100, with interest, be paid to her out of the proceeds. J. W. Loudin filed his answer to the original bill and amended bill, averring that the character of the land was such that the interest of all parties would be best subserved by a sale of the land. The infant defendants answered by their guardian ad litem. Depositions of three witnesses were taken, whose evidence tended to show that

the land was not susceptible of partition, and that it would be to the interest of the infant defendants, as well as all others, to have the land sold. John N. Johnson filed no answer, but it appears that he had not paid all the purchase money due on his interest, and that a suit in chancery was pending against him and his surety for the collection of that money; and the two causes were consolidated and heard together, and on the 4th day of April, 1890, a decree was entered in the consolidated causes directing a sale of all of the land; it being recited in the decree that partition could not be conveniently made, that the interest of the infant defendants would be promoted by the sale, and that all of the adult parties had consented to such sale. The sale having been made and reported, another decree was entered on the 5th day of August, 1890, confirming the sale; J. N. Johnson being the purchaser of the land. This decree recites that there were no exceptions to the report of sale, and refers the cause to a commissioner to ascertain and report the true owners of the respective interests in said land, and who are entitled to the proceeds of the sale, together with the proportions in which each of said persons shall receive said money, and the liens existing against any of the several shares, together with the amounts and priorities thereof, and any other pertinent matters. The land sold for \$558. On the 13th day of September, 1890, the court (a special judge sitting) set aside said sale and the decree confirming the sale, and ordered a resale of the land; it appearing by the order then entered that exceptions to the report of sale were filed, and also an upset bid for \$800 made by W. L. Harper, with sufficient guarantors. It does not appear when the exceptions were indorsed, but the bid is dated September 12th; and, as the exceptions refer to the bid, the presumption is that they were made at the time of the filing of the upset bid,—more than a month after the sale had been confirmed. After confirming the sale on the 5th day of August, 1890, the court continued to sit until the 11th day of August, and then adjourned until the 12th day of September next, ordering a petit jury to be drawn to attend on that day. So the order setting aside the sale and decree confirming the sale was entered at the adjourned term. Johnson, the purchaser, appeals, insisting that the court was without jurisdiction to set aside the sale and the order confirming it.

Section 4 of chapter 112 of the Code, providing for the adjournment of the holding of a court to a future day when its term is about to end without dispatching all its business, as was done in this case, contains the following clause: "All judgments, orders and decrees, rendered and made by such court before or during the day on which said court adjourned to such future day, as aforesaid, shall have the same force and effect in all respects as if said court had finally adjourned

on that day." This statute has been construed in the case of *Wickes v. Railroad Co.*, 14 W. Va. 157, in which it is held that by force of said statute the term of the court, as to a judgment rendered by it before or during the day on which such adjournment becomes final, is ended, and it is not competent for the court or the judge thereof at the adjourned term, or any other subsequent term, to receive a bill of exceptions, and sign it and make it a part of the record in the cause. This case was cited with approval in *Amos v. Stockert*, 47 W. Va. 119, 84 S. E. 821. It is well settled that a cause cannot be reheard, and that a court cannot ordinarily set aside a final judgment or decree after the expiration of the term of court at which the judgment or decree was rendered. While the term continues, the cause may be reheard upon petition, and the decree may be set aside, but after the expiration of the term a cause can only be reheard upon a bill of review. *Hodges v. Davis*, 4 Hen. & M. 400; *Laidley v. Merrifield*, 7 Leigh, 353; *Carper v. Hawkins*, 8 W. Va. 291-301; *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. 662. The decree confirming the sale made in this cause on the 5th day of August, 1899, was a final decree as to the purchaser, J. N. Johnson. His proposal of purchase made to the commissioner, and by him reported to the court, was accepted by that decree, and the sale was confirmed, and a writ of possession was awarded the purchaser. This vested in the purchaser the title to the land. *Childs v. Hurd*, 25 W. Va. 530. It is also well established that the purchaser at a judicial sale, upon complying with the terms thereof, becomes a party to the suit from the day of his purchase, and in all subsequent proceedings in regard thereto is entitled to a hearing upon the question whether the sale shall be set aside, and if the court erred in setting aside the sale the purchaser has the right to appeal. *Childs v. Hurd*, cited; *Delaplaine v. Lawrence*, 10 Paige, 602; *Blossom v. Railroad Co.*, 1 Wall. 655, 17 L. Ed. 673; *Curtis v. Thompson*, 29 Grat. 474; *Kable v. Mitchell*, 9 W. Va. 492; *Hughes v. Hamilton*, 19 W. Va. 366; *Haymond v. Camden*, 22 W. Va. 180; *Talley v. Starke's Adm'r*, 6 Grat. 339; *Marling v. Robrecht*, 13 W. Va. 440. It is further held, however, in *Childs v. Hurd*, and in *Bank v. Jarvis*, 26 W. Va. 785, that where a court sets aside a sale, and directs the property to be reoffered for sale before the sale has been confirmed, the purchaser cannot appeal until after the resale has been made and confirmed. In such case the purchaser obtains no fixed interest in the land. Until confirmation of the sale he acquires neither possession nor title, and the order setting aside the sale does not deprive him of either possession or title. *Hartley v. Roff*, 12 W. Va. 401; *Cocke's Adm'r v. Gilpin*, 1 Rob. 20; *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750; *Heywood v. Covington's Heirs*, 4 Leigh, 373; *Taylor v. Cooper*, 10 Leigh, 317,

84 Am. Dec. 737; *Hudgins v. Marchant*, 28 Grat. 177. But this case does not fall within that principle, for here the sale to Johnson was confirmed, and title vested in him. The order setting aside the decree of confirmation and the sale is certainly erroneous, and probably absolutely void. As the court is without power to set aside its judgment or decree after the expiration of the term, except upon a bill of review or other proper proceeding, and the statute provides that in case of an adjournment, such as was taken in this case, the judgment and decrees rendered and made on or before the day of adjournment shall have the same force and effect as if the court had finally adjourned on that day, it follows that the court could not at such adjourned term set aside the decree of confirmation and the sale, upon the mere filing at such adjourned term, after the confirmation of the sale, before the adjournment, exceptions to the report of sale, and an advance or upset bid. This is so manifest that counsel for appellees do not undertake, in their brief, to uphold the action of the court in so doing. The only persons appearing as appellees are the infant defendants, and they content themselves with the argument of their cross-assignment of error, insisting that the court erred in decreeing a sale of the land without having first ascertained the liens thereon and their priorities, and the respective interests of the claimants to the land. It is to be noted here that the court below has not disturbed the decree of sale. That decree remains in full force, and the court has only ordered a re-execution of the order of sale. From this it must be inferred that no application has ever been made to the court below, by petition, bill of review, or otherwise, to correct any error it may have committed in entering the decree of sale. That decree, in the absence of a showing of fraud, cannot be set aside at the instance of any of the adult parties, because, as to them, it is a consent decree. Hence the infant defendants are the only persons who can complain of it. Rule 10 of the supreme court provides that, on an appeal or a writ of error, the court will consider the whole record as being before it, and will reverse the proceedings, in whole or in part, if error is perceived against the appellee or defendant in error, and it authorizes the appellee or defendant in error to cross-assign as to any error in the record which is prejudicial to him. Under this rule, as well as upon reason and principle, it is proper for the infant defendants to cross-assign error in the decree of sale, although no petition for rehearing or bill of review had ever been filed for the correction of error in said decree. This view is re-enforced by the principle laid down in *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262, that on application, in any form, showing cause against a decree by an infant, the whole record will be examined to find such error, just as on an appeal by an adult.

It remains now to determine whether there

is error in said decree, and, if so, whether it is prejudicial. It is not enough that the decree is erroneous. The error must be such as to prejudice the rights of the party complaining of it, or the decree will not be reversed. *Clark v. Johnston*, 15 W. Va. 804. It does not appear from the record that there are any creditors holding liens upon any of the interests in the property, except Fleming and Cora Sargeant. As to the debt due Fleming, commissioner, the court ascertained and fixed the amount of his lien upon the interest formerly belonging to Perry Sargeant at the date of the decree, and declared it to be a lien upon that interest. As to the \$100 due Cora Sargeant, the decree of sale is silent, and in lieu of settling and fixing the amount of that charge, and ascertaining the interests of the various parties in the land, the decree contains the following provision: "The court will, upon the coming in of the said report of sale, settle the right of all the other parties as to the said proceeds of sale, decree as to costs, and provide for the investment of the interest of said infant defendants according to law." The amount due Cora Sargeant differs in its status from a lien acquired by a creditor of one of the co-tenants upon his interest in the land. It is a sum given to her by the testator, to be paid to her when the real estate of said decedent should be sold; and it is claimed by her that, by virtue of this provision of the will, it was made a charge upon the whole of said tract of land. However, it is still only a lien upon the land, according to her contention. It is well settled that in creditors' suits it is error to decree a sale without first ascertaining the amounts and priorities of the liens, and the respective interests of all the parties in the subject-matter. *Livesay v. Jarrot*, 3 W. Va. 283; *Rohrer v. Travers*, 11 W. Va. 147; *Marling v. Robrecht*, 18 W. Va. 440; *Scott v. Ludington*, 14 W. Va. 387; *Payne v. Webb*, 23 W. Va. 558; *Dent v. Pickens*, 50 W. Va. 382, 40 S. E. 572. But it is held generally by the courts that partition never affects the interest of third persons, and that creditors have no concern with it, and that, if they are made parties to the suit, it will be dismissed as to them. *Stevens v. McCormick* (Va.) 19 S. E. 742; 2 Rob. Pr. (Old) 14; *Wotten v. Copeland*, 7 Johns. Ch. 140; *Agar v. Fairfax*, 17 Ves. 533; 2 Jones, Real Prop. § 1906; *Espalla v. Touart*, 96 Ala. 137, 11 South. 219; *Shivers v. Hand*, 50 N. J. Eq. 231, 24 Atl. 911; 17 Am. & Eng. Enc. Law, 783; 15 Enc. Pl. & Prac. 796. But actual partition does not disturb the liens of creditors. Upon actual partition the lien of a creditor upon an undivided interest is transferred by the partition from the undivided portion of the whole premises to the whole of the part set off to the tenant against whose portion the lien was charged. 17 Am. & Eng. Enc. Law, 783; *Wright v. Strother*, 76 Va. 357; 2 Jones, Real Prop. § 1906. And where the

lien attaches to the whole of the real estate, it remains a lien upon all of it after partition, if the lienor is not made a party to the suit. 17 Am. & Eng. Enc. Law, 783. But where the lienor is made a party to the suit his claim must still remain a lien upon the property, unless by some means it is satisfied and paid off or provided for, for the court has no power to arbitrarily deprive a creditor of his lien or of his debt, merely to enable it to make partition of the land among its owners. And where there is actual partition, and the land is not converted into money, the court has no means of paying off the lien, and it would be inequitable and injurious to refuse partition merely because the lien cannot be released.

Where, from insusceptibility of partition, the land must be sold, reason suggests that lienholders should be made parties, and the payment of the amounts due them, according to priority, provided for in the decree of sale. Analogy to the principles governing sales in creditors' suits would lead to that result. But it seems not to be the law. Many authorities hold that, in the absence of statutory provisions requiring lienholders to be parties, the land must be sold subject to the liens. "But when, instead of a partition, a sale of the property is ordered, it is evident that some means must be devised for the adjustment of the conflicting interests of the lienholders and of the purchasers at the sale. Even where a sale is sought, lienholders are not, in the absence of statutory provisions to the contrary, necessary parties defendant, because they cannot be affected by such sale. The business of the court is not to draw into discussion various and conflicting rights and equities of incumbrancers. The property is divided cum onere. The true rule is, no persons are to be made parties except those having a present interest in the premises." *Freem. Co-Ten.* § 479. "Judgment creditors and other incumbrancers are not proper parties to a bill for partition, even where a sale of the premises is decreed; and where they were made parties, in such case, by a supplemental bill, held, that the bill should be dismissed." *Sebring v. Mersereau*, 9 Cow. 344. *Halsted v. Halsted*, 55 N. Y. 442, holds that creditors should be made parties; but that is because of a statutory provision, passed after the decision of the former case, authorizing such procedure. That lienholders cannot be made parties, even where land is to be sold, is held in *Wotten v. Copeland*, 7 Johns. Ch. 140; *Harwood v. Kirby*, 1 Paige, 469; *Thruston v. Mink*, 32 Md. 572; *Owsley v. Smith's Heirs*, 14 Mo. 153; *Stephens v. McCormick*, cited; *Espalla v. Touart*, 96 Ala. 137, 11 South. 219. To sell the land subject to liens, without ascertaining their amounts and to whom due, appears to be glaringly inequitable and disadvantageous to both owners and lien creditors. At the sale they bid for the protection of their interests, under uncertainty as to their rights and inter-

ests, in the same sense, and in some cases to the same extent, as where land is sold in a creditors' suit. All the reason and equitable principles that require a determination, before sale of the lands, of the amounts and priorities of the liens in creditors' suits, apply with equal force here. And it is difficult to conceive of any good reason why they should not be applied where real estate is sold in a partition suit. Some delay would be occasioned the owners of the land, but not more than occurs in other suits in which substantial interests in the property to be sold must await the determination of matters which may be necessary to an advantageous sale. But it must be remembered that, in respect to creditors' suits, the legislature has expressly provided that all lienholders shall be made parties. Section 7, c. 86, Code; section 7, c. 139, Code. As to partition suits, such provision has not been made, except to a very limited sense. That is a clause in section 3, c. 79, of the Code, which requires the court, in making distribution of the proceeds of sale, to take "care, when there are creditors of any deceased person, who was a tenant in common, joint tenant, or coparcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors." Until the legislature shall make further provision, the well-settled rule that sale in partition suits may be made subject to liens upon the whole of the land, or upon interests of some of the respective owners thereof, must be applied, in the absence of judicial legislation on the subject.

As has been shown, the court failed to determine and fix, before the sale of the land, the respective rights and interests of the parties in the property. That a decree of sale under such circumstances is erroneous is established by an abundance of authority. 17 Am. & Eng. Enc. Law, 748; 15 Enc. Pl. & Prac. 809; *Stevens v. McCormick* (Va.) 19 S. E. 743. However, the sale cannot be set aside for this error. The sale was confirmed without objection, and there is no error in the decree of confirmation. Hence section 3, c. 132, of the Code, protects the title of the purchaser. While Johnson, the purchaser, is a party to the suit, it does not appear that he in any way encouraged or sought to bring about the sale of the land, and it cannot be said that he was the moving cause of the sale. The sale is not more beneficial to him than to his co-tenants, and he does not stand in the situation of a creditor who has caused the land to be sold for the satisfaction of his debt, and purchased it at the sale. Although a defendant and one of the owners, he did not even file an answer in the partition suit. This being true, the principle announced in *Martin v. Smith*, 25 W. Va. 585; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Buchanon v. Clark*, 10 Gratt. 164; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959,—does not apply. In all those cases the purchasers whose ti-

ties were held not to be within the protection of the statute were persons who were benefited by the erroneous decrees, and who had been instrumental in procuring the sale. In *Dunfee v. Childs* it is said: "Merely being a party would not alone disturb his purchase, but, if the decree goes to his benefit, it is otherwise. The same reason does not exist for protecting him as an innocent third person. He moves the proceeding." As the sale cannot be set aside, and the fund arising from the sale is still in the hands of the court, and the parties complaining of the error in the decree of sale must now look to that fund alone, it would be useless to reverse the decree. Upon such reversal, nothing could be done except to give them their interest in the proceeds of the sale, and that can be done without a reversal of the decree. While the decree is erroneous, it is not, under the circumstances, prejudicial.

For the reasons hereinbefore given, the decree setting aside the sale and confirmation, and ordering the land to be resold, must be reversed, and the cause remanded for further proceedings according to the rules and principles governing courts of equity and the directions herein given.

(51 W. Va. 569)

MARSHALL v. HALL et al.*

(Supreme Court of Appeals of West Virginia.
March 29, 1902.)

WILL—CONSTRUCTION—PURCHASE MONEY—LIEN—TRUST FUND—MISAPPROPRIATION.

1. W. devised to H., "to him, his heirs, and assigns," a farm described; "he paying to my executor twelve thousand dollars in five equal annual payments, bearing interest from the date of my death; such payments to form part of my estate in the hands of my executor, and to be disposed of as hereinafter provided"; and giving H. one month from the date of the probate of the will in which to refuse in writing to take the farm. H. elected to take it. *Held*, that the \$12,000 was purchase money, and a lien upon the land, and, as such, prior to all other liens or claims created upon the said land by H., as well as judgments recovered against him.

2. A legacy of \$3,000 by the same will was bequeathed to H., to be held by him in trust; the interest to be paid to B. during his life, and at his death the \$3,000 to be paid to other parties named. R., the executor of W., having collected from H. \$9,000 of the purchase money, instead of requiring H. to pay the residue of \$3,000, took from H. his receipt for that amount,—being the amount of the trust legacy,—and treated it as the residue of the purchase money as paid by H. *Held* a misappropriation of the trust fund, and that, the money not having been paid by H., the lien for the residue of the purchase money upon the land remained valid, and inured to the benefit of the beneficiaries of the trust legacy.

(Syllabus by the Court.)

Appeal from circuit court, Jefferson county; E. Boyd Faulkner, Judge.

Suit by A. P. Marshall, executor, against John H. Hall and others. Judgment for

*Rehearing denied November 12, 1902.

plaintiff, and defendants W. L. Wilson and Ed. Tearney appeal. Affirmed in part.

A. W. McDonald and J. M. Mason, Sr, for appellants. Daniel B. Lucas, J. F. Engle, D. C. Gallaher, and Mollohan, McClintic & Mathews, for appellee.

MCWHORTER, J. John H. Hall purchased from the estate of Mrs. Ellen Waters a tract of 235 acres of land in Jefferson county, under the provisions of the will of said Ellen Waters, at the price fixed by the will, \$12,000, which will provided a legacy of \$3,000 to said John H. Hall, to be by him held in trust, to pay the interest accruing thereon to John L. Briscoe, the brother of the testatrix, during his life, and after the death of her said brother the said sum of \$3,000 was to be paid to Julia Armstead, Bettie Miller, and Julia Gallaher, each the sum of \$500, and the residue of said sum to testator's sisters Julia B. Miller, Elizabeth C. Hall, and Amelia F. Gallaher, equally, to be divided between them share and share alike. To raise the money to pay for the farm, the executor of the will borrowed for said Hall from Judge Marshall the sum of \$7,000, to secure which Hall executed a deed of trust on the land. The executor allowed the said Hall to retain the \$3,000 bequeathed to him as a trust fund by said will, to be held by him in trust for John L. Briscoe and others, and took Hall's receipt therefor. On the failure of Hall to pay off this trust deed, George Johnson and Charles W. Ross, executors of Ann P. Marshall, and Charles W. Ross, as trustee, brought their suit in chancery in the circuit court of Jefferson county, and filed their bill at April rules, 1893, convening the creditors of said Hall for the purpose of subjecting said land to the payment of his debts, in which suit said John L. Briscoe and others, the beneficiaries of the \$3,000 trust fund, were not made parties. These parties on the 14th day of December, 1894, tendered their petition in said cause, setting up their claims for the \$3,000, and praying that this resulting trust might be fully recognized and established by decree, and that all resulting and consequential relief might be granted, etc. To the filing of said petition the parties plaintiff and defendant to said suit objected, which objection was sustained, and the petition not allowed to be filed. Petitioners appealed from the decree rejecting their petition, and by decree of this court the said decree was reversed, and the cause remanded for further proceedings to be had therein in accordance with the rules of equity. 42 W. Va. 641, 26 S. E. 300. On the 17th of February, 1897, Eugene Baker, sheriff, committee administrator of Julia B. Miller, and the other said petitioners, filed their petition and amended petition, making all the parties to said suit, plaintiffs and defendants, parties defendant to said petition; setting up their said claim for \$3,000 and interest; al-

leging that their resulting or implied trust is a lien upon the whole of the 236 acres, and superior in dignity—First, to all deeds of trust against said farm; secondly, to all judgments against said John H. Hall; and, thirdly, to every other lien or charge against said property, of whatever character or description, except so far as otherwise held by the supreme court of appeals of this state in this case; that the deed of trust of plaintiff Charles W. Ross, trustee, etc., was recorded April 1, 1881, and that said Ross, as such trustee, relinquished his lien on the 80 acres of the Briscoe tract in favor of one Thomas H. Bates, by deed exhibited with the bill, and dated January 1, 1884; and averring that as to said 80 acres the said Ross must be taken to have received the benefit thereof as against the petitioners, and, as against them, the plaintiffs' debt audited against the remainder of the Briscoe tract, 156 acres, should be charged with the price of said 80 acres, and petitioners so pray; and averring further that the deed of trust to George Baylor in favor of W. L. Wilson, as set out in the bill, was recorded May 23, 1881, while the legal title to the Briscoe tract was outstanding in Ross, trustee, and therefore it conveys nothing but the equity of redemption, and was subordinate, therefore, to the equity of petitioners upon the principle that *qui prior est in tempore potior est in jure*, and praying that it may be so adjudged; and averring that the same is true in regard to the other deeds of trust set out in the bill, and also over the lien of S. S. Dalgarn, by virtue of the deed of trust to Frank Beckwith, dated October 10, 1893, for \$243.77, for the same reason, and for the further reason that this last conveyance was made *pendente lite*; averring that the decree of sale of February 23, 1894, was and is virtually null and void as to the petitioners, as also is the decree confirming the sale; and pray that said decrees be so held; and they charge that, even if the sale should not be disturbed, said purchaser made his second payment of the 10th of August, 1895, after petitioners had tendered their petition to the court to be filed, which was done December 14, 1894, at which date all the parties appeared in answer to said petition, and moved to reject it; hence said Dalgarn is a purchaser with notice of petitioners' claim; and pray that it may be so adjudged, and that the 156 acres may be subjected in the hands of the purchaser, Dalgarn, to the payment of their debt; averring that plaintiff had notice of petitioners' equity when he brought this suit, and subsequently that it appeared on the face of the record that they were necessary parties to the suit; and they therefore aver that all the decrees entered in the cause are liable to be set aside and treated as null and void as to petitioners, and pray that it may be so held, and that their resulting trust be fully recognized and established by decree, and relief be granted accordingly;

that the cause be recommitted to a commissioner to ascertain and report how much of the purchase money remains undistributed, and how much thereof is entitled, under the decision of the supreme court of appeals in this cause, to be applied to the payment of the lien of petitioners, and for process, etc., and for general relief. Frank Beckwith, trustee, filed his answer to said petition, setting up the trust deed he represents, and showing its recordation; denying all notice of any claim or equity on behalf of petitioners until the filing of their petition; and charging laches on part of petitioners in asserting their claims, and calling for strict proof of their claim. W. L. Wilson, Edward Tearney, and George Baylor, trustees, filed their answer, denying that the \$3,000 is a lien upon the 236 acres, as a resulting trust or otherwise, or that they ever had notice of the facts set out in the petition until the filing thereof; that the farm devised by Mrs. Waters to John H. Hall originally contained 236 acres; but averring that in June, 1884, the said Hall sold off 80 acres of said tract to Thomas H. Bates, and petitioners' lien, if their theory of the law be true, would equally attach to said 80 acres in the hands of Thomas H. Bates; that the claim audited in the cause in favor of Ann P. Marshall's executors has been fully paid and satisfied under the decrees in this cause (\$2,897.98 under decree of July, 1894, and the residue, \$2,003.98, under the decree of August, 1895), and same has been paid out and distributed under the will of the said Ann P. Marshall under and according to the laws of Maryland; that on the 23d of May, 1881, said Hall borrowed from respondent Wilson \$2,000, and secured the same by deed of trust to George Baylor, trustee, on the said tract of land devised to Hall, and on a tract of 61½ acres purchased by Hall of Thomas Hite; that said last-named tract had been sold in the cause, and the proceeds, after paying the cost and expenses, viz., \$2,065.21, paid on this debt, and that on the balance of said debt, \$541.84, there was paid under decree of August, 1895, \$126.14, arising from proceeds of Waters tract, leaving still due on the debt \$415.70, with interest from August, 1895; that on the 1st of March, 1886, Hall borrowed from Edward Tearney \$800, and secured same by deed of trust of that date to George Baylor, trustee, on the Waters tract; there being 159 acres; said 80 acres having been sold off to Bates. And respondents deny that either Wilson, Tearney, or Baylor, trustees, at the time of said loan had any notice of the claims of petitioners upon said tract of land, nor until the filing of their petition, and aver that John L. Briscoe, the beneficiary for life of the \$3,000 bequeathed under the will, has been a party to the cause, and has audited in the commissioner's report filed February 12, 1894, a judgment obtained by him against Hall for interest accrued to him on said sum of \$3,000, and the same had been

confirmed as the sixth lien upon the Waters tract, and that certainly Briscoe is bound by all the decrees in the cause. Respondents say that as early as March 8, 1883, petitioners, on the showing in their petition, were apprised by the letter of Charles W. Ross, exhibited with their petition, that Hall had received the sum of \$3,000 in payment of the sum of \$12,000 due by him to the estate of Ellen Waters, yet they have slept on their rights from that date to the filing of their petition, and have by their negligence allowed innocent purchasers and creditors to acquire rights adverse to such claim, and now, after fourteen years, they come in and ask the court to give them priority over innocent and diligent purchasers, when it would be grossly inequitable to do so; and pray that the prayer of petitioners be not granted. S. S. Dalgarn filed his answer, that he purchased the tract of land under decree of the 31st of July, 1894, paying therefor cash \$3,000 and giving two bonds, each \$2,077.30, payable at one and two years, respectively, with interest from date; that he paid one of said bonds on the — day of August, 1895; that he had not paid the other because notice was given him not to pay it until the questions raised in the petition were settled, but that before paying said bond in August, 1895, he had no notice of the claim set up in the petition, paying the same on demand of the special commissioner, and according to the terms of the sale made; denied that there is any claim in the nature of a lien on the land, as set out in the petition; that he is ready to pay the last bond given by him for the purchase money, as the court may direct; and prays that the prayer of the petitioners be not granted.

The following "agreement of facts" is filed in the record: "It is admitted and agreed as facts in this cause that neither W. L. Wilson, Edgar Tearney, or George Baylor, trustee in the deeds of trust from John H. Hall and wife to George Baylor, trustee, nor J. G. Hurst, Frank Beckwith, trustee, nor T. C. Green, trustee, under deed of trust to T. C. Green, trustee, made by John H. Hall and wife, had any actual notice of the facts set out in the petition or amended petition of Eugene Baker, sheriff committee of Julia B. Miller, John L. Briscoe, and others, until the filing of said petition. Daniel B. Lucas, for Petitioners. George Baylor, for Wilson, Tearney, and Self. Frank Beckwith, Hurst, Green, Trustee, and Self and Miller."

On March 8, 1883, Charles W. Ross wrote from Frederick, Md., to Mrs. Amelia F. Galaher, Waynesboro, Augusta county, Va., in reply to a letter of inquiry (apparently) from her, in which he gives her a full statement of the transaction; his dealings with Mr. Hall; his writing of the will of Mrs. Waters; how he assisted Hall to raise the money; and he says, "\$2,000 Mr. Wilson raised for him on the small place he had, and which Mr. W. received as trustee for Mrs. Asquith,

and receipted to me as executor for the same;" and, continuing, says: "There remains \$3,000. I did not require him to pay in cash, for the reason that Mrs. W. bequeathed him that amount as trustee for J. L. Briscoe, and if he had paid me I would have had to pay it back; so I took his receipt for that amount, less collateral tax of two and one-half per cent. due state of Maryland. * * * I do not know what the laws of West Virginia may be, regulating the rights of parties in reference to remainders and their relations to trustees. In this state such parties can appeal to the courts, and require trustees to give bond for the faithful execution of their trust, and I have no doubt but that similar proceedings can be instituted in the courts of other states. I feel sure, however, if you desire any information, and will approach Mr. John Hall in a manner not to offend, that he will give you satisfaction." Signed by Charles W. Ross. This letter is proven to be genuine by Thomas Forman and by Ross himself.

The cause was heard on the 6th day of March, 1900, when the court decided "that the petitioners, Eugene Baker, sheriff, committee administrator of Julia B. Miller, John L. Briscoe, Julia H. Gallaher, Mrs. Ellen A. Darby, Mrs. Bettie Harrison, and Mrs. Julia W. Olmstead, and Bettie F. Gassaway, are entitled to the relief prayed for in their petitions; that, in pursuance of the opinion of the court of appeals, a resulting trust is declared in their favor in the tract of land of 159 acres, known as the 'Briscoe Tract,' which was sold in this cause on the 31st day of July, 1894, and which was purchased by Stephen S. Dalgarn, which resulting trust, according to the commissioner's report aforesaid, amounted to three thousand dollars, principal, at the date of said report, with interest on said sum from April 18, 1893, and an unpaid judgment for interest prior to that date amounting to \$249.35, recovered by John L. Briscoe against John H. Hall, which is audited in class 6, among the debts decreed against said John H. Hall in this cause in Commissioner Moore's report of February 12, 1894, and interest on said judgment from said date, and cost of same, with interest, and judgment is due to John L. Briscoe, or to B. D. Gibson, his trustee. The court is further of opinion that the resulting trust heretofore declared has equal dignity with the claim and lien of Charles W. Ross, trustee of Ann P. Marshall, and now her executor, and is superior in dignity and prior in lien to all the judgments audited in the cause, except the judgment audited in favor of John L. Briscoe for \$249.35, which is of equal dignity, being covered by the resulting trust. And the court is further of opinion that the several trustees and beneficiaries whose deeds of trust were executed subsequently to the 1st day of April, 1881, were purchasers, severally, of the equities of redemption, and do not come under the definition of purchasers for

value without notice, as defined by the court of appeals in its opinion, they never having acquired the legal title, and therefore the subsequent trusts are subordinated as inferior in dignity and priority to the resulting trust of the said petitioners,"—and providing further that the special commissioner collect the last payment of \$2,077.50, with interest from July 31, 1894, from S. S. Dalgarn, the purchaser of the Briscoe tract, and pay the same to J. F. Engle, who was appointed a special receiver for the purpose, to be held by him for the benefit of the beneficiaries under said resulting trust until the further order of the court. From this decree the defendants William L. Wilson and Edward Tearney appealed, and say it was error to hold that the sum of \$3,000 named in the petition of Eugene Baker and others was superior in dignity and a prior lien to the deeds of trust in favor of William L. Wilson and Edward Tearney audited in Commissioner Moore's report.

The appellees base their claim upon two clauses in the will of Ellen M. Waters, which read as follows: "I give and bequeath to my cousin John Hall, of Jefferson county, state of West Virginia, to him, his heirs, and assigns, my farm, situated in Jefferson county, state of West Virginia, which I purchased in the year 1874, with funds belonging to my separate estate, of Edward Tearney, administrator of Thomas Briscoe, deceased; he paying to my executor twelve thousand dollars, in five annual payments, bearing interest from the date of my death; such payments to form part of my estate in the hands of my executor, and to be disposed of as hereinafter provided. But in case my said cousin John Hall refuses to take said farm, at the valuation aforesaid, within one month from the probate of my will (such refusal to be in writing, signed by him), I then authorize and empower my executor to sell said farm, and direct and will that the proceeds of sale, together with other parts and portions of my estate, shall be applied to the payment of my debts, funeral expenses, legacies, pecuniary and residuary, as hereinafter devised. * * * I give and bequeath to my cousin John Hall, of Jefferson county, state of West Virginia, the sum of three thousand dollars in trust, to have and to hold the same, and to pay the interest accruing thereon to my brother John L. Briscoe for and during his natural life, and after the death of my said brother I give, devise, and bequeath the said sum of three thousand dollars as follows: I give, devise, and bequeath to Julia Olmstead, Bettie Miller, and Julia Gallaher, each, the sum of five hundred dollars; and the residue of said sum I give, devise, and bequeath the same to my sisters Julia B. Miller, Elizabeth C. Hall, and Amelia F. Gallaher, equally, to be divided between them, share and share alike." It will be observed that the testatrix devises to Hall the farm on condition that he pay \$12,000 to her executor.

He accepted the farm under the terms of the will; all the purchase money being payable in the future, and a charge or lien upon the land until fully paid by Hall. He borrowed money to the amount of \$9,000 by giving trust deeds to secure the payment thereof on the farm. The residue of \$3,000 never was paid. The only way in which the conditions of the will could be complied with was by the payment of the money by Hall. An attempt was made by an arrangement between him and Ross, the executor, by simply passing receipts for the sum of \$3,000. According to Ross' own statement, he did not require Hall to pay the \$3,000 in cash, but took Hall's receipt for the same, as though he had paid Hall the money under the second clause mentioned of Mrs. Waters' will, which bequeathed \$3,000 to Hall in trust. This was not a payment of the money by Hall for the residue of the purchase money of the farm under the will. *Hoge v. Vintroux*, 21 W. Va. 1. There remained due from him the sum of \$3,000, and its accruing interest, to the executor of the estate, as the residue of the original purchase money yet unpaid to the estate. Wilson and Tearney, trust creditors, claimed to be purchasers without notice. The language of the will, which was recorded in the county of Jefferson, under which Hall took the land, showed upon its face that the \$12,000 purchase money was to be paid in the future, and was a charge or lien thereon. This was surely sufficient to put any purchaser upon inquiry as to whether this purchase money had been paid. In *Burwell's Adm'r v. Faber*, 21 Grat. 446, at page 463, Judge Moncure, in delivering the opinion of the court, says: "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive, notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser, without notice." *Jones v. Smith*, 1 Hare, 43, 55. And in *Brush v. Ware*, 15 Pet. 93, 10 L. Ed. 672, it is held: "No principle is better established than that a purchaser must look to every part of the title which is essential to its validity." And it is there further said: "When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact." And cites *Mertins v. Joliffe*, Amb. 311; *Moore v. Bennett*, 2 Ch. Cas. 246. And Justice McLean, in speaking for the whole court in *Brush v. Ware*, cited, says: "The law requires reasonable diligence

in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and, having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced by his negligence?" *Long v. Weller's Ex'r*, 29 Grat. 347. Justice Story, in his first volume of *Equity Jurisprudence* (section 400), says: "Generally it may be stated as a rule on this subject that, where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. So the purchaser is in like manner supposed to have knowledge of the instrument under which the party with whom he contracts, as executor or trustee or appointee, derives his power. Indeed, the doctrine is still broader; for whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and person) is, in equity, held to be good notice to bind him." In *Acer v. Westcott*, 1 Lana. 193, it is held: "A purchaser or mortgagee of lands is presumed to have knowledge of every fact to which he is led by a deed forming a link in the chain of his title. And he does not, in equity, escape from such presumption because the fact to which he is referred is the existence of an equitable right, and not a legal one." *Jumel v. Jumel*, 7 Paige, 591; *Wood v. Krebs*, 30 Grat. 708; *Campbell v. Fetterman's Heirs*, 20 W. Va. 308. Hall had no deed. He only held by virtue of the will of Mrs. Waters, and the provisions of that will must, of necessity, put purchasers upon inquiry as to Hall's title. But it is contended by the appellants that the letter of Ross to Mrs. Gallaher of March 8, 1883, is evidence that Hall had paid the \$3,000. By that letter it is shown, after informing her how the \$9,000 had been raised and paid to him, "there remains \$3,000. * * * I did not require him to pay in cash, for the reason that Mrs. W. bequeathed him that amount as trustee for J. L. Briscoe, and if he had paid me I would have had to pay it back; so I took his receipt for that amount, less collateral tax of 2½% due state of Maryland." So that it appears from the letter, which they claim as evidence of the payment, that it is therein stated in terms that he did not require him to pay it in cash,—the only way he had a right to pay it, or the executor had a right to receive it. To pay it or apply it on the price of the land charged to him in the will was a misappropriation of the trust fund, and, not having been actually paid in money, the vendor's lien, or the lien created by the will, remained a lien thereon for the \$3,000 and its interest, notwithstanding the parties afterwards treated it as a resulting trust, and the lien inured to the beneficiaries of the \$3,000 trust.

It is insisted by appellants that the appellees were guilty of laches in lying quiet 15

years and making no effort to collect their money; that Briscoe was a party to the suit, having filed his judgment against Hall in April, 1893; while it is contended by appellees that the question of laches and staleness of the claim was passed upon by this court in ordering the filing of the petition. On the 14th of December, 1894, John L. Briscoe and others tendered their petition in this cause, setting up the claim of \$3,000 as a resulting trust upon said farm in their favor, to the filing of which plaintiffs and defendants objected; and on the 22d day of July, 1895, the court sustained the objection to the filing of the petition, and refused to file the same, from which decree of the court the petitioners appealed. This court reversed the decision of the court, and ordered the petition filed. It is claimed now by the appellees that the objection to the filing of the petition was in the nature of, and equivalent to, a demurrer, which disposes of the question of laches, as well as the statute of limitations. In 1 Bart. Ch. Prac. p. 85, quoting *Landsdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219, the court holds: "The proper rule of pleading would seem to be that, when the case stated by the will appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in asserting his claim is a bar in equity, if that objection is apparent on the bill itself there can be no good reason for requiring a plea or answer to bring it to the notice of the court." And in *Jackson's Adm'r v. Hull*, 21 W. Va. 610, Judge Snyder, in delivering the opinion of the court, says: "It is now clearly the rule in equity that the statute of limitations, or objection in analogy to it on the ground of laches, may be taken advantage of by demurrer as well as by plea." And the reason given for the change in the rule is "the abolition and disuse of special replication in equity practice." In *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26, Judge Lucas, delivering the opinion of the court, says at page 584, 33 W. Va., and page 30, 11 S. E.: "While it may be doubted whether the presumption of payment or the mere staleness of demand can be reached by demurrer to the bill, yet, when the bar is applicable by analogy to the statute, and that appears in the bill, the defect may be taken advantage of by demurrer." And cites *Story*, Eq. Pl. 484, and notes; *Bart. Ch. Prac.* 84; *Jackson's Adm'r v. Hull*, cited. And *Barton*, at page 85, says: "The rule that the defense of laches may be made by demurrer seems to be definitely settled by the same court [*West Virginia*] in the cases of *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765; *Thompson v. Iron Co.*, 41 W. Va. 574, 23 S. E. 795. The weight of authorities, therefore, as well as of reason, seems to be strongly against the doctrine established by the Virginia cases." The decision of this in 42 W. Va. 641, 26 S. E. 300, is *res adjudicata* as to the question

of laches. Mr. Barton, in his section on "Grounds of Demurrer," under the Virginia decisions, nowhere mentions either the statute of limitations or laches as being such grounds, and decidedly favors the rulings of our courts as "against the doctrine established by the Virginia cases." The interest on the legacy of \$3,000 had been kept paid up to about July, 1891, all of which went to the holder of the life estate therein, and neither he nor the remaindermen in such legacy up to that time had cause of complaint. The suit was brought early in the year 1893, and on December 14, 1894, the said legatees filed their petition in the cause. In the meantime suits had been brought and judgment recovered for interest accruing after the last payment of interest in 1891, so it would seem that petitioners could not be charged with laches, and the court so held on demurrer. It is claimed by the appellants that if any charge, by the will of Mrs. Waters, is made, it is on the proceeds of the sale of the farm, and other parts and portions of either estate, and this charge extends to all debts, funeral expenses, and legacies. This might be true if the farm had been sold and proceeds disposed of as provided in the will, in case Hall refused to take the farm, but Hall elected to take the farm under the provisions named in the will. It is also claimed that Ross, the executor, in his settlement reports the \$12,000 as the proceeds of the farm, and the whole of it as collected and disbursed. This fact does not appear from the record. The petitioners, Eugene Baker, sheriff committee, Amelia F. Gallaher, and others, tendered their petition in this cause, asking to be allowed to file the same, and to have their rights adjudicated. Parties then litigants in the cause objected to the filing of the petition, and the court below sustained the objection, and refused to allow it to be filed, from which order alone the former appeal was taken. There were no issues made up on the pleadings as to the rights of the petitioners as between themselves and Marshall, Wilson, or any one else, and this court was simply called upon to decide whether said petition should be filed or not, and it was distinctly so stated in the opinion (42 W. Va. 641, 26 S. E. 300); and the court had no power or authority to adjudicate any questions between the petitioners and Marshall, or anybody else, as to the validity or priorities of their claims. Therefore there is no *res adjudicata* in respect to the legacy of \$3,000 in this case, except to the extent that petitioners, Baker, Gallaher, and others, had such interest in the controversy that they were entitled to file their petition herein and litigate such questions. Until the decision of this court on the filing of the petition, the petitioners were not parties to the suit, and, of course, could not be bound by any decrees or orders made in the cause.

It is claimed by counsel for appellees that Hall in June, 1884, having sold 80 acres of the Briscoe tract for \$6,000, and Ross,

trustee for Marshall in the deed of trust, having full notice of petitioners' claim, joined in the conveyance of the 80 acres to the purchaser, Bates, as did also Wilson and Baylor, his trustee, thereby releasing their liens upon the said 80 acres, \$4,000 of the purchase money being paid on the Marshall claim, it was equivalent to a sale of the 80 acres by the trustee, and his cestui que trust should be held responsible for the whole of the \$6,000, instead of only the \$4,000 which was credited on the Marshall debt. This position is correct only as respects the rights of petitioners, Baker, committee, Gallaher, and others; but the Wilson estate has no equity to compel the Marshall estate to account for the \$2,000, being a part of the proceeds of the sale of the 80 acres of the land to Bates, as Wilson and his trustee joined in the release, and it does not appear from the record that there was any arrangement or understanding in the execution of the deed and release to Bates that the whole proceeds of the 80 acres were to be applied to the Hall debt due Marshall. The Marshall trust debt and Wilson trust debt made by Hall should be subrogated to the lien or charge of Mrs. Waters created by the will, in the order in point of time in which the trust deeds were executed to Marshall and Wilson, but subordinate to the residue of \$3,000 of the original charge or lien, and its interest. *Sheld. Subr. § 19; McClaskey v. O'Brien*, 16 W. Va. 791. The money in hand, and directed to be collected by the special commissioners, should be applied first to the payment of the said legacy of \$3,000, with interest, and, if any balance remains thereafter, it should be paid on the Wilson debt, and then upon the other claims according to their respective priorities. But if the fund in hand, and so to be collected, is insufficient to pay off the said \$3,000 and interest, the Wilson estate should be required to refund a sufficient amount, which it received from the proceeds of the sale of the Hall lands, only, derived from Mrs. Waters by the will, to pay off the balance of said \$3,000 and interest, and, in the event there is not a sufficient amount thus refunded to pay the same, then the Marshall estate should be decreed to pay in a sum sufficient to pay off the residue of the said sum of \$3,000 and interest.

For the reasons herein given, the decree is reversed, except in so far as it orders the special commissioners to collect the residue of the purchase money remaining unpaid, and except so far as it subordinates the judgments audited against Hall by the commissioner to the payment of the claims of petitioners, Baker, Gallaher, and others, to which extent the same is affirmed, and the costs of this appeal to be paid out of the fund to be collected in; and the cause is remanded to the circuit court of Jefferson county for further proceedings to be had therein as indicated in this opinion, and according to the principles governing courts of equity.

(51 W. Va. 605)

BEECHER v. FOSTER et al.*

(Supreme Court of Appeals of West Virginia, April 5, 1902.)

LIMITATIONS—IMPLIED TRUSTS—ASSIGNMENT FOR BENEFIT OF CREDITORS—PRIORITIES—ACTION—PARTIES—ALLOWANCE TO TRUSTEE.

1. Implied trusts are within the statute of limitations, and the statute begins to run from the time the wrong was committed by which the person becomes chargeable as trustee by implication.

2. H. & B. and M. filed a petition, answer, and cross-bill in a cause, setting up a note of one F., held by them by assignment of H., the payee, as collateral to secure their respective claims, and also to secure the claims of other creditors of said H. mentioned in the said petition, answer, and cross-bill, but claiming priority and preference to plaintiffs in said cross-bill over the other beneficiaries in said assignment mentioned. *Held*, such other beneficiaries were necessary parties to the petition and cross-bill.

3. A party cannot stand as a representative of others to whom his own interests are hostile and adverse.

4. Under the last clause of section 6, c. 72, Code, where a debtor conveys all his property to a trustee for the benefit of his creditors, or where he so conveys it all except what is exempt from execution or other process, and where it is made the duty of the trustee to take possession, control, manage, and administer the trust property, the commissioner of accounts, in stating and settling the accounts of such trustee, should make the same allowances to him for reasonable expenses and reasonable compensation in the form of a commission as should be allowed to an executor or other fiduciary under section 17, c. 87, id.

(Syllabus by the Court.)

Appeal from circuit court, Ritchie county; G. W. Farr, Judge.

Action by John S. Beecher against Thomas Foster and others. Judgment for plaintiff, and defendants appeal. Affirmed in part.

Merrick & Smith and W. N. Miller, for appellants. V. B. Archer and Wm. Beard, for appellee.

McWHORTER, J. On the 24th day of July, 1883, John Hustead conveyed to Thomas Foster a tract of 258 acres of land in Highland county, Ohio, in consideration of \$12,500. Said Foster paid a part of the purchase money, and gave his three several notes for \$2,000 each, and one for \$700, one of which notes for \$2,000, payable in two years from its date, with interest, was on the 15th day of April, 1894, by said Hustead assigned and transferred by indorsement in writing on the back of said note, \$1,000, a part thereof, to Mrs. Mollie E. Foster, daughter of said Hustead; and on the same day he assigned in like manner \$1,000 of the same note to his daughter Mrs. E. A. Leap. Mrs. Leap afterwards, in September of the same year, assigned her \$1,000 of said note to H. H. Leavensworth, attorney in fact for the Livingstone, Ontario & Greaves Run Mining & Petroleum

*Rehearing denied November 19, 1902.

¶ 1. See Limitation of Actions, vol. 23, Cent. Dig. §§ 500, 502.

Company, in part payment for a tract of 207 acres of land purchased by her from said company, which \$1,000 of said note so assigned to Mrs. Leap, and by her assigned to Leavensworth, came to the hands of J. S. Beecher, president of the said mining and petroleum company, and a creditor thereof to the extent and value of said note. On the 9th day of August, 1886, Thomas Foster made a general trust assignment to John P. Saunders, trustee, for the benefit of all his creditors, including in said assignment said tract of 258 acres of land in Ohio, subject to a mortgage in favor of L. B. Dellicker for \$5,500, and a large number of tracts of land and interests in land in the state of West Virginia, and all his personal property, as well on the said Ohio farm as that in West Virginia; reserving only from the effect and operation of said deed of assignment \$200 worth of personal property (household and kitchen furniture), the amount of exemption allowed by law. On the 19th day of November, 1885, Thomas Foster executed a mortgage on said 258 acres of land so purchased from Hustead to secure L. B. Dellicker in the sum of \$5,500, borrowed from said Dellicker. On the 29th of September, 1886, the trustee, Saunders, borrowed from Dellicker \$2,000, and from the First National Bank of Parkersburg \$550, for the purpose of compromising and paying off prior judgment and attachment liens against the said 258 acres in Ohio, and the personal property thereon, amounting to \$4,000, which liens were paid off and satisfied by the said Saunders, trustee, with the said sum of \$2,500. On the 25th day of June, 1887, said trustee refunded and repaid to said Dellicker the \$2,000, with \$88.84 interest.

At the July rules, 1890, J. S. Beecher, plaintiff, filed in the circuit court of Wirt county his bill against Thomas Foster, J. P. Saunders (trustee), E. R. Woodyard (sheriff of Wirt county, and, as such, administrator of John Hustead, deceased), Eliza A. Leap, Mollie E. Foster, the Livingstone, Ontario & Greaves Run Mining & Petroleum Company, and others, to enforce the collection, as he claimed, of a balance due him, on said assignment of the \$1,000 of the said note, of \$895, which suit involved a settlement of the accounts of the said Saunders as such trustee; plaintiff praying that said trustee be required to answer the bill, and state fully the amount and value of all money and property received by him under the deed of trust made to him by Foster, etc. On the 5th day of April, 1893, John L. Hall and Samuel H. Beller, partners as Hall & Beller, and William S. Mackey, tendered their joint petition, answer, and cross-bill in said cause of John S. Beecher against John P. Saunders, trustee, and others, reciting the object of the suit of John S. Beecher, and alleging that John Hustead was engaged as a copartner at Climax Springs, in the state of Missouri, with one — Douglass, under the firm name of Hustead & Douglass, in general

mercantile business; that said firm was on the 1st day of September, 1886, indebted to Hall & Beller, engaged at Sedalia, Mo., in the business of wholesale grocers, in a balance on account of \$229.59, with interest from September 1, 1886, and to the said Mackey, who was in the wholesale boot and shoe business at Sedalia, in the sum of \$204.05, balance of account, with interest from July 25, 1887, which balances had not been paid; that at the same time said Hustead & Douglass were also indebted, in various amounts stated, to William Curran, to E. E. Johnson, to D. A. Clark, to McGlaughlin Bros., all of Sedalia, Mo.; to A. R. Lemon and to Clark & Drake, of Warsaw, Mo.; and to J. E. Allison, to John Kobrock, and to the St. Louis Hardware Company; that the said John Hustead, prior to the maturity thereof, and for the purpose of obtaining indulgence and extension of credit from respondents and others, and as collateral security for said debts, assigned, transferred, and set over to respondents Hall & Beller and W. S. Mackey a certain note of the defendant Thomas Foster, dated Hillsboro, Ohio, July 24, 1883, whereby, four years after date, said Thomas Foster promised to pay to the order of said Hustead \$2,000, with interest until paid, and exhibited with their answer and cross-bill said note; that the understanding and agreement was that said note was to be taken and held by respondents as collateral security, first for the payment of the respective debts of respondents, and after them as collateral security for the payment of the several debts of the creditors before mentioned; that said Hustead & Douglass failed in business, both becoming insolvent, and no part of the debts due respondents and other creditors was ever paid, and they were obliged to resort to said collateral security of the said note of said Foster. And by way of matter of complaint in their cross-bill, they alleged the assignment by said Foster of his real and personal estate to Saunders, the trustee, and the giving of the mortgage by Foster to Dellicker for the \$5,500, and that, prior to said mortgage to Dellicker, certain judgments had been rendered against John Hustead and Foster in Highland county, and become liens on the land of said Foster, and that the mortgage of said Dellicker was subject to the liens of said judgments; that the said Dellicker was not named as a creditor in the deed of assignment of said Foster, and was not entitled to share therein or derive any benefit therefrom, unless it might be under the provision of said assignment respecting the claims and demands inadvertently omitted from the list of nonpreferred creditors; that said Dellicker had due notice of the terms and provisions of the said assignment from the time of its execution; that on the 29th of September, 1886, the trustee, Saunders, undertook to borrow from Dellicker \$2,000, and from the First National Bank of Parkersburg \$542.15, for the purpose of paying off and discharging the several judgments against said Hustead

and Foster which constituted liens on the land in Highland county prior to the mortgage of said Dellicker, aggregating \$2,500, and which money so borrowed was paid by the said Saunders on the 30th of September, 1886, to the creditors, in satisfaction of the said judgments; that on the 25th day of June, 1887, the said Saunders, trustee, out of the proceeds of the sale of the property in West Virginia to which plaintiffs in the cross-bill and other creditors secured by said trust were entitled, undertook to pay the said Dellicker the \$2,000 borrowed, and the accrued interest thereon, amounting to \$88.84, and Dellicker received the same with full notice of the rights and equities of plaintiffs and other creditors, which appears from the said trustee's second report to the clerk of the county court of Wirt county, where he credits himself in his accounts with the payment of said money to Dellicker on June 25, 1887, and on the 28th day of October, 1886, said Saunders, out of the funds arising from the West Virginia property, paid the First National Bank of Parkersburg \$547, which appears from a copy of the said second report, exhibited in the cross-bill; that plaintiffs were advised and believed that said Dellicker and the said bank, in loaning the money to Saunders, trustee, and in receiving payment from him, had notice of his trusteeship, and that he was without authority to borrow money, and that he had no authority to divert the funds in his hands to the payment of the money borrowed and expended as stated; that the dealings of the said bank and Dellicker were, in law and in equity, individual contracts with the said Saunders, and that he had no lawful authority to pay his individual contracts and obligations out of the funds belonging to the trust creditors of said Foster; and that Dellicker and the bank, who so received said money from the trustee, should be held and treated as trustees thereof for the benefit of the creditors, including plaintiffs, and should be required to refund and repay the same; and alleged that the borrowing of said money and the payment of the judgments by the trustee was a scheme and device of said Saunders, Dellicker, and Foster to relieve the land in Highland county from said judgments, in the interest of the mortgage of Dellicker, and in fraud of the rights of the other creditors of Foster; that, after the land was so relieved, said trustee, about the 10th of November, 1887, sold 47 acres of said land to Dellicker at the price of \$1,175, which was credited on the mortgage debt of Dellicker, and on or about the 11th of April, 1889, the trustee sold the residue of the Highland county land to one W. A. Polk at the price of \$5,000 (just the balance alleged to be due said Dellicker on said mortgage), and the trustee claims to have paid the whole amount of the proceeds of said last-mentioned sale over to Dellicker in satisfaction of his mortgage, which is shown by the report of the trustee to the clerk of the county court

of Wirt county, and charges against the other funds belonging to said estate his commission of 5 per. centum, amounting to \$308.75, which commission, plaintiffs allege, was not a proper charge against the proceeds of the sale of the Highland county land, and that, having been paid over to Dellicker, he should be required to refund the same; and further allege that said trustee, in addition to said unlawful expenditure of the trust funds in the interest of the mortgage of Dellicker, acknowledged in his statement to Casto, special receiver, the expenditure of the sum of \$1,537.90 by way of costs incurred in clearing off the judgments against the said Highland county land, which should have been deducted from the proceeds of the sale of said land, and not charged against the other trust funds, and, the proceeds having been wholly paid over to Dellicker, he should be required to refund the same for the use of the trust creditors of Foster, and that, further to relieve the said land in the interest of said Dellicker, the trustee, Saunders, on January 20, 1887, paid out of said trust funds \$305.56, taxes on said land, which should be required to be refunded by Dellicker for the benefit of said creditors; that said Saunders, trustee, also illegally paid to the Citizens' National Bank \$200, and to the Second National Bank of Parkersburg, \$60, not mentioned or preferred in said assignment, and only entitled to a pro rata share of the fund applicable to non-preferred creditors; that said trustee, by sale and conveyance to Mollie E. Foster, October 23, 1888, of house and lot in Elizabeth at the price of \$850, paid her in full the preferred debt due her on account of said assignment, and on May 16, 1887, he paid her in cash \$25; on July 3, 1887, \$15; on December 20, 1887, \$50,—which fully paid her preferred notes; and that it appears by the trustee's report made August 13, 1889, that he paid her \$945, which is claimed to be an excess of any preferred claims due her, and which should be made a lien, as to the excess over her pro rata share as one of the nonpreferred creditors, on the house and lot in Elizabeth conveyed to her by trustee.

Plaintiffs in the cross-bill pray that the plaintiff and several creditors named as defendants in the caption of the amended bill of complaint be made defendants to the cross-bill, and, in addition thereto, the said Dellicker, M. W. Brain, D. C. Casto (special receiver), V. B. Archer (in his own right and as special commissioner), D. H. Leonard, the Citizens' National Bank of Parkersburg, the First National Bank of Parkersburg, and the Parkersburg National Bank of Parkersburg, be made parties to the cross-bill, and required to answer the allegations thereof; that plaintiffs in the cross-bill be admitted as defendants in the original and amended bills, and that their petition, answer, and cross-bill be taken and treated as their answer to said original and amended bills, and, in addition to the prayer for relief in

the original and amended bills, pray that they may have a decree against said Foster for the note of \$2,000 held as collateral security to themselves and other creditors of Hustead & Douglass; that a decree be entered for the sale of the unsold real estate of said Foster, and a decree be entered in favor of D. C. Casto, special receiver, against said Dellicker, for the sum of \$2,088.84, with interest from June 25, 1887, and for the commissions of Saunders, trustee, for the sale of the Highland county land, amounting to \$308.75, wrongfully paid over to him by the said Saunders, trustee, as herein set forth, with interest from day of payment, and for the sum of \$305.56 taxes on the Ohio land aforesaid, with interest from January 20, 1887, and for the sum of \$1,537.90, reported by said Saunders, trustee, to have been paid out of the trust funds in his hands to pay costs and expenses of suit in Highland county, Ohio, with interest thereon from date of payment, and for a decree against Mollie E. Foster in favor of Casto, special receiver, for \$940 wrongfully paid to her by Saunders, trustee; also for a decree against Citizens' National Bank for \$200, and against the Parkersburg National Bank for \$60, wrongfully paid to said banks by the said trustee on notes of Foster not preferred in said deed of trust; and also for a decree in favor of said receiver against the First National Bank of Parkersburg for \$547 borrowed by the trustee from said bank, and for the sale of the land of Thomas Foster; that the assets of the estate be marshaled, debts, liens, and priorities ascertained, and the accounts of Saunders, trustee, and of D. C. Casto, special receiver, be settled, and the affairs of the estate of Foster finally wound up, and the proceeds distributed to those legally entitled thereto, and for general relief.

Defendant L. B. Dellicker demurred to said cross-bill, and answered the same, denying that he knew anything of the prior liens on the Ohio property at the time he loaned Foster the \$5,500 and took a mortgage thereon. Avers that the trustee, Saunders, informed respondent that legal proceedings were had in the common pleas court of Highland county, Ohio, against the land and personal property belonging to the trust estate, and asked him to loan him money to protect it for the trust creditors, and on the 29th of August, 1886, he loaned the trustee for that purpose \$2,000, which the trustee used for the protection of said trust property, in saving it from litigation. Denies any fraud, collusion, or any scheme or device by said respondent or Saunders, trustee, and each and every allegation in said cross-bill which in any way tends to reflect upon respondent as guilty of any fraudulent practice, collusion, or combination in any particular in said transaction. Admits the money was repaid to him June 25, 1887, with interest, \$88.84. Respondent

says that he relies upon the statute of limitations against the claims of the plaintiffs in the cross-bill; that, as appears by the record in the cause, said cross-bill was filed April 5, 1893, against respondent and others; that this is the first time respondent is brought into court in said cause; that the claims of the plaintiffs in said cross-bill are mere parol contract debts against Thomas Foster, and that the statute of limitations of 5 years bars the claims of the plaintiffs in said suit, because the sum of \$2,000, and interest thereon, which respondent had loaned to said Saunders as trustee, was repaid to him by the trustee on the 25th day of June, 1887, and that five years from that time would be the 25th day of June, 1892, and hence the plaintiffs are barred, not having instituted their suit against respondent, if they had any just cause of action, until after the lapse of five years, and respondent therefore pleads and relies upon the statute of limitations not only as to the claims of the plaintiffs in said cross-bill, but also as to the claims of each and every other creditor of the said Thomas Foster in said cause growing out of any transaction in said cross-bill mentioned, or otherwise. To which answer the plaintiffs in the cross-bill made general replication.

The cause was referred to Commissioner O. C. Morris, of Wirt county, who made three reports. The cause was removed to Ritchie county, and there recommitted to Commissioner Lininger, who filed a report, to which said Hall & Beller and Mackey filed three exceptions: First. Because the commissioner reported as a lien upon the Highland county, Ohio, property, the deed of trust or mortgage of Dellicker for \$5,500, although the said property in the deed of trust from Foster to Saunders of August 9, 1886, conveyed said land subject to the Dellicker mortgage, and the equity of redemption only should have been sold, and the mortgage was not a lien upon any of the property conveyed to the trustee. Second. Because the commissioner had allowed the trustee credit for total disbursements of \$22,764.07 under his fourth head, which included \$2,088.84 paid Dellicker out of general funds, and \$547 paid First National Bank for money borrowed without authority to pay off liens on the Ohio land prior to Dellicker's mortgage; and because it included \$305.56 for taxes on the Ohio land out of the general funds, and \$6,175 paid Dellicker on mortgage; and, further, because the said sum included several items of general expenses properly chargeable to and payable out of the sale of the Ohio land before payment to Dellicker on account of his mortgage; naming various items of expenses of trustee and others to Ohio and to Missouri, and costs in Ohio, and commissions on aggregate sales of land in Ohio,—2 per centum on \$6,175. Third. Because the

commissioner reported a balance in the hands of Trustee Saunders of only \$1,398.93, when the balance would be much greater if improper credits were disallowed and a true balance struck. Trustee Saunders excepted to said report: First. Because the commissioner disallowed the sum of \$732.94, commissions charged by him in his settlement as trustee. The commissioner allowed \$455.18, only, whereas he should have allowed \$1,188.12, as shown by Exhibit No. 3 with Saunders' deposition. Second. Because in stating the debts against the estate of Foster the commissioner wholly failed to report the debt due from Foster to said Saunders, amounting to \$1,895.43, with interest from August 9, 1883. Third. Because the commissioner finds a balance of \$1,398.93 due from Saunders, when the true amount was \$671.49, as shown by Saunders' settlement.

The cause was heard on the 3d day of November, 1899, when the court sustained the second exception of Trustee Saunders to the commissioner's report, and overruled his first and third exceptions, and sustained the second exception of the plaintiffs in the cross-bill as to the item of \$2,088.84 paid to Dellicker, and \$305.56 taxes paid on the Ohio land, and various items of costs and expenses, aggregating \$247.50, and \$547 paid the First National Bank, in all aggregating the sum of \$3,188.99, which aggregate amount it was decreed should have been deducted from the gross proceeds of sale of the Ohio property, Dellicker having been paid in all \$6,175, being in excess of the amount to which he was entitled in the sum of \$1,873.01, as ascertained by the court, with which the court charged him interest from the 11th day of April, 1889, to date of decree, which aggregated at that time the sum of \$3,056.10, for which decree was rendered against Dellicker. The third exception of said plaintiffs in the cross-bill to said commissioner's report was overruled. From this decree the defendant Dellicker appealed, and assigned as error the overruling of the demurrer of appellant to the cross-bill of Hall, Beller, and Mackey, and that the court further erred in the decree of November 3d, in entering any decree for any sum of money whatever against the appellant, and particularly in entering a decree for the sum of \$3,056.10, and in sustaining the exceptions of the said Hall, Beller, and Mackey to the report of the commissioner, and in not sustaining appellant's plea of the statute of limitations against the claims of Hall & Beller and Mackey.

As to the first assignment, the overruling of the demurrer, the cross-bill shows on its face that the money decreed against appellant Dellicker was paid him by the trustee, Saunders, on the 25th day of June, 1887, and the record shows that the cross-bill was filed on the 5th day of April, 1893, within a little over two months of being six years from

the date of payment to the time of commencing proceedings to recover it. Appellees contend that, the bill being filed for the purpose of surcharging and falsifying the accounts of the trustee and for accounting by him, there is no statute of limitation fixed for a bill of this character. This may be true as far as the trustee is concerned, but is it so in case of an implied or constructive trust? What is the relation of Dellicker to this trust fund? There is certainly not an express trust. He received the money in payment of the indebtedness of the trustee to him, for money borrowed for the purposes of the trust estate, and the receipt of it by Dellicker created an implied trust. There were none of the elements of a contract for the purpose of creating a trust in the transaction. There was no intention to create a trust, but, as far as the parties were concerned, it was the simple payment of a debt due from the trustee to Dellicker. The great weight of authorities is that such a trust is subject to the statute of limitations. Appellees cite *Duckett v. Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, where it is held, "One who participates in a breach of a trust can no more than the trustee invoke the defense of the statute of limitations." The opinion in that case shows that the plea of the statute of limitations by the bank was relied on "only as against the claim for two thousand dollars, which is not the claim for the two thousand and twenty-four dollars and thirty cents collected on the check given in payment of the Duchett mortgage debt, and that is the claim for which we hold the bank liable. So in fact the statute is pleaded against the claim that the bank is not liable for, and is not pleaded against the claim for which it is responsible." Section 1080, 2 Pom. Eq. Jur., is cited as well in support of said decision as by appellees in case at bar, where it is said: "The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple-contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court." In treating of trusts (1 Bart. Ch. Prac. 117, § 27), it is said: "Those which come under the general head of indirect trusts, and which are subject to the laws of limitation, are resulting, implied, and constructive trusts." 2 Minor, Inst. (4th Ed.) 218: "Constructive trusts depend on conclusions of law, independently of contract or intent, are commonly imposed in invitum, and embrace every trust arising by operation of law which is neither implied nor resulting." 1 Lom. Dig. 232, 233; 1 Spence, Eq. Jur. 508 et seq.; 2 Story, Eq. Jur. § 1195 et seq.; *Cook v. Fountain*, 3 Swanst. 585. 1 Rob. Prac. (New) 458: "To exempt a trust

from the bar of the statute, it must be—First, a direct trust; secondly, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, thirdly, the question must arise between trustee and cestui que trust." 2 Wood, Lim. § 200: "Trusts which arise from an implication of law, or constructive trusts, are not within the rule, but are subject to the operation of the statute, unless there has been a fraudulent concealment of the cause of action; and the statute is as complete a bar in equity as at law." In *Wilmerding v. Russ*, 33 Conn. 77, it is said by Chief Justice Hinman: "By the whole current of modern authorities, implied trusts are within the statute, and the statute begins to run from the time the wrong was committed by which the person becomes chargeable as trustee by implication." *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Robinson v. Hook*, 4 Mason, 139, 152, Fed. Cas. No. 11,956; *Swindersine v. Miscally*, Bailey, Eq. 304; *Hayne v. Hall's Ex'r*, 5 Humph. 290, 42 Am. Dec. 427. In *Sheppard v. Turpin*, 3 Gratt. 373, Syl. points 3, 4, and 5, are as follows: "(3) Property conveyed in a deed of trust is taken under execution and sold, and the purchasers remain in peaceable possession thereof for five years before suit is instituted by the trustee or the cestui que trust to recover it. Held, the statute of limitations is a bar to the recovery. (4) A mere constructive trustee may protect his possession by a plea of the statute of limitations. (5) If the statute of limitations will bar the action of the trustee against third parties for the recovery of the trust property, it will equally bar the action of the cestui que trust for the same subject-matter." And in *Spedel v. Henrich*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718, it is held: "Implied trusts are barred by lapse of time. A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. If a bill in equity shows upon its face that the plaintiff, by reason of lapse of time and of his laches, is not entitled to relief, the objection may be taken by demurrer." *Maxwell v. Kennedy*, 8 How. 210, 12 L. Ed. 1051; *Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219. And in *Thompson v. Iron Co.*, 41 W. Va. 574, 23 S. E. 795, it is held: "The defenses of the statute of limitations and laches and stale demand may be made by demurrer." *Jackson's Adm'r v. Hull*, 21 W. Va. 601; *Laidley v. Laidley*, 25 W. Va. 530; *Crumlish's Adm'r v. Railroad Co.*, 28 W. Va. 637; *Van Winkle v. Blackford*, 33 W. Va. 582, 11 S. E. 26; *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507; 1 *Daniell*, Ch. Prac. p. 559, § 9. In *Thompson v. Iron Co.*, cited, it is said: "Where the trust is such as admits of a law jurisdiction, the statute applies, and were it a trust of purely equitable cognizance, known only to equity, then that

limitation created by equity, called 'laches' would apply." In *Key v. Hughes' Ex'rs*, 32 W. Va. 184, 9 S. E. 77 (Syl. 3), it is held: "Where the relation of parties is that of trustee and cestui que trust, the statute of limitations does not commence to run until there has been an open denial and repudiation of the trust by the trustee, brought home to the cestui que trust in such a manner as will require the latter to act as upon an asserted adverse title." This was a case where a direct trust existed,—the acknowledged relation of trustee and cestui que trust. In the case at bar, except by implication, there was no such relation between Dellicker and the creditors of Foster. Dellicker had received from the trustee of such creditors the money as in payment of a debt owing to him by the trustee, and so carried into the settlement of the trustee, and filed and recorded in the clerk's office of the county court of the proper county, where it had stood on the record more than five years before any action was taken to hold Dellicker as trustee,—a standing repudiation of the idea of the relation of trustee and cestui que trust. While all this is true as far as it applies to a proceeding directly against Dellicker to recover back the money returned to him by Saunders on the 25th day of June, 1887, and the statute of limitations is applicable, yet on the 11th day of April, 1889, on the sale of the land in Ohio, it was clearly the duty of Saunders, the trustee, to have refunded from the proceeds thereof to the general trust fund a sufficient amount, after first applying thereto the net amount realized and saved to the said trust fund from the sale of said personal property, to have repaid the money borrowed and returned to Dellicker and the bank, which had been used to compromise and pay off prior liens on the Ohio land and personal property, and which had inured to the benefit of Dellicker as subsequent lienor. Said trustee being subrogated to the rights of said prior liens, and said Dellicker having so received directly from the trust fund money to which he was not entitled, the arguments of counsel for appellees, and authorities cited, are applicable to this phase of the case. The decree against Dellicker should be reduced by the net amount of the proceeds of the sale of the personal property in Ohio realized, which went into the general trust fund, and represented that much saved to said fund by the use of the money borrowed from Dellicker and the bank, and was so much of said loan returned to said fund; and said decree against Dellicker should be increased by the sum of \$305.56, taxes paid on the Ohio land, and \$123.50, commissions on the sale of the said land, for which plaintiffs in the cross-bill file a cross-error, which several items should have been paid out of the proceeds of the sale of said land before any distribution to the appellant Dellicker on account of his mortgage; the said item of \$123.50 com-

mission being 2 per centum on the gross amount paid said Dellicker, and both of which sums were improperly charged against the general trust fund, and should be refunded to said trust fund by said Dellicker; and the decree thus corrected should be re-entered, and Dellicker's decree against Foster should be corrected accordingly.

Appellant sets up another ground of demurrer. Plaintiffs in the cross-bill, who are assignees of the \$2,000 note, show in their cross-bill that the note was assigned to them as collateral for the payment not only of their respective claims, but for the claims of some six or more other creditors of Husted named in their cross-bill, wherein the several claims and amounts are set out; and it is alleged in the cross-bill that, while the note is assigned for the benefit of all the creditors mentioned, the claims of plaintiffs are entitled to be preferred and paid in full before the other named creditors can participate in the benefits of the assignment. Appellees contend that, being the only parties mentioned in the assignment as assignees, they are to be treated as mere agents for the collection and distribution of the money, and the suit is properly brought in their name, and cite 1 Bart. Ch. Prac. p. 225, § 49; 2 Perry, Trusts, 874; and Dicey, Parties, p. 155,—and claim the other beneficial creditors named as being before the court by representation. Are the plaintiffs in the cross-bill and the other creditors whom they assume to represent "similarly situated"? Plaintiffs in their bill claim a preference over them. In 15 Enc. Pl. & Prac. 628, it is said: "Where parties, any one of whom would have a right to come in by petition and be made a party if necessary to protect his interests, are allowed to be dispensed with on account of their number, the parties of record ought to proceed with the utmost fairness and good faith, and should not resort to anything like sharp practice in procuring a final decree which is to be binding on all." *Campbell v. Railroad Co.*, 4 Fed. Cas. 1178 (No. 2,366), 1 Woods, 368. And 15 Enc. Pl. & Prac. 629: "To authorize one to sue or defend on behalf of himself and others not named as parties, it is necessary that the party on the record and the persons represented shall have a common, or at least a similar, interest in the subject-matter of the litigation. A party cannot stand as a representative of others to whom his own interests are hostile and adverse." And authorities cited. In *Hallett v. Hallett*, 2 Paige, 15, it was held that "one of the several legatees, all of whose legacies were charged upon real estate, could not file a bill in behalf of himself and the other legatees, but that all must be made parties in their own persons. All persons having distinct interests must undoubtedly be brought into court." *Hopkirk v. Page*, 12 Fed. Cas. 504 (No. 6,697), 2 Brock, 20. The claims of plaintiffs in the cross-bill are hostile to those of the creditors named as co-beneficiaries, in that plaintiffs claim

priority for themselves, and to be paid in full before any benefits accrue to the other said creditors; hence they are proper parties defendant to the cross-bill. Therefore the cross-bill is defective in that regard, and bad on demurrer.

The defendant J. P. Saunders, trustee, by his counsel, says the court erred in holding that in the distribution of the proceeds of sale of the Ohio land it was his duty to have repaid the said sums of \$547, the money borrowed from the First National Bank of Parkersburg, and \$2,088.84 borrowed from Dellicker, he having in good faith repaid the same prior to the sale of said Ohio land,—the \$547 to the bank on the 28th of October, 1886, and the \$2,088.84 to Dellicker June 25, 1887,—claiming that it was his duty to protect the property conveyed to him, and that he had a right to borrow money for that purpose; having no money of the trust fund in hand at the time, except \$76, he had no other alternative but to borrow or let the property go, and whatever the personal property and the equity of redemption was worth to the trust estate would have been lost to it. Under the evidence as to the value of the Ohio property, and the circumstances of this case, the trustee was warranted in borrowing the money to save said property,—there being a reasonable prospect of saving to the trust estate a considerable sum of money,—and, under the authorities, rightly repaid it to the loaners out of the general trust fund. The money was used to compromise and pay off prior liens upon the property he was attempting to save by the use of the borrowed money, and when he had paid them he was entitled to be subrogated to the rights of said prior liens; and, when the proceeds arising from the sale of the property came to his hands as trustee, it was certainly improper to pay it out to the holder of a subsequent lien; thus giving such subsequent lienholder all the benefits of the property saved, at the expense of the trust estate. The subsequent lienor would have been no worse off with the trustee holding the prior liens than the original creditors, and was not entitled to receive anything on his lien until the prior liens were satisfied. The trustee should have applied a sufficient amount of the proceeds of the sale of the land and personal property in Ohio, before distributing anything to the subsequent lienholders, to refund to the general trust fund the amount so used in compromising and paying off the said prior liens from the general trust fund; and, without so saving the estate from loss, the payment of the money to Dellicker, the subsequent lienor, was a misappropriation of the general trust fund. The said Dellicker, who received the money thus improperly paid, is primarily liable, and the trustee, Saunders, is secondarily liable therefor to said fund. Dellicker had loaned to the trustee \$2,000, which had been repaid to him. How did he occupy a position different from any other person who

might have been the owner of the subsequent mortgage of \$5,500 on the land, to give him the right of subrogation to the rights of the prior liens? Having returned to him his \$2,000 and interest, the trustee, Saunders, was no longer under obligation to him therefor. Suppose the trustee had borrowed all the \$2,500 from the bank, and none from Dellicker, and had repaid it out of the trust fund; it would probably never have occurred to Dellicker, the trustee, or anybody else, that Dellicker would be entitled to the whole proceeds of the sale of the land, to the exclusion of the trustee, who had with the trust funds settled the prior liens. The trustee was not repaying Dellicker the borrowed money out of the proceeds of the sale of the land. That had been paid back to him almost two years before, and he occupied precisely the same relation that any other subsequent lienholder would have occupied.

It is further contended by the trustee, Saunders, that the court erred in overruling his exception to Commissioner Lininger's report, in allowing but \$455.18 for commissions, when he should have allowed \$1,188.12, which was 5 per centum on amount received or collected by the trustee. Section 6, c. 72, Code, provides, in case of sale under deed of trust for security of debts, or to indemnify sureties, the proceeds shall be applied "first to the payment of expenses attending the execution of the trust, including a commission to the trustee of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds, then pro rata (or in the order of priority, if any, prescribed in the deed) to the payment of the debts secured," etc. This applies in all cases where the trustee has nothing to do in the premises except to make the sale where required, and to execute the trust; but the same section contains a further provision covering such trust as that in case at bar, where it is made the duty of the trustee to take possession, control, management, and administer the trust property, and is intended to be placed upon the same footing with executors and administrators in relation to the property committed to his care. Such provision is as follows: "And in all cases where a debtor conveys all his property to a trustee for the benefit of his creditors, or when he conveys all his property except what is exempt from execution or other process, every such trustee shall settle his accounts before a commissioner of accounts of the county in which such land is recorded, and the provisions of chapter 87 of the Code of West Virginia, as amended, shall apply to such settlement as far as applicable." And section 17, c. 87, says: "The commissioner in stating and settling the account shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise." For more than a century, in Virginia and in this state, un-

less in a case where there is special reason for allowing more, 5 per centum on receipts and disbursements has been the established compensation to fiduciaries generally, where there is no other provision, as in case of an ordinary deed for security of debts, as above stated. By making this second provision in section 6, c. 72, the legislature recognized the difference in the duties devolving upon the trustee, who should only be called on in case a sale was desired to be made, and his duties under the other class of trust deeds, where he is required to take possession and manage and administer the property. In *Tallafarro v. Minor*, 2 Call, top of page 156, it is held: "Administrator allowed 5 per cent. commission on the amount of sales and debts received by himself; that allowance not being too great for selling and receiving, paying and accounting for the money, and risking the receipt of counterfeit paper." In *Fitzgerald v. Jones*, 1 Munf. 150: "Executor allowed 7½ per centum on all his receipts and disbursements; the real and personal estate having, in obedience to direction of the will, been kept together and managed by him." And in *Triplett's Ex'rs v. Jameson*, 2 Munf. 242: "A commission of more than five per centum on amount of sales and collections ought not to be allowed an executor except upon peculiar circumstances." And in *Cavendish v. Fleming*, 3 Munf. 198: "An executor may reasonably be allowed a commission of ten per centum on moneys received by him, where the debts were very small and numerous, and the debtors presumed to have been much dispersed." *McCall v. Peachy's Adm'r*, Id. 288; *Hipkins v. Bernard*, 4 Munf. 83; *Kee's Ex'r v. Kee's Creditors*, 2 Grat. 117. Authorities might be multiplied, but it is useless. The rule is well established that 5 per centum is the accustomed and ordinary commission allowed in such case, and it is with the commissioner or court, in the exercise of a sound discretion, to increase it, if necessary to make a reasonable compensation. This exception of the trustee to the commissioner's report should have been sustained.

Plaintiffs in the cross-bill file a cross-error that the court erred in sustaining the exception of Saunders, trustee, to commissioner's report in disallowing the claims of Saunders against the trust estate for \$1,895.43. This was a claim provided for among the nonpreferred or general creditors in the general deed of assignment, and seems to have been simply overlooked in reporting that class of claims or debts against the estate, and does not pass upon the claim the one way or the other. Instead of disposing of it, the commissioner seems to have ignored or overlooked it. I can hardly think the exceptants seriously press this assignment of error. Counsel, in his brief, says, "Documentary evidence was brought by Foster strongly impeaching the correctness of the account of Saunders, and this defense was in no way met by Saunders," but fails to point out the impeaching evidence,

or show in what particular the claim is incorrect, or to overcome the acknowledgment of Foster by his solemn act in the provision made for its payment in the deed of assignment. The exceptions both of the plaintiffs in the cross-bill, and of Saunders to the report of Commissioner Lininger, as to the amount of \$1,398.93 due from Saunders,—the first claiming that it should be more, and Saunders claiming that it should be only \$671.49,—have both been disposed of in former parts of this opinion; largely in that touching the commissions which should be allowed the trustee.

For the reasons herein given, the decree of November 3, 1899, complained of, is reversed, except in so far as it decrees the amounts due the several general creditors, but not including in said exception the plaintiffs in the cross-bill, Hall & Beller and W. S. Mackey, and their co-beneficiaries, as set out in their bill; as to said general creditors excepted it is affirmed; and the cause is remanded for further proceedings to be had therein according to the principles herein stated, directions given, and the rules governing courts of equity.

(51 W. Va. 583)

PARISH FORK OIL CO. v. BRIDGEWATER GAS CO.

(Supreme Court of Appeals of West Virginia.
March 29, 1902.)

OIL LEASE—CONSTRUCTION—ABANDONMENT—DISCOVERY OF OIL—RIGHTS OF LESSEE.

1. An agreement whereby certain lands, in consideration of \$50, are granted, demised, leased, and let for the sole and only purpose of boring, mining, and operating for oil and gas, and laying pipes and building tanks, stations, and houses thereon to take care of the products, for the period of 15 years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of 50 cents an acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed and understood that the fifty dollars, paid in cash, is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises, then all cash rentals shall cease."—does not bind the lessee to do anything further after completing one well on the premises, and upon his abandonment of further operations upon the premises for more than 18 months, leaving the well unprotected, so that it caved in and partially filled up, the lessor, after waiting a year or more from the date of abandonment, had the right to lease the land to another.

2. The principal purpose and design of the parties to such a lease, clearly discernible from its terms, being the production and marketing of the oil and gas in the land for their mutual benefit, mere discovery of oil by exploration under it vests no title to it in the lessee, but it does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. In such right the lessee will be protected, but he must proceed to exercise it with reasonable promptness and diligence.

3. When its terms will permit it under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness.

4. The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.

(Syllabus by the Court.)

Appeal from circuit court, Wirt county; L. N. Tavenner, Judge.

Action by the Parish Fork Oil Company against the Bridgewater Gas Company. From a judgment for defendant, plaintiff appeals. Affirmed.

S. D. Turner, D. C. Casto, and Campbell, Holt & Duncan, for appellant. T. A. Brown and W. N. Miller, for appellee.

POFFENBARGER, J. This is an appeal from a decree of the circuit court of Wirt county, made in two causes, which had been consolidated. The Parish Fork Oil Company, a copartnership, claiming under a lease of 118½ acres of land, executed by Jacob S. Swisher to E. R. Woodyard, and dated June 4, 1894, had entered upon the land in August, 1898, and drilled a well about 200 feet deep, which was completed some time in September, 1898. The well was shot, and it was found to be a producer of oil in small quantities, the man who drilled it having taken out with the sand pump about one-third of a barrel; but no tubing was put in it, and it was not pumped. In the spring of 1899 the drilling machinery, belonging to one Abram Pearson, who drilled the well for the lessees under a contract, moved all the machinery away, and the well was to all appearances abandoned. No further visible work was done upon the land by the lessees until early in June, 1900. The cash consideration mentioned in the lease was \$50, and it was therein agreed and understood that said \$50 was payment of the rental for one year; that is, from June 4, 1894, until June 4, 1895. The lease further provided that the lessees should "complete one well on said premises within one year, or the said E. R. Woodyard shall pay to said Jacob S. Swisher rental as hereinafter provided." A further provision as to rent was that the lessee should pay "fifty cents per acre for each year that this lease may remain in force after the first year." A further stipulation as to the payment of rent is as follows: "It is further agreed that when the first well is completed on said premises then all cash rentals shall cease." Another important clause of the lease reads as follows: "It is agreed that this lease shall remain in force for the term of fifteen years from this date, and as much longer as the premises are operated for oil or gas." By its terms the lessor was to receive one-eighth of all the oil produced and saved from the premises and \$50 per year for the gas from every gas well on the premises, the product of

¶ 4. See *Mines and Minerals*, vol. 34, Cent. Dig. § 204.

which might be marketed and used off the premises. The rentals were paid in advance each year until June 4, 1899, the last payment having been made June 2, 1898. Prior to the resumption of work by the lessees, Swisher executed a subsequent lease sometime in 1899 to J. W. Bell and one Hewitt, but it was allowed to expire by reason of nonpayment of rental. Then Swisher executed another lease, covering the same land, to said Bell, who was an employé of the Bridgewater Gas Company, a Pennsylvania corporation, which lease was dated February 7, 1900, but was not recorded until some time in April, 1900. This lease was assigned to the Bridgewater Gas Company on the 1st day of August, 1900, and Bell says he took the lease for said company. Early in August, 1900, the claimants, under the two conflicting leases, undertook to begin operations on the land, each placing materials upon the ground and beginning the work of operation. This resulted in the institution of these two suits. On the 15th day of August, 1900, on a bill of the claimants under the Woodyard lease, praying a cancellation of the lease made to Bell as a cloud upon their title to the leased premises, and general relief, an injunction was awarded by Hon. G. W. Farr, judge of the Fifth judicial circuit, restraining the Bridgewater Gas Company, its agents and employes, from interfering with the premises. On the 21st day of August, 1900, upon the bill of the Bridgewater Gas Company, praying a cancellation of the Woodyard lease, and an injunction against the claimants thereunder, and general relief, an injunction was granted by Hon. Reese Blizard, judge of the Sixth judicial circuit, restraining E. R. Woodyard, W. M. Cox, A. F. Dennison, and S. B. Sayre, their agents, servants, employes, and assignees, from going upon the premises, and from doing any of the acts mentioned in the bill. An amended bill was afterwards filed by the Bridgewater Gas Company, and all the bills were answered, and affidavits and depositions were taken and filed by all the parties. Hon. Lewis N. Tavenner, the judge of said court, being a witness in the causes, Hon. Walter Pendleton was, by agreement, selected to try them, and on the 22d day of May, 1900, the causes were consolidated and heard together, and a decree was entered dissolving the injunction awarded to the claimants under the Woodyard lease, dismissing their bill, canceling the said lease of June 4, 1894, and perpetuating the injunction granted the Bridgewater Gas Company. From this decree an appeal has been taken by the parties interested in the Woodyard lease.

The question of paramount importance is whether the lessees who drilled the well under the lease of June 4, 1894, abandoned the lease, for that question must be taken into consideration in more than one aspect of the case. Its determination necessitates a fuller statement of the facts than has been

given. At the time the well was drilled the Woodyard lease was owned by S. E. Mobley, E. Jones, W. M. Cox, and E. R. Woodyard. Mr. Woodyard had retained a one-fourth interest in the lease, and the balance of it had been assigned, directly or indirectly, to the other parties, each of whom held distinct fractional interests. D. C. Mobley, the husband of S. E. Mobley, had the management and control of the operations upon the land, as agent of the owners of the lease. After the well had been drilled, shot, and cleaned out, and a showing of oil found in it, Mobley located another well, and talked of going on and drilling more wells, with the intention of connecting and operating them together by power from one plant, but that was not done. The contractor—Pearson—testifies that he was to go right on and drill another well, when notified to do so, but that there was some delay in paying him for the work he had done, and he received no notice to begin work on a new well, and his tools remained at the well during the fall and winter, and in the spring he moved them all away. It is admitted that at the time of the completion of the well there was a failure of water by reason of dry weather in that locality, but it is uncertain how long that condition existed. Shortly after the cessation of work on the lease, Mobley became interested in other business, and declined the further management of the work on the lease, and then his wife sold her interest. He and W. M. Cox testify that when he gave up the management Cox was to take charge of it. Cox took sick with pneumonia in the fall, and was unable to do anything during the greater part of the winter. In the year 1898 Cox was engaged in oil prospecting and development in Ohio, near Marietta, and he says that as soon as he became able he went over there to look after some business, and then came back to Parkersburg, and purchased machinery and supplies for the development of the Swisher land under the Woodyard lease; but before these tools and supplies were shipped he was notified by J. W. Houke that Swisher had no title to the land, and that the legal title was in him (Houke) and one T. H. Murphy, both of Parkersburg; and thereupon he abandoned the idea of resuming work on the lease until the title could be perfected, and went back to Ohio. He claims to have written from Marietta five letters to Swisher, urging him to perfect his title. These letters were dated May 10, June 17, August 12, September 17, and October 22, 1899, and addressed to Swisher at Elizabeth, W. Va.; but Swisher denies that he ever received any of them, and further says that at that time Elizabeth was not his post office. Cox says the letters were inclosed in return envelopes, and that none of them ever came back to him. The Swisher title was in this condition: It was perfect and undisputed as to 68½ acres of the

land, and the well had been drilled on that part of it. The other 50 acres was in two tracts, one containing 21 acres and the other 29 acres. Houke and Murphy, in the year of 1881, had sold these two tracts to one Isaac Trader, executing to him a title bond. Swisher had purchased the interest of Trader, and assumed the payment to Houke and Murphy of three notes for the sum of \$66.66 each, executed by Trader for purchase money. Swisher had paid off two of these notes and \$70 on the principal and interest of the third one, as he contends. The only dispute as to these payments is in respect to \$30, which Swisher handed to Lewis N. Tavenner on the 27th day of March, 1889, to be paid to Houke. Judge Tavenner has no recollection of handing the money to Houke, but he is satisfied that he either did that or that it was included in some of the checks which he filed. From this it is clear that nothing stood in the way of Swisher's obtaining a deed for the 50 acres of land except the payment of a very small amount of money. However, Houke says Swisher had given him, by verbal contract, in consideration of forbearance, an interest in the mineral in the land. It is also shown that Mr. Woodyard, the lessee, knew the condition of Swisher's title at the time the lease was executed. Cox's only effort to get Swisher to perfect the title was the writing of said letters. He never went to see Swisher about it, nor did Woodyard or any of his associates. In the winter of 1899 Cox was sick again for a considerable time, and it is claimed by the appellants here that all this long period of delay is excused and accounted for by these circumstances, failure of water, bad weather, Cox's sickness, and defect of title, and that they never had any intention of abandoning the lease. On the other hand, it is claimed that the appellants actually abandoned the lease, and are now setting up these matters as mere pretenses and subterfuges; and attention is directed to their long absence from the premises, the condition in which they left the well, and their permitting the machinery which was on the ground to be taken away. How long there was a lack of sufficient water to carry on the work does not appear, but there was certainly water during the winter, and it is shown by the testimony in the case that such work could be and was carried on in that part of the country during the winter. If the well was protected in any way during the winter from the surface water and from the throwing of obstructions into it, it was only by a board laid over the top of it and held in place by a wrench or some tools. Pearson says the tools were left hanging in the well. Swisher and others say there was a board over it. When Pearson moved his machinery away, one Ash, who was assisting him, cut a wooden block and plugged the well with it, and this probably remained in it for about a year. Only two pieces of casing were put in, and these were not of

sufficient length to go down far enough to prevent the well from caving nor to shut off from the well what is called "surface water,"—water which comes into the well above the oil sand. No examination of the well seems to have been made until after these suits were brought. Swisher and Bell testify that in January, 1901, they took a line, tied a piece of cast iron to it weighing several pounds, and with that measured the depth of the well, and found that it was then only 104 or 105 feet deep, and the casting brought up with it clay or other substance, which was of the character of that which caves into an unprotected well in that locality. They also found that water stood in the well to within 12 or 13 feet of the top, and that there was but a scum of oil on it. It further appears from the testimony that the opening and cleaning out of a well in that condition is more expensive and difficult than the drilling of a new well. Other pertinent facts bearing on the intention of the lessees and the construction of the lease are that all who were concerned in the well drilled, including Swisher, thought there was oil there in paying quantities. Swisher seems to think the well was injured by shooting, but he gives no good reason for that. Mobley was present when the well was shot, and he says they found lubricating oil at 74 feet, and it was his judgment that, had they stopped there, the well would have produced one barrel a day. He says that when they went down into the second Cow Run sand and shot the well it flowed up to within 45 feet of the top.

It is suggested in the briefs for the appellees that the lease in question here is very similar to the Gartlan lease construed in *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, but in some respects they differ widely. In the Gartlan lease the consideration expressed was only \$1, while here it is \$50; but that is unimportant, for it is expressly agreed in the lease that the \$50 is for the rent for one year. The Gartlan lease did not bind the lessee to do anything but drill one well on the premises. It contained no covenant to pay rent even for delay in putting down the well. By reason of its failure to impose any obligation on the lessee to do anything after drilling a dry hole and his abandonment of the premises, it was held that the lease created an estate at will, and the lessor had the right to lease the land to another. Here, as has been shown, there is a covenant to pay rent, and one of the pivotal questions in construing the lease is, when does that obligation cease? If it continues after an unsuccessful effort to find oil, or after it is found, but production is abandoned, it has never ended, unless on the theory of abandonment of the lease. The rent is not made payable in advance, nor is any time fixed for its payment, nor does the lease contain a clause of forfeiture. If the completion of a dry hole on the premises operates a cancellation of the

obligation to pay rent under the clause, "it is further agreed that when the first well is completed on said premises, then all cash rentals shall cease," there would be an end of all obligations or covenants on the part of the lessee, for he is not bound to drill a second well by the terms of the lease. Such construction would class this lease with the Gartian lease, and abandonment of the premises after putting down an unproductive well would end the lease. A widely different view of the legal meaning of the lease is the one taken by the lessees. It is not contended for in the argument, but, as it serves to throw light on the conduct of the parties, and affects the question of intention, so vital in determining whether there has been an abandonment of the lease, it is here given and discussed. Taking the meaning of the clause last quoted to be that the completion of a dry hole, or a well by which oil is discovered, but from which none is produced, operates an extinguishment of the obligation to pay rent, and vests in them title to the oil in the land, the lessees, after completing this well, refused to pay any more rent, and denied that any was, or would thereafter become, due. Both Cox and Woodyard insisted, after the well had been drilled, that they were not bound to pay any more rent. Soon after the 4th day of June, 1899, the date to which the rent had been paid, Swisher wrote Woodyard a letter in reference to the rent and the lease, and he says he notified him that the lease was forfeited. Woodyard admits having received a letter from Swisher, but says he does not remember its contents. He says that on another occasion, still later, he saw Woodyard, and told him that the lease was forfeited, and Woodyard insisted that under the lease he was to pay no rent after the completion of a well; and on the witness stand in this case he still insisted that he was not bound to pay any more rent, but that he was entitled to hold his lease without such payment. On the 24th day of August, 1900, Cox made Swisher a tender of the rent up to June 4, 1900, with the interest thereon, but he coupled it with a protest to the effect that no rent was due him. This position of the lessees is based upon the assumption that by drilling a well and finding oil they acquired a vested interest in the oil and gas in that tract of land. Until oil is discovered in paying quantities, the lessee acquires no title under such lease. It simply gives a right of exploration. *Steelsmith v. Gartian*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Plummer v. Iron Co.*, 160 Pa. 483, 28 Atl. 853; *Crawford v. Ritchie*, 43 W. Va. 252, 27 S. E. 220. After the discovery of oil in paying quantities, it is held that title does vest in the lessee, but there is no case which goes so far as to announce that after mere discovery of oil the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it

for speculative purposes, or to await his own pleasure as to the time of development. A well-settled principle of law is that a contract shall be construed as a whole, and in the light of the purposes and objects for the accomplishment of which it was made. Oil leases are no exception to the rule, and, as the subject-matter of the lease is peculiar in its nature, the courts have given this principle great latitude in their construction. They are executed by the lessor in the hope and with an expressed or implied condition that the land shall be developed and oil produced. When production takes place, the lease is mutually beneficial. The royalty which it is stipulated in all these leases that the landowner shall receive is generally the moving cause of the execution of the lease. If there is one principle that is asserted in *Steelsmith v. Gartian* more vigorously and with more emphasis than any other it is that the lessee shall proceed to make the lease profitable to both parties, and that he shall not be permitted to tie up the land. "The 'testing' provided for was manifestly a condition upon which the lease depended. If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee. Technical words are unnecessary to raise a condition. If a fair and reasonable construction of the instrument shows that a lease shall depend upon the doing or not doing something essential to the purposes of the contract, the law implies the condition." *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn. 381, 18 S. W. 65. "It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice." *Conrad v. Morehead*, 89 N. C. 31. "Forfeiture for nondevelopment or delay is essential to private and public interest in relation to the use and alienation of property. In general, equity abhors a forfeiture, but not where it works equity and protects a landowner from the laches of a lessee, whose lease is of no value till developed." *Munroe v. Armstrong*, 96 Pa. 307. "The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee, who has paid no consideration, to hold it merely

for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement." *Huggins v. Daley*, 40 C. C. A. 19, 99 Fed. 613, 48 L. R. A. 320. "If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent. It would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner and to a reasonable extent is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments and the other sums stipulated were intended not only to spur the operator, but to compensate Ray for the operator's delay or default." *Ray v. Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922. "If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract." *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220. All the provisions of the contract must be effective, if possible. By its terms this lease is to be in force for the period of 15 years from its date, and as much longer as the premises are operated for oil or gas. Another provision is that the lessor shall have one-eighth of the oil produced and \$50 per annum for each gas well. It is just as important to the lessor that, when discovery of oil is made, the land shall yield him his royalty, as it is that discovery shall vest in the lessee title to the balance of the oil. If the lessee shall be permitted to sit down, and refuse to produce, after discovery, the lessor loses a part of what he contracted for. The contract bears no such construction as that. What the lessee acquires by discovery is the right to produce and take the oil, paying out of it the stipulated royalty, and not title to the oil as it remains in the land without production. Hence this provision that, when a well is completed on the premises, all cash rentals shall cease, must be taken to mean that such cash rental shall cease only when a producing well is completed and operated on the premises, or that the completion of a nonproducing well extinguishes the obligation to pay rent, and places the lease within the principle announced in *Steel-smith v. Gartlan*.

Which is the true construction? If the former be taken, it must be said that after the completion of this well the lessor had his right of action on the covenant to pay rent, and, as the lease contains no clause of forfeiture, all he could get during the whole period of 15 years would be his rent of 50 cents an acre,—\$59.25 per year,—if the lessee should determine not to further prosecute their right of exploration. That would as effectually tie up the oil, and prevent production by the landowner or anybody else for a long time, as the construction which the les-

see put upon the lease; but in so construing it the strict letter of the contract would be adhered to. The lessor agreed to take either the production of oil, yielding him one-eighth, or a rental of 50 cents an acre for each year that the lease may remain in force after the first year. There is no provision in the lease which compels the lessee to drill a well at any particular time, and, if this provision stood alone, unqualified by any other clause of the lease, the drilling of a well might be deferred during the whole period of 15 years, so that the lessor would receive nothing but the rent. It is useless to enter upon a discussion of the proper construction of this in view of all the other provisions of the lease had no well ever been drilled; for one has been drilled under the lease, and that makes it necessary to consider it along with the clause providing for extinguishment of the rentals. If the clause providing for the payment of rent shall be construed according to its very letter, is there any reason why the clause providing for the extinguishment of rent shall not be construed in the same way? If it be so construed, does it not mean that the completion of any well, producing or nonproducing, shall put an end to the covenant to pay rent? If the parties meant that the completion of a well to so operate should be a producing well, why did they not say so in the lease? It was a matter of great importance to each of them. Why should the court read into the lease what the parties did not put in? If it means that the completion of any well should have that effect, they contemplated a virtual cancellation of their respective rights under the lease with the completion of one well. One rule of construction is that every clause in a lease or contract shall have some effect, and it is presumed that it was inserted by the parties for some purpose. If a producing well was in the contemplation of the parties when they inserted this clause, they did a vain and useless thing in putting it in the lease. No court would so construe this lease as to compel the lessee producing oil under it to give the lessor his royalty and rental, too. The rental provision in the lease is never intended to continue after the production of oil begins. The completion of a producing well would end the obligation to pay rent, and this clause, providing for its extinguishment, would be useless in that event. In order to find any reason or purpose on the part of these parties for inserting it, it must be held to apply to a nonproducing well as well as a productive well, and thus end the obligation to pay rent in either event. But a careful inspection of all of that portion of the lease which relates to the payment of rent will show conclusively that this is the true interpretation of its meaning. It is as follows: "Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm; to bury gas lines two feet below the surface, when notified so to do; and pay all damages to growing crops by reason of said opera-

tions; and, further, to complete one well on said premises within one year, or the said E. R. Woodyard shall pay to said Jacob S. Swisher rental as hereinbefore provided. The consideration upon which this lease is executed as follows: Fifty dollars cash in hand paid, the receipt of which is hereby acknowledged, and fifty cents per acre for each year that this lease may remain in force after the first year; but it is agreed and understood that the fifty dollars paid in cash is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises then all cash rentals shall cease." Clearly, it only means to make certain the cessation of any obligation to pay rent after the completion of one well. If the word "and" be inserted between the words "hereof" and "it," it supplies what has clearly been omitted by mere inadvertence, the link which connects this clause directly with the covenant to pay rent, and makes it qualify that clause. The covenant to pay rent itself is conditional by its very terms. The lessee agrees "to complete one well on said premises within one year, or" pay rent as thereafter provided. The provision referred to is that he shall pay 50 cents per acre for each year that the lease should remain in force after the first year. This being qualified by the clause providing for the cessation of cash rentals, it simply means that the rent shall be paid for each year that the lease may remain in force after the first year, but no longer than the completion of the first well on the premises. This makes it harmonize with the undertaking to complete one well on the premises within one year, or, in lieu of completing a well within the year, pay rent. This construction not only harmonizes with the true meaning and purport of the entire provision concerning rent, and adheres to the very letter of the clause itself, but also embodies and enforces that principle of law so universally announced by the courts, as shown by the authorities hereinbefore cited and quoted, which discourages tying up and rendering unproductive the vast fields of mineral wealth, construes every contract and lease as to both lessor and lessee so as to best promote production, development, and progress, and frowns upon every attempt to evade it as being in contravention of both good morals and public policy.

Under this construction it may be said that, had the lessees found this well, upon its completion, to be a dry hole, they could not have gone on and drilled another, and continued their exploration for oil, without making a new lease or contract. That is a question which neither this court nor any other has ever been called upon to decide. How far the equitable principles which the courts apply in all cases involving rights under oil leases might be applied for the relief of one who is prosecuting his search in good faith and with diligence and at great expense, remains to be seen when such a case shall pre-

sent itself. Such was not the case of *Steel-smith v. Gartian*, nor is it true of this case. It is by no means conclusive of the question of abandonment that the lessees insisted that their lease was not forfeited, that there were some circumstances which rendered it inconvenient for them to continue the work of exploration, and that Oox made some effort to have the alleged defective title of Swisher perfected. All this is consistent with the intention to continue the work of exploration, but it is equally consistent with the intention merely to endeavor to hold onto the lease without doing any work under it,—a thing which the policy of the law does not permit unless the right to do so is absolutely fixed and secured by the terms of the contract; and even then it is not always permitted. In *Huggins v. Daley*, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320, an illiterate farmer leased his land for the term of five years, and the lease contained this clause: "Provided, however, that a well shall be commenced upon the above-described premises within thirty, and completed within ninety, days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of fifty dollars." Of this lease the court said: "The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of the promise to the ear and breaking it to the hope'; skillfully turning it into a mere speculative lease binding the lessor and leaving himself free. It would be unconscionable to hold the lessor bound." These excuses and pretenses of the lessees must be taken in connection with the other facts disclosed by the evidence in determining whether they had laid aside their purpose to go on in good faith and diligence to develop that land, and were simply making such pretense of preparation so to do as would enable them to say that they still entertained such purpose, or were actually using diligence, and doing what it was reasonably and fairly in their power to do to render the lease productive. Having drilled a well, which, according to their own representation, would have produced oil in paying quantities, if protected, they allowed it to fill up, and become absolutely worthless, according to the uncontradicted testimony in this case. This undoubtedly shows an abandonment of the purpose expressed by Mobley to drill other wells to be connected with this one, and all operated by the same power. It is further shown by the fact that Pearson, whom he intended to employ to do that work, was never requested to begin it, but was allowed to move his machinery away, leaving nothing except a mere hole in the ground to indicate that anything had been done upon the premises. While a lack of water may have delayed the work of clean-

ing out the well, putting in the tubing, and pumping it, no attempt is made to show any reason for the failure to put in sufficient casing and otherwise protect the well from caving in and becoming filled up with obstructions. After leaving the premises in the fall of 1898, Mobley never returned. Cox never came upon the land, nor sent anybody else to it, until in April, 1900,—very nearly the date on which the lease executed to Bell was recorded. At that time development and exploration for oil, which had not been active in that community for some time, were resumed, and there was considerable excitement. These circumstances, no doubt, had much to do with the effort on the part of Cox to resume work on the lease. But that effort came long after the time when they should have been at work on the land, or doing something to evidence a purpose to develop it, and long after the occurrences which conclusively show an intent on their part to abandon the lease. The theory that the lessees, for a long time after the completion of the well, had no intention to go on with the work, but were simply trying to hold the lease without doing anything under it, finds strong support in the meaning which they put upon the lease. Under their misconception of it they claimed the right to hold it, and take their own time in which to develop the land. Prompt and vigorous work on a new well after abandoning the one put down, being in possession of the premises under a lease, which, by its own terms, had no binding force upon either party after the completion of one well, might have entitled them to stand upon the equity of the case; but certainly they are not entitled to do so after having delayed action for more than 18 months, under circumstances which strongly indicate an intention to indefinitely abandon further work on the premises.

These views result in the affirmance of the decree.

(51 W. Va. 598)

NUTTER v. BROWN et al.*

(Supreme Court of Appeals of West Virginia.
March 29, 1902.)

PRINCIPAL—AGREEMENTS OF AGENT—REFORMATION OF CONTRACT.

1. A principal is bound by the agreements, representations, concealments, and mistakes of his agent, made as a part of the *res gestæ* of the transaction.

2. The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, if the evidence be sufficiently cogent to thoroughly satisfy the mind of the court, is fully established and undoubted.

3. Laches cannot be imputed to one in the peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title, since possession is notice of equitable rights, and he need assert them only when he finds occasion to do so.

(Syllabus by the Court.)

*Rehearing denied.

Appeal from circuit court, Harrison county; John W. Mason, Judge.

Bill by Cordelia Nutter against Beeson H. Brown and others. Decree for plaintiff, and defendants appeal. Reversed.

M. F. Snider, M. G. Smith, and E. A. Brannon, for appellants. John Bassel and W. Scott, for appellee.

DENT, P. Cordelia Nutter appeals from a decision of the circuit court of Harrison county dismissing her bill in chancery, filed against Beeson H. Brown and others, for the purpose of having the words "oil and gas" stricken out of a deed executed by her to him on the 26th day of June, 1890, conveying to him the coal under a certain tract of land held by her as her separate property. In her bill plaintiff insists that when one James M. Plant, acting as agent for the defendant, and at the same time as a notary public, presented her both the original option and the deed for her signature, and read them to her, the words "oil and gas" were therein, and that before she signed them she insisted they should be stricken out, and said Plant agreed to and did strike them out. In her evidence she testifies she could not read or write, and that when the papers were presented to her for her signature she declined to sign them unless the words "oil and gas" were stricken out, as she had not agreed to sell and convey the defendant the oil and gas underlying the land; that Plant at once agreed that they should be stricken out, and went through the motion of erasing them, and when she signed both the option and deed she supposed they were erased, as she relied implicitly on Plant's statement with regard thereto, and she signed the papers under this belief; that she never knew any better until after she leased the land for oil and gas, when the lessee, upon investigating the matter, gave up his lease, because he had found out that defendant's deed included the oil and gas; that as soon as she received this information she went to see the defendant, and tried to get him to correct it, and he refused to do so; that this was not quite three years prior to the institution of this suit; that she again leased it to Garrett and Arnett, who agreed to be responsible for this litigation. James M. Plant testifies that he was the agent of the defendant; that when he took the option to the plaintiff to be executed, she and her husband both objected to signing it unless the words "oil and gas" were stricken out, and he agreed to do so; that he does not remember whether they were stricken out or not, but such was the agreement; that according to his memory the words "oil and gas" were not in the deed when it was signed; that the defendant instructed him, if the parties asked him to read the deed before signing it, to skip the words "oil and gas," and he declined to do so, saying that if the parties did not insist on his reading the deed he would not do so. The defendant does not

testify. The option shows the words "oil and gas" printed in it, unerased. The deed shows them interlined and unerased. With the exception of some few matters of contradiction, this is all the evidence touching on the controversy.

The defendant, by demurrer and answer, relies on two grounds to defeat plaintiff's suit, to wit: failure of proof and laches in bringing suit. As to the first of these grounds, it is fully established that it was agreed at the time of the execution of the papers that the words "oil and gas" were to be stricken out, and that plaintiff understood that it had been done. By this agreement defendant is bound, because made on his part by his agent. It is the same as though made by himself, for it was a part of the *res gestæ*. Story, Ag. §§ 135, 139. The fraudulent or negligent statements, misrepresentations, and concealments, when part of the *res gestæ*, as well as the positive acts, misrepresentations, declarations, and admissions of an agent, are binding on the principal. Therefore, to take the most charitable view of the matter, the failure to erase the words "oil and gas" was a mere oversight of the agent, although he was directed by the principal to leave them in by concealment, if he could possibly do so. He claims that he left them in by oversight or neglect. It is not shown in evidence that the defendant purchased or paid anything for the oil or gas. He was buying the coal, and, if he could get the oil and gas thrown in, he would take it. His sole reliance in this case is on the fact that they appear in the papers by the confessed mistake of his agent. He does not claim that he bought and paid for them, but that, because of their valueless character at the time, the plaintiff was willing to let them go to secure the sale of her coal. There is no evidence to sustain this contention. On the contrary, the evidence is wholly against it. When the plaintiff found out that defendant's agent had made this mistake, she asked defendant to correct it. This he refused to do. The fraud, therefore, does not consist in the original leaving of the words in the papers by oversight; but it is in the refusal to correct the matter when called to his attention, and the determination to take advantage of a mistake made by his agent, as though it were made by himself. He may have been innocent of all intention to defraud in the beginning, notwithstanding the undenied statement that he desired his agent to deceive his grantors by concealment, if possible. Being informed of the mistake, it became his duty to correct it; and he is just as guilty in the eyes of the law in trying to take advantage of it as though it were an intentional fraud from the beginning, and if his agent left the words in, purposely and deceptively, to defraud the plaintiff, defendant is responsible therefor. The papers themselves have but little weight as evidence, for it is admitted that the words "oil and gas" were in them at the time they were

presented for signature, and it was agreed between the parties that they should be stricken out. No one denies this agreement. The papers merely show that for some reason it was not carried out in good faith by the defendant, either purposely or by mistake. No witness testifies that they were rightfully left in the deed. The defendant is silent on this question, and his agent, who should have stricken them out, testifies to the contrary.

It is claimed that Plant's evidence should be given but little weight, as it tends to impeach his certificate of acknowledgment. Under our present statute a certificate of acknowledgment is only *prima facie* evidence of the facts certified therein. This provision was first enacted into our statute law by section 6, c. 73, Code 1868, and has been carried down to the present time, in section 6, c. 73, Code 1890. It seems to have been entirely overlooked and disregarded in the case of *Rollins v. Menager*, 22 W. Va. 461; also in the case of *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622, although the certificate in the latter case bears date prior to the time the Code of 1868 became operative. These cases follow *Harkins v. Forsyth*, 11 Leigh, 294, and hold the recitals in the certificate of acknowledgment of a married woman to be judicial in their nature, and conclusive, and oral evidence, either by the officer or otherwise, is not admissible to impeach the same, except in cases of fraud or duress, and there should have been added mistake, accident, or other adventitious circumstance. A different rule must prevail where the statute provides that the certificate shall be *prima facie* evidence of the facts therein stated. 1 O. L. P. 618. As this, however, is a question of fraud and mistake as between the original parties to the deed, involving no innocent third party, and the officer was acting as agent of the grantee, his evidence is undoubtedly competent. *Davis v. Monroe*, 187 Pa. 212, 41 Atl. 44, 67 Am. St. Rep. 581. His evidence ordinarily would be of little weight, for he convicts himself of fraud, and the court is left to decide as to whether he was guilty of participation of fraud in the first place or is attempting to perpetuate a fraud by his evidence. He claims that the leaving of the words "oil and gas" in the papers was an oversight or mistake on his part. As his evidence is unimpeached, he is entitled to the presumption of honesty. The fact that he testifies that he was under instructions from his principal to leave these words in by concealment tends to show that he left them in purposely; but this is insufficient to overcome his positive statement that he left them in by mistake. This undenied instruction from his principal shows that he was not bargaining for the "oil and gas"; but if, by deceitful means or otherwise, without openly purchasing them, he could obtain them, he was willing to accept them, without regard to the means employed. He does

not, as a witness, claim that he purchased them, or that he is out anything by reason thereof. *Davis v. Monroe*, cited, is in all points similar to the present case, except the fraud in that case arose in its inception, while this originally was a mistake, and it only becomes fraudulent from the fact that the defendant is willing to profit thereby. This being a purely equitable demand, the statute of limitations has no application.

Nor is the plaintiff barred by laches. The doctrine of laches is founded upon prejudice to the defendant. He has suffered none. The witnesses to the actual transaction are all living. The testimony of those dead could not aid him in the least. He gave nothing for the property, and is in statu quo without putting him there. The rights of innocent third parties have not intervened. The fact that plaintiff relied on the statements of his agent until their falsity was brought to her attention by her grantee cannot be taken advantage of by him. No man can take advantage of his own wrong or duplicity against those who assume he is honest and trust him accordingly. Not until his duplicity is brought home to them by facts which put them on their guard can laches be imputed to them. She trusted him, and continued that trust until the knowledge that she had been deceived was brought home to her. She having been deceived by them, he cannot take advantage of the acts of himself or his agent. It is said that she had the same means of information he possessed. This is not true, for she did not know that he would take advantage of her. If she had known it, she would have been placed on her guard, and his agent could not have misled her. *Real Estate Co. v. Claiborne*, 97 Va. 734, 750, 84 S. E. 900. Nor does the doctrine of laches apply in this case, in my opinion; for she was in possession, claiming both the legal and equitable title, and his deed was a mere cloud on her title. 18 Am. & Eng. Enc. Law, 124. On page 125 of the last citation it is said: "Laches will not be imputed to one in peaceable possession of property for delay in resorting to a court of equity to establish his right to the legal title. The possession is notice to all of the possessor's equitable rights, and he need only assert them when he may find occasion to do so." *Weekly v. Hardesty*, 48 W. Va. 39, 35 S. E. 880; *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 230, 35 L. Ed. 1063; *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728; *Mills v. Lockwood*, 42 Ill. 111, 118; *Maders v. Lawrence*, 49 Hun, 361, 2 N. Y. Supp. 159; *Wiswall v. Hall*, 3 Paige, 313; *Hall v. Erwin*, 60 Barb. 349. The plaintiff's possession of the land, including the oil and gas, has never been disturbed. Defendant did not attempt to assert his title thereto until after she had leased the same, and her possession is still undisturbed; for the South Penn Oil Company would not attempt to develop the same until they had direct authority from her to do so.

The law being plainly against the defendant, the court cannot do otherwise than reverse the decree complained of, and enter a decree reforming the deed in controversy by striking therefrom the words "oil and gas" as interlined therein, and remand the case for disposition of the funds in the hands of the special receiver, which is accordingly done.

POFFENBARGER, J. I concur in the decision of this case for the reason that the defendant has failed to testify and exculpate himself from the charge concerning directions as to the method of obtaining options and conveyances of oil and gas, and as to whether there is a mistake in the deed. His silence may be due wholly to his belief that his contradiction of this testimony is unnecessary, or that it is not such as calls upon him to speak, and he may be entirely guiltless of what is charged. But the court cannot act as his guardian or protector in respect to a thing which he should have done, if it could have been done, and speak for him. In the absence of his silence, the evidence would be far from satisfactory. There are few cases in which deeds and other solemn writings have been permitted by the courts to be contradicted and altered or canceled upon oral testimony, when the evidence did not show admission on the part of the defendant of mistake or fraud, or show facts and circumstances from which such admission was clearly inferable.

BRANNON, J. I acquit Brown of any fraud. My opinion is that Plant took the option from Mrs. Nutter, using a printed form including coal, oil, and gas, and that when Chapin drew the deed he used a printed blank having only coal in its granting clause, and interlined "natural gas and oil" to agree with the option. It is not claimed that Brown was present when either option or deed was executed. Plant took them. Brown merely found the instruments as they were. But though this is the case, there stands the evidence of Mrs. Nutter that she refused to sign with oil and gas in the option, and directed the words "natural gas and oil" to be stricken out. There stands the evidence of Brown's agent, Plant, that Mrs. Nutter did so, and that he so promised to change the option. This is confirmed by young Nutter, who says his father refused to sign the deed with those words in. There stands the evidence of a disinterested witness, Flowers, showing that Mrs. Nutter went to Brown to protest against oil and gas being in the option, and demanding that they be waived by Brown. There stands the fact that Mrs. Nutter gave a deed of trust to some one excepting only coal, not oil and gas, a strong circumstance to show that she believed she had not optioned oil and gas.

Can we arbitrarily reject and discredit this evidence without any adverse showing? True, there are certain features of improbability

bility in the evidence; but that evidence of Flowers and the deed of trust confirm circumstantially the evidence of Mrs. Nutter and Plant in the specific point that oil and gas were not to be in the option, and of course the deed must follow the option. There remains the fact, discarding intentional fraud, that the option, by Plant's mistake in omitting to erase those words, does not do what it was intended to do. This point we cannot change, unless we arbitrarily disregard evidence.

As to laches. I would apply it, if Brown had given evidence that the interview with Mrs. Nutter was in 1893; but under the evidence time is too short.

(100 Va. 619)

BROWN v. NORFOLK & W. RY. CO.
(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

LIBEL—PRIVILEGED COMMUNICATION—MALICE—EVIDENCE.

1. The publication of an order discharging an employé of a railroad with the statement that he had been dismissed for intimating that an officer of the company had used insulting language in speaking of another officer, and that such intimation was untrue, which order was published after inquiry and investigation, was a privileged communication.

2. Where a communication is privileged, the party concerning whom it is made has the burden of proof of showing that the party making it availed himself of the occasion not for the purpose of protecting his interests, but to gratify his malice.

3. A statement published by a railroad company that an employé had been dismissed for intimating that an officer of the company had made insulting reflections as to another officer, which was proved to be untrue, does not show language so violent or so disproportioned to the occasion as to raise an inference of malice, no extrinsic evidence of malice being shown.

Error to circuit court, Pulaski county.

Action by H. M. Brown against the Norfolk & Western Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. O. Wysor and D. S. Pollock, for plaintiff in error. A. A. Phlegar, for defendant in error.

KEITH, P. Plaintiff in error, Brown, had been a fireman in the employment of the Norfolk & Western Railway Company for several years, and was well esteemed. In July, 1898, he was directed to take an engine from Radford to Bluefield, to be used in drawing an excursion train. This engine had been standing in the roundhouse at Radford without protection, and was in a rusty and filthy condition. Brown endeavored, as he states, to clean it by the use of oil and waste cotton, but was unable to do so. When the engine arrived at Roanoke, its condition was reported to Henretta, the road foreman of engines, who summoned Brown before him. Brown reported to Henretta in obedience to the summons, and stated to him that he had done his best with the means at his disposal,

and thereupon, as Brown alleges, Henretta used the following language: "Newman (meaning S. D. Newman, a master mechanic in the employment of the railway company), the damn son of a bitch, is the cause of all this trouble. He ought to have had that engine jacket lyed off,"—meaning that he ought to have had it washed with lye, in order to remove the rust and filth. Brown repeated the remark which Henretta was alleged to have made in the presence of several other employés of the railway company, and it was finally communicated to Newman. Thereupon Newman called upon Brown with reference to it, and Brown gave him a written statement of the occurrence as above narrated. When Newman, shortly thereafter, met Henretta, he asked him about this statement, and Henretta denied it, and asked him to get a written statement from Brown, and send it to him, which was done. Henretta also got a statement from Dickerson, who was present at the interview between Brown and himself, and then wrote to Pearce, division master mechanic, the following letter:

"The attached papers are self-explaining. I have only to state that Fireman H. M. Brown has told a deliberate lie. Mr. Dickerson was witness to all my remarks when I was investigating Fireman Brown's neglect to properly clean engine 706. His statement is attached. The papers are handed you, that proper discipline may be applied. Yours truly, F. B. Henretta."

Pearce looked into the matter, and reported the result of his inquiry in the following letter to W. H. Lewis, superintendent of motive power:

"Further concerning the case of engine No. 706, which you will remember came out on an excursion train in a very dirty condition, fireman claiming he worked two hours cleaning the engine, and engineman stating that he put ten minutes on it, please note attached, from which it appears that Fireman Brown tried to get even by intimating that Mr. Henretta had cast reflections on the female ancestry of Mr. Newman, and lied about the matter. I think, under circumstances, that Mr. Brown's services should be dispensed with without further consideration. J. S. Pearce, D. M. M."

W. H. Lewis, as a result of his investigation, published the following order:

"A fireman has been dismissed from the service for intimating that an officer of the company had cast reflections upon the ancestry of another officer, which was proved to be untrue."

For the publication of this order the Norfolk & Western Railway Company was sued. The jury rendered a verdict against the defendant for \$5,000. Subject to the judgment of the court upon the demurrer to the evidence, the court entered judgment for the defendant, and the case is before us upon a writ of error awarded upon the petition of the plaintiff, Brown.

The contention of the railway company is

¶ 2. See Libel and Slander, vol. 32, Cent. Dig. § 150.

that the order issued by Lewis discharging Brown from the service of the company and assigning the reason for his action was a privileged communication, for which the defendant in error is not liable in damages, unless the publication was malicious; that the company acted in good faith, after due investigation, and was inspired by no other motive than a desire to promote the efficiency of its service, and to give necessary information to its employes.

In *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803, it was held that: "To justify publication of defamatory matter, the occasion must be privileged, and must be used bona fide, without malice. Whether the occasion be privileged is a question of law for the court. Whether it has been used bona fide is a question of fact for the jury."

We think it plain that the communication which is the subject of controversy here was privileged. Brown had made a statement with reference to what was said by his superior officer, who was inquiring into the manner in which his duty had been discharged. He reported that Henretta had at that interview used language in the highest degree insulting to Newman, a co-employe. Henretta denied the truth of the statement. It was inquired into in a due and orderly course of investigation, and the conclusion reached that Brown's version of the affair was untrue. Assuming, for the moment, that it was untrue, it cannot be doubted that Brown was guilty of a very grave offense tending to produce ill will, discord, and strife among the employes of the company. If such were the case, it was altogether proper to discharge him from the service, and due to him and all concerned that the reason for his discharge should be given, so as to fix the blame where it belonged, and to exonerate those who were innocent.

As was said by Judge Lewis in *Chaffin v. Lynch*, supra: "The reported cases on the subject of privileged communications are very numerous, and they show that, while the law as to such communications is well settled, its application to particular cases is often attended with difficulty. They also show that the law in this particular was formerly more restricted than at present, the rule having been gradually extended, on the ground that it is to the interest of society that correct information should be obtained as to the character and standing of persons with whom others have business or social relations; so that it is now settled, as laid down by Baron Parke in the leading case of *Toogood v. Spyring*, 1 Crompton, M. & R. 181, that a communication honestly made in the performance of a social duty is no less privileged than one made in self-defense, or in the protection of one's own interest. And a communication made under such circumstances, and without malice, is protected, notwithstanding its imputations be false, or founded upon the most erroneous information."

Did the defendant company act in good faith in making the publication complained of, or was its action inspired by malice?

The question is not as to the truth or falsity of the publication. It is solely a question of good faith on the one hand and of malice on the other. In the interview between Henretta and Brown, at which the language with reference to Newman is said to have been used, there was, in addition to these gentlemen, Dickerson and Stauffer. Brown, of course, swears that his account of the interview is the correct one. Henretta denies that it is true, and says that the language which he used was "that it was a damn shame for Newman to let the engine come out in that fix." Stauffer says that he was in the room when Brown was being questioned, not more than five or six feet distant, and that he did not hear the expression attributed by Brown to Henretta. Dickerson says that he was present at the interview in Henretta's office when Brown was called in; that he was not paying very much attention to what passed; that, although he was within a few feet of them, he did not hear Henretta make use of the expression imputed to him by Brown; that he twice heard him say—once at the office, and just before that when examining the engine—"that it was a damn shame that this engine was allowed to come out of the roundhouse in such condition."

This case was heard in the trial court on a demurrer to the evidence, but the plaintiff voluntarily joined in the demurrer. Whether he could have been compelled to join if the action had been brought for common-law libel simply it is unnecessary to decide. Section 2897 of the Code, however, provides that "all words which, from their usual construction and common acceptance, are construed as insults and tend to the breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon." The latter provision was evidently inserted for the benefit of plaintiffs in actions to which the section is applicable, and they have the right to waive it if they choose. Counsel for the plaintiff in the trial court, bearing in mind this statute, intended to waive the benefit of it expressly, as is manifest from his bill of exceptions, which states that "after the evidence was all introduced to the jury the defendant demurred to the testimony, and the plaintiff, being willing to join therein, notwithstanding the last count of the declaration [which was a count under section 2897 of the Code], joined in the demurrer." This he had a right to do.

Notwithstanding the fact, however, that the case was heard on a demurrer to the evidence, we repeat that the question here is not as to the truth or falsity of any statement made in the published order, but merely as to the motive and intent by which the railway company was inspired. The communication being privileged, plaintiff in error can

only prevail by showing that the defendant availed itself of the occasion, not for the purpose of protecting its interests, but to gratify its ill will. Upon this issue the burden of proof is upon the plaintiff in error.

The remarks of Judge Lewis in *Strode v. Clement*, 90 Va. 553, 19 S. E. 177, are applicable in this case: "There is no extrinsic evidence of malice, such as an antecedent grudge, or previous disputes, or anything of that sort, between the parties; but the contention is that the language used by the defendant is of itself evidence of malice. Undoubtedly, strong or violent language disproportioned to the occasion may raise an inference of malice, and thus lose the privilege that otherwise would attach to it. But when the occasion is privileged the tendency of the courts is not to submit the words to a too strict scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances."

In this case there is no extrinsic evidence of malice, nor is the language complained of so violent or disproportioned to the occasion as to raise an inference of malice. In other words, there is no evidence of malice. If the issue before the jury had been as to the truth of Brown's account of what passed between Henretta and himself, the evidence would have required a verdict establishing as true Henretta's version, though a verdict in favor of the truth of Brown's statement could not with propriety have been disturbed by the court (*Tyree v. Harrison* [Va.] 42 S. E. 295); but the fact that the publication complained of was only made after the controversy between Brown and Henretta had been investigated, and that it embodies the results of that inquiry in accordance with the weight of evidence, clothed in temperate and decorous language, in the absence of any extrinsic fact or circumstance having such tendency, leaves the case stripped of any evidence to support the charge of malice, and the presumption that the publication was made in good faith must prevail.

In *Tyree v. Harrison*, supra, the jury rendered a verdict for the plaintiff in an action for libel. The court set aside that verdict, and at a subsequent trial rendered judgment for the defendant. Thereupon the plaintiff obtained a writ of error to this court, which reversed the case, and entered judgment for the plaintiff upon the first verdict. It was there held that it was for the jury to say which account was true,—that given by Tyree, or that given by Harrison; that the jury, in the exercise of their function, had seen fit to accept as true the statement of Tyree; and that, according to his account, the language used was so strong, violent, and abusive as to warrant an inference of malice, and destroy the privilege that would otherwise attach to the communication, or, at the

least, that this court was unable to say that the verdict of the jury was so plainly against the weight of evidence as to justify the interference of the court.

In the case under consideration we are not called upon to consider the weight or preponderance of evidence. There is no extrinsic evidence of malice, and the language of the communication of which complaint is made, and the manner of its publication, do not justify the imputation of malice, but rather tend to repel it. It does not name the person at whom it is directed. It states in language as mild as could have been employed the conclusion of the person charged with the duty of making the investigation, and that conclusion was warranted by the preponderance of evidence, which includes the testimony of every disinterested witness present upon the occasion.

Upon the whole case, we are of opinion that the judgment complained of should be affirmed.

(100 Va. 627)

FRANK v. FRANK.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

BONDS—DELIVERY.

1. Where a debtor, a short time before his death, executed bonds for the amount of his debts, and placed them in the hands of another to be delivered at his death to the obligees named therein, the obligor parting with all dominion over them, the delivery was sufficient.

Appeal from circuit court, Rockingham county.

Sipe & Harris and W. H. Bertram, for appellant. O. B. Roller, D. H. L. Martz, and Winfield Liggatt, for appellee.

KEITH, P. Henry Frank, a short time before his death, caused six bonds, each for the sum of \$250, to be written, signed, and placed in the hands of William Miller, to be delivered at his death to the obligees therein named. The bonds are in the following form:

"\$250.00/100.

"One day after date I promise to pay to Luverna Ellen Frank two hundred and fifty dollars, for value received of her, and I hereby waive the homestead exemption as to this debt.

"Witness my hand and seal this the 9th day of May, 1901.

"[6 cts. Revenue Stamp.]

"Henry Frank. [Seal.]"

In two of the bonds Luverna Ellen Frank was named as the obligee, one of which was delivered to her in person immediately upon its execution. After the bonds were written, Henry Frank executed his will, in which he provides that all of his just debts shall be paid, and then disposes of the residue of his estate. This will was duly attested, and there is no controversy concerning it. The sole question for our decision is, were the

bonds delivered by the testator in his lifetime?

Three witnesses were present with Henry Frank,—Benjamin F. Ralston, who wrote the bonds, J. W. Miller, and Lewis E. Swank. According to the testimony of Ralston and Swank, the bonds were written and signed. The will was then written and signed, and then Henry Frank delivered the bonds and will to Miller for safe-keeping; the bonds to be by him delivered upon the death of Henry Frank to the obligees named therein, and the will given to the executors therein named.

Miller's recollection of the transaction is that the bonds and will were delivered to him to be by him at the death of Henry Frank given to the executors named in the will, with instructions to deliver the bonds to the obligees therein named.

There is no material conflict, therefore, among these three witnesses, who are the only witnesses to the transaction. The only difference between the testimony of Miller and that of Ralston and Swank is that, according to his recollection, he was instructed to deliver the bonds and will to the executors, with instructions that the bonds should be delivered to the obligees; while according to the testimony of Ralston and Swank the bonds were to be delivered by Miller to those entitled to them. The delivery seems to have been unconditional and absolute. The obligor parted with all dominion over them. The obligees were his children who had remained with him, and rendered service to him, after they had attained the age of 21 years. It was his declared purpose to compensate them for this service. He regarded it as a debt, and put the evidence thereof in the most solemn form. There is not a circumstance in the record indicative of any purpose to impose any condition upon the complete delivery of these bonds, except that they were to be placed in the hands of the obligees after his death.

"Delivery is an indispensable requisite to the validity of a deed. It may be done by acts or words, or by both, by the grantor himself, or by another with the grantor's authority, to the grantee personally, or to a stranger with subsequent ratification, although it do not reach the grantee until after the death of the grantor." *Shep. Touch.* 57, 58.

The delivery must be in the lifetime of the grantor, and yet there may be an inchoate delivery in the grantor's lifetime, which will become absolute on his death. *Jackson v. Leek*, 12 Wend. 107; *Stone v. Duvall*, 77 Ill. 473; *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154.

"Where a deed is left with a third person, with instructions to hold it until the grantor's death, and then to deliver it to the grantee, the weight of authority seems to be in favor of the doctrine that, if there is no reservation by the grantor of the privilege of recalling the deed before his death, but if he delivers it to the depository with the abso-

lute and final determination that it shall take effect when the contingency of his death happens, it will become operative upon its delivery, after his death, to the grantee, and such delivery will relate back to the prior delivery for the purpose of passing the grantor's title." *Wheelwright v. Wheelwright*, 2 Mass. 454, 3 Am. Dec. 66.

As we have seen, the delivery to Miller was unconditional. There was no reservation of a right to recall the bonds. They were placed in his hands to be delivered upon the obligor's death to the obligees, and that was done. It is immaterial here whether the delivery to Miller is to be regarded as a delivery in escrow, so that the bonds became effectual only upon the delivery by Miller to the obligees, or whether they were to be regarded as presently binding upon the obligor; and therefore we shall not consider the authorities in which that distinction is discussed.

We are of opinion that there is no error in the decree of the circuit court, which is affirmed.

(100 Va. 612)

STUART v. PENNIS.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

SALE OF REALTY—BREACH OF CONTRACT—DAMAGES.

1. The measure of damages on breach of contract for the sale and conveyance of real estate is the contract price, and not the difference between the contract price and the market value of the property at the time of the breach; and the purchaser can only recover the purchase money actually paid and interest thereon.

Error to circuit court, Russell county.

Action by D. C. Stuart against Mrs. S. P. Pennis. Judgment for defendant, and plaintiff brings error. Affirmed.

J. J. Stuart and Wm. E. Burns, for plaintiff in error. W. W. Bird and Henry & Graham, for defendant in error.

CARDWELL, J. This is a writ of error to a judgment in an action of trespass on the case in assumpsit on a contract entered into between plaintiff in error, D. C. Stuart, and defendant in error, Mrs. S. P. Pennis, on the 24th day of December, 1892, for the sale and purchase of standing timber at a stipulated price per tree. It is the sequel of a suit in equity between the same parties, which was twice appealed to this court,—once in 1895, when it was determined that the growing trees constituted a part of the soil, and that the contract was for such an interest in land that a bill for its specific enforcement would lie (91 Va. 688, 22 S. E. 509); again in 1899, when the decree of the circuit court dismissing complainant's bill upon its merits was affirmed, after being amended so as to permit him to bring his action at law upon the contract if he should be so advised (33 S. E. 1015); whereupon plaintiff in error instituted this action, and

his declaration, besides the common counts in assumpsit, contains a special count upon the express contract of the parties, as follows:

"And for this, also, that whereas, the plaintiff and defendant entered into a contract which is in the words and figures following, to wit:

"Contract.

"Bought of Mrs. S. P. Pennis all poplar timber between her residence and Mrs. E. C. Carter's, and between the Meade road and the Jesse's Mill road, and running with the top of Copper Ridge, and measuring twenty-four inches in diameter inside the bark, and up, and as much as thirty-two feet of merchantable timber at three dollars per tree, and all other poplar on her place of the same measurements and specifications, at two dollars per tree. Also white oak, ash, and cucumber trees on her place, of same dimensions, at one dollar and fifty cents per tree.

"All timber is to be free from knots and all other visible defects. Three years is the time allowed for removing timber from land. One hundred dollars is to be paid January 1, 1893, and the remainder to be paid as the timber is taken away. The timber is to be inspected and marked as soon as practicable.

"December 24th, 1892."

"And, the plaintiff and defendant having entered into, signed, and delivered each to the other, in duplicate, the contract as above set out, the plaintiff afterwards, to wit, on the 2d day of January, 1893, attempted to inspect and mark the timber sold by said contract, but was prevented and prohibited by the defendant from doing so.

"And the plaintiff afterwards, to wit, on the 3d day of January, 1893, tendered to the defendant the sum of one hundred dollars, the amount to be paid to the defendant by the plaintiff under the terms of the contract aforesaid, whereupon the defendant refused to receive it, or to in any way comply with her said contract. Thereupon the plaintiff deposited the said sum in bank to the credit of the defendant, and notified her of such deposit.

"The plaintiff further avers that he has at all times been ready and willing to perform said contract, and has offered to do all things incumbent upon him by the terms thereof. The defendant hath refused, and still doth refuse, to perform the contract on her part, or to do any of the things incumbent upon her to do by the terms thereof, to the damage of the plaintiff \$2,500.

"And therefore he brings his suit."

At the trial, upon defendant in error's plea of non assumpsit, plaintiff in error introduced evidence as to the market value of the timber at the time of the contract and at the date of the breach thereof, which evidence, upon motion of defendant in error, the court excluded, on the ground that the contract price was the measure of damages recoverable in the case, and not the difference between the contract price and the real value at the date of the contract or the market value at the time of the breach, to which ruling plaintiff in error excepted.

Plaintiff in error also offered in evidence a deed from defendant in error to one Mason, dated November 14, 1893, conveying a part of the land upon which a portion of the timber referred to in her contract with plaintiff in error of December 24, 1892, set out above, is located, and to the introduction of which deed defendant in error objected, the

objection was sustained, and plaintiff in error again excepted. These two exceptions are made the grounds, respectively, of plaintiff in error's first and second assignments of error, and will be considered in inverse order.

With reference to the second assignment of error, it is only necessary to say that, as the deed was not executed until nearly five years after the breach of the contract sued on, it was irrelevant, and was, therefore, properly excluded.

The subject-matter of the contract being real estate (*Stuart v. Pennis*, supra), the general rule pertaining to damages recoverable by a vendee from a vendor on a breach of a contract for the sale and conveyance of real estate, or for a breach of a covenant to warrant the title to real estate conveyed, is applicable, unless the case can be brought within some exception to the general rule.

In *Thompson's Ex'r v. Guthrie's Adm'r*, 9 Leigh, 101, 33 Am. Dec. 225, following *Stout v. Jackson*, 2 Rand. 182, *Threlkeld's Adm'r v. Fitzhugh's Ex'r*, 2 Leigh, 451, *Mills v. Bell*, 8 Call, 320, and the leading English case of *Flureau v. Thornhill*, 2 W. Bl. 1078, it is shown that the rule is as applicable to executory contracts as to those executed, and that the vendee is not entitled to more damages than the purchase money he has actually paid and interest thereon. "For this," says the opinion in that case, "he ought to be compensated, if the land falls in value; and no more than compensated if it rises. Such a rule offers no temptation to the vendor to violate his contract, because, if he has a good title, the vendee can claim specific performance in a court of chancery, instead of bringing his action at law."

It is true, as pointed out in the argument of the case at bar, the doctrine announced in *Flureau v. Thornhill* and *Thompson's Ex'r v. Guthrie's Adm'r* has not been uniformly followed in the supreme court of the United States and several of the state courts, but it has been recognized as a settled doctrine in a number of decisions by this court, viz.: *Wilson v. Spencer*, 11 Leigh, 271; *Newbrough v. Walker*, 8 Grat. 16, 56 Am. Dec. 127; *Chick v. Green*, 77 Va. 835; *Sheffey's Ex'r v. Gardiner*, 79 Va. 313; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646; and *Roller v. Effinger's Ex'r*, 88 Va. 641, 14 S. E. 337.

It is contended, however, that the rule does not extend to the case of a party who simply refuses to perform his contract in order to secure a more advantageous bargain; and *Wilson v. Spencer*, supra, is relied on as sustaining this view. The opinion of the court in that case, instead of departing from or qualifying the rule laid down in *Thompson's Ex'r v. Guthrie's Adm'r*, supra, distinctly recognized it as well established, and sustained the ruling of the lower court allowing proof as to the value of the land at the time of the breach, upon grounds that do not exist in the

case at bar, viz.: First, the vendor having title to the land in bad faith disabled himself to perform his contract to convey to his vendee by conveying to another; second, the action was upon a bond conditioned to convey a tract of land, the breach assigned being a failure to convey, and there was no agreed price stated in the bond; and, third, the defendant, instead of objecting to the proof offered by the plaintiff as to the value of the land at the time of the breach, entered into the controversy as to the value at that period, and offered evidence to reduce the price at that date.

The elaborate opinion adheres to the rule laid down in *Thompson's Ex'r v. Guthrie's Adm'r*, but treats the case under consideration as coming within an exception to that rule.

Mr. Minor, discussing this subject, and citing a number of authorities, among which are the Virginia cases to which we have referred, including *Wilson v. Spencer*, supra (2 Min. Inst. 865), says: "But nothing can be allowed for the loss of a bargain, even though there may have been an actual increase in the market value of the land, and much less where the loss is of a purely speculative character, as of profits which he (the plaintiff) might, perhaps, have realized by advantageous employment of the property, or otherwise." Again, on page 866, it is said: "And it will be observed that for the most part the best standard whereby to determine the value of the land is the purchase money," citing, among others, the case of *Wilson v. Spencer*. He then sets out, as held in *Wilson v. Spencer*, that an exception to the rule is where the vendor's breach of contract results, not from his misfortune in proving to be not entitled to land of which he believed himself to be the owner, but from his misconduct, or from his undue precipitancy; as, for example, where he had subsequently conveyed to another person, or where he has entered into a contract to sell before he had himself acquired title to the land.

Suppose, then, it were conceded in this case that plaintiff in error, under the declaration he has filed, had the right to have the evidence adduced by him to show a purpose on the part of defendant in error, in refusing to perform her contract, to secure a more advantageous bargain, considered by the jury, was it sufficient to take the case from the control of the general rule we have been discussing, and bring it within the exception stated by Mr. Minor and in *Wilson v. Spencer*? We think not. The contract sued on states the price of the timber per tree as agreed on between the parties. Defendant in error owned the timber and the land upon which it stood when she entered into the contract, and still owned both at the time of its alleged breach, and the special breach alleged is that plaintiff in error "on the 2d day of January, 1893, attempted to inspect and mark the timber sold by the said contract, but was prevented and prohibited by

the defendant from doing so." If there be any evidence in the record from which it might, perhaps, have been inferred that defendant in error, "for the purpose of making a more advantageous bargain," refused to allow the timber to be inspected and marked, it appears in her letter of January 2, 1893, introduced in evidence by plaintiff in error, addressed to him as "Dear Dale," in which she says: "I have decided to ask you to let me out of our timber trade. * * * My neighbors, I hear, are selling poplar trees at \$5.00. Besides this, I need the money for my timber at once. You can spend your time as profitably in some other affair, and let me keep my timber, and get more for it, if I can, from somebody else." A letter of later date, also introduced by plaintiff in error, shows that she thought he had let her off.

Viewing the case, therefore, in the light of the facts and circumstances surrounding it, including those intended to be shown by the evidence ruled out by the learned judge below, we see nothing to take the case from the control of the general rule that the measure of damages is the contract price, and not the difference between the contract price and the market value of the property at the time of the breach.

Plaintiff in error having admitted at the trial that he had gotten back the \$100 deposited by him in bank to the credit of defendant in error, and therefore had paid nothing on the contract, the verdict of the jury is in accordance with the law and evidence in the case, and the judgment is affirmed.

(100 Va. 660)

NICHOLAS et al. v. NICHOLAS et al.*

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

GIFT OF LAND—POSSESSION—IMPROVEMENTS—EFFECT—SUPPORT OF FATHER.

1. Under Code, § 2413, providing that no estate of inheritance or for a term of years shall be conveyed, unless by deed or will, nor shall any right of conveyance accrue to the donee of land under a gift not in writing, though followed by possession and improvement of the land, where a father placed a son in possession of land after the enactment of that section, and the son improved said land, he acquired no title thereto.

2. There is no implied contract by a father to pay his son for board and attention furnished him.

Appeal from circuit court, Rockingham county.

Suit between George M. and W. S. Nicholas and Frank L. Nicholas and others. From the judgment, George M. and W. S. Nicholas appeal. Reversed in part.

Winfield Liggett and Marshall McCormick, for appellants. Sipe & Harris and John E. Roller, for appellees.

*For opinions on petitions to rehear, see 42 S. E. 866.

† 1. See Gifts, vol. 24, Cent. Dig. §§ 43, 46, 47.

KEITH, P. J. B. Nicholas was seised during his lifetime of several parcels of real estate in the county of Rockingham. He gave one of these tracts, valued at \$7,000, to his son Charles H. Nicholas. The donee was put in possession about the year 1880, and thereafter placed valuable improvements upon it, and exercised exclusive ownership over it until his father's death.

In 1872 the father placed J. J. Nicholas, another son, in possession as tenant of what is known as the "Palmer Tract," consisting of 125 acres. In 1887 his father proposed to him that he should take this tract at \$10,000, \$8,000 of which was to be treated as an advancement, and \$2,000 to be paid after his father's death, and one-quarter of the grain raised upon the place was to be paid to the father during his lifetime in lieu of interest. After this arrangement, J. J. Nicholas exercised complete ownership over the property, made improvements upon it, and has ever since remained in possession.

With respect to the land claimed by F. L. Nicholas, the evidence fails to establish a parol gift to him prior to the 1st day of May, 1888, but, on the contrary, it appears that he was placed in possession of the lands of which he now claims to be the owner after that date.

The circuit court entered a decree which declares that Charles H. Nicholas, J. J. Nicholas, and Frank L. Nicholas shall be quieted in the possession and ownership of the respective tracts of land held by them. From this decree, George M. and W. S. Nicholas appealed.

We are of opinion that with respect to so much of the decree as confirms the title of Charles H. Nicholas and J. J. Nicholas there is no error, but that the decree is erroneous in so far as it undertakes to establish the claim and quiet the title of Frank L. Nicholas to the home place, of 230 acres; the evidence being too vague and indefinite to support his contention, which, in our judgment, is put at rest by section 2413 of the Code, which is as follows:

"No estate of inheritance or freehold, or for a term for more than five years, in lands, shall be conveyed unless by deed or will, nor shall any voluntary partition of lands by coparceners, having such an estate therein, be made, except by deed; nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him."

The case before us is within the mischief aimed at by the section just quoted. Section 2561, which treats of advancements to be brought into hotchpot, is in the following words:

"Where any descendant of a person dying intestate as to his estate or any part there-

of, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he or any descendant of his, shall come into the partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal."

The two sections above quoted must be read together. "The true notion of an advancement is a giving by anticipation the whole or a part of what is supposed a child will be entitled to on the death of a parent." *Chinn v. Murray*, 4 Grat. 397. A gift, then, by a father to a child, of real estate, since the 1st of May, 1888, or a promise of a gift "hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him," carried with it no right to a conveyance of the land to the donee. The terms of section 2413 seem necessarily to embrace such transactions as that under investigation, and the cases cited by the revisors in connection with that section show that gifts of land by a parent to a child were within the contemplation of those who prepared the section. *Burkholder v. Ludlam*, 30 Grat. 255, 32 Am. Rep. 668; *Stokes v. Oliver*, 76 Va. 72; *Griggsby v. Osborne*, 82 Va. 371. Indeed, Judge Burks, one of the revisers, in speaking of the change wrought by section 2413 of the Code, says:

"Even a parol gift of land, if possession was taken by the donee and a large expenditure was made by him in improving the land, was treated in equity as a valid sale, and was allowed to be set up on oral testimony alone. This was a most prolific source of fraud.

"Voluntary partition, also, of land by coparceners, was considered as not within the operation of the statute requiring a deed to convey an estate of inheritance or freehold, and therefore partition by parol was upheld.

"In both of these instances the law was changed by the revision so as to require writing." 4 Reports Virginia State Bar Ass'n (1891) pp. 117, 118.

We are also of opinion that there is no error in the decree rejecting the claim of Frank L. Nicholas for board and attention to his father during his lifetime. The commissioner reported against this claim, the circuit court concurred with the commissioner, and the evidence is not such as to warrant us in reversing its decree upon this point. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364, and *Jackson's Adm'r v. Jackson*, 96 Va. 165, 31 S. E. 78.

The decree complained of should be reversed in so far as it undertakes to establish the title of Frank L. Nicholas to the home place, and in all other respects affirmed.

(100 Va. 631)

PARTLOW v. LICKLITER.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

APPEAL—REVIEW—EXECUTION—PROPERTY SUBJECT.

1. On appeal from a judgment rendered on trial of claim by third person to property levied on under execution, an order of a court issued in a chancery cause, the record of which was admitted in evidence, cannot be reviewed.

2. Code, § 2877, provides that, if any person transact business in his own name without any addition as "factor" or "agent," all the property and stock used in such business shall, as to his creditors, be liable for the debts of such person. Code, § 2465, as amended by Acts 1899-1900, p. 89, provides for the recording of muniments of title valid between the parties, but void as to purchasers without notice. *Held*, that the stock of one doing business in his own name is liable for his debts, though the title of some other person to such property be of record, under Code, § 2465, as amended.

Error to hustings court of Staunton.

Action by Ella F. Lickliter against William F. Lickliter. Judgment for plaintiff. On levy of execution Fannie L. Partlow asserted title. Judgment for plaintiff in execution, and claimant brings error. Affirmed.

Patrick & Gordon, for plaintiff in error. S. D. Timberlake and J. M. Perry, for defendant in error.

WHITTLE, J. The salient points of this case are as follows:

On December 17, 1901, a writ of fieri facias came into the hands of the sergeant of the city of Staunton, issued upon a judgment confessed that day by William F. Lickliter in favor of Ella F. Lickliter in the hustings court of that city. The execution was levied on personal property in the possession and used in the business of William F. Lickliter, but to which Fannie L. Partlow asserted title by virtue of a bill of sale executed by William F. Lickliter to her, and recorded prior to the confession of judgment.

Upon the petition of the officer, and in accordance with the provisions of section 2999 of the Code, the parties were convened to the January term, 1902, of the hustings court for the determination of their conflicting rights and claims in respect to the property in controversy.

The trial of the case was had before a jury upon the following issues directed by the court:

"Whether or not, at the time the execution of Ella F. Lickliter against William F. Lickliter was levied upon the goods mentioned in the officer's return thereon, the said William F. Lickliter was transacting business as a trader, with the addition of the words 'factor,' 'agent,' and 'company' or 'Co.,' and failed to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business was transacted, and also by notice published for two weeks in a news-

paper printed in the city of Staunton; or if said William F. Lickliter transacted such business in his own name, without any such addition, and acquired or used said goods in said business."

In the interval between the levy of the execution and trial of the issues above named Fannie L. Partlow obtained an injunction from the judge of the circuit court of Augusta county, certified to the hustings court of the city of Staunton, to which court the bill was addressed, enjoining William F. Lickliter from collecting certain accounts and notes mentioned in the bill, from negotiating the same, and from interfering with the property and business in question. The sergeant and Ella F. Lickliter were also enjoined from taking possession of the property or business.

The bill was not a bill of interpleader, but charged that the officer was threatening to interfere with and take possession of the business and property. All the defendants answered the bill, and upon notice the hustings court dissolved the injunction.

On the trial of the issues before the jury the record of the injunction proceedings was introduced in evidence, and was, in that aspect alone, incorporated by bill of exceptions into the record now before this court.

By their verdict the jury returned a negative response to the first inquiry submitted, but upon the second issue rendered the following verdict:

"We, the jury, find that William F. Lickliter did transact the business on Greenville avenue, in the city of Staunton, in his own name, as a trader, and was transacting such business in his own name at the time of the levy of the execution of Ella F. Lickliter, on the 17th day of December, 1901, and did acquire and use said property levied upon in said business."

There was a motion on behalf of Fannie L. Partlow to set aside the verdict as contrary to the law and evidence, which motion the court overruled, and rendered judgment upon the verdict in accordance with the provisions of section 2998 of the Code.

The case is here upon writ of error to that judgment.

It is also sought upon this record to review and reverse the order of the hustings court dissolving the injunction in the chancery cause. To that end there is a separate petition, upon which an appeal was granted by one of the judges of this court.

Of that branch of the case it is sufficient to observe that the record certified by the clerk of the lower court does not purport to be the record of the chancery cause in which the appeal is pending, but the record of the law case in which the chancery proceedings were interpolated as part of the evidence.

This attempt to review or attack collaterally the order of a court in a cause, the record of which is only before this court as evidence in another case, is not permissible.

Spotts v. Com., 85 Va. 531, 536, 8 S. E. 375; *Powers v. Iron Co.* (Va.) 41 S. E. 867, 869.

The appeal in the chancery cause must, therefore, be dismissed, as having been improvidently allowed.

The issues referred to were regularly submitted to the jury upon correct instructions, the verdict is sustained by the evidence, and there was no error in the refusal of the lower court to set aside the verdict.

The remaining question for decision is whether the second paragraph of section 2877 of the Code applies to a case in which the title of the owner of the property levied on is evidenced by a recorded bill of sale. The language of the provision is: "Or if any person transact such business in his own name, without any such addition, all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person."

It is insisted that, if the statute be held applicable to such case, it is in conflict with section 2465, amended, p. 89, Acts 1899-1900.

That section occurs in chapter 109 of the Code,—the registry statute,—which provides for the recordation of muniments of title in general, and of sundry other transactions affecting the title to property, valid between the parties, but declared to be void as to purchasers for valuable consideration, without notice, and creditors, until and except from the time that they are duly admitted to record.

Section 2877 falls in a different category. It is found in an independent chapter, which deals with a restricted class,—partners, partnership associations, factors, agents, and traders,—and was passed in the interest of trade and commerce. It operates chiefly upon shifting stocks of goods, wares, and merchandise bought for the express purpose of daily indiscriminate sale, and constantly changing hands; property difficult of accurate description, and impossible of continued identification through the medium of the registry laws. To undertake to apply those laws to that class of citizens and to that species of property, if their enforcement were practicable, would operate as an embargo on trade.

Other mischiefs and inconveniences intended to be prevented by the statute are pointed out in the recent cases of *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291, and *Edmunds v. Plano Co.*, 97 Va. 588, 34 S. E. 472, in which section 2877 is construed. On the other hand, the section affords the true owner simple and effectual means of protecting his property (provisions which would be quite unnecessary if he is already protected by recording his title).

In the case of *Hoge v. Turner*, in discussing the subject of ownership, the court said: "The language of the statute is plain, explicit, and imperative. It leaves no room for exception or qualification. If any person, as

is alleged in this case, transact business as a trader in his own name with the addition of the word 'agent,' or in his own name without such addition, and fail to comply with the provisions of the statute, it makes all the property, stock, and choses in action acquired or used in such business absolutely liable for his debts, whether contracted in the particular business or not, and without regard to knowledge by the creditor of the principal, if principal there be. Knowledge or want of knowledge plays no part in the application of the statute. That is an immaterial matter."

The conclusion from that statement of the law is irresistible that knowledge or notice of ownership, actual or constructive, will not exempt the property from liability for debts of the party in possession and conducting the business. To hold otherwise would be to ingraft upon the statute an exception not warranted by the language, and tend to defeat its manifest object.

The case of *Edmunds v. Plano Co.* is relied on to sustain the contrary view, but the decision is not susceptible of that construction. It is true, in describing the status of some of the property involved in that litigation, the fact is adverted to that it was consigned to the Hobbie Plano Company for sale under written contracts which were not recorded. But the liability of the property for the debts of the defendant company was not placed upon that ground, nor was the language there employed intended to overrule or modify the doctrine announced in the previous case in that particular.

It follows from the foregoing views that there is no error in the judgment complained of, and it must be affirmed.

(100 Va. 581)

STEVENSON v. HENKLE.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

TAXATION—ASSESSMENT—MISTAKE IN NAME—EFFECT ON TAX-SALE OWNERS—APPEAL.

1. An assessment to the "Basic City Chilled & Roller Iron Works Co.," while the name of the owner at the time was the "Basic City Chilled Roll & Iron Works," was not insufficient, so as to nullify all subsequent proceedings, where, as a matter of fact, it was shown that the true owner had full knowledge of all the proceedings culminating in the tax deed to the property, and intended to redeem the property, and there was no other company with a like name, or one at all similar, doing business or owning property in the county, and it was further shown that the property had been assessed in the same manner before, and the taxes paid by the owner.

2. Under Code, § 459, providing that the clerk of every county or corporation court shall make out a list of deeds, giving the names of the grantors and grantees, except mortgages and deeds of trust, which lists are to be sent to the commissioners for their counties in assessing property, really should be assessed in name of owner, and not of trustee.

3. Only such alleged errors as are involved in the record, and have been considered by the lower court, can be reviewed on appeal.

4. Code, § 661, providing that a right acquired on tax sale shall stand in the grantee in a tax deed as it was vested in the party assessed for the taxes, refers to the character of the title in the grantee in such deed, whether in fee simple or otherwise, and does not provide that the purchaser shall take the land subject to the liens resting thereon at the time the taxes were assessed.

Appeal from circuit court, Augusta county.

Suit by one Stevenson against F. L. Henkle. Decree for defendant, and plaintiff appeals. Affirmed.

J., J. L. & R. Baumgardner, for appellant. Elder & Elder and J. M. Perry, for appellee.

HARRISON, J. By deed dated November 5, 1895, the Basic City Chilled Roll & Iron Works, a corporation created by the laws of Virginia, became the owner of the property involved in this controversy, consisting of about four acres of land, and improvements thereon, situated at Basic City, Va.

On the 5th day of December, 1895, that company conveyed the property to the Central Trust Company of Camden, N. J., in trust to secure 100 bonds, of \$1,000 each. This deed of trust was recorded in the county court clerk's office of Augusta county.

Under the head of "Table of Town Lots in the Town of Basic City, in the County of Augusta, in South River Magisterial District," this property was assessed for taxation in the name of "Basic City Chilled & Roller Iron Works Co." The taxes for 1897 being delinquent, it was listed for the non-payment of taxes in the same name in which it was assessed, and advertised in that name for sale by the treasurer of Augusta county. At the sale, on the 26th day of December, 1898, between the hours of 10 in the morning and 4 in the afternoon, the property was knocked out at public auction to F. L. Henkle for the sum of \$62.74; that being the amount due the treasurer thereon. On the 5th day of February, 1901, after the period allowed for redemption had expired, the purchaser at the tax sale obtained from the clerk of the county court a deed of conveyance, and had the same duly recorded. It appears from this deed, regular on its face, that all formalities preceding its execution, required by law, had been complied with.

The appellant, who is a lien creditor of the Basic City Chilled Roll & Iron Works, secured by and claiming under the deed of trust already mentioned, instituted this suit in March, 1901, to have the tax-title deed to the appellee, F. L. Henkle, declared void, upon certain grounds set forth in the bill, and, if the deed should be held valid, then to have the lien of the trust deed under which appellant claims declared prior in dignity to the lien of the taxes for the enforcement of which the sale resulting in the tax title deed was made. The bill assails the deed under which appellee claims upon the ground—First, that, prior to the close of the redemption period, the Basic City Chilled Roll &

Iron Works was informed of the tax sale, and determined, in accordance with its duty in the premises, to redeem the property, and that in pursuance of this purpose the attorney and agent of the company agreed with Henkle, the purchaser, that he should be paid \$76.08,—an amount somewhat in excess of the sum to which he would be entitled under the statute,—and that in consideration thereof Henkle would cancel and surrender all rights acquired by him as purchaser at the tax sale; that, in accordance with this agreement, a tender of the sum agreed upon was made to Henkle, who refused to accept it; that Henkle should be required to accept the \$76.08, which had been kept intact, and carry out his agreement, by releasing and surrendering his rights under the tax-title deed.

In his answer the appellee, Henkle, broadly and emphatically denies that he ever made the alleged agreement, or that such a proposition was ever at any time made to him. There is no evidence in the record tending to support this allegation. On the contrary, it seems to have been abandoned both here and in the court below.

The second ground of objection to the deed alleged in the bill rests upon the proposition that in the assessment of this property there was an error in the name of its corporate owner; that the name of the owner at the time of assessment was "Basic City Chilled Roll & Iron Works," while the assessment was to the "Basic City Chilled & Roller Iron Works Co." On account of this variance in name, it is further alleged that the appellee only acquired such estate as was vested in the person assessed with the taxes, and that as the taxes were assessed against the "Basic City Chilled & Roller Iron Works Co.," and the property sold as the property of that company, there passed to Henkle, as the result of such assessment and sale, only such property as was vested in a corporation or partnership of that name, and as no corporation or partnership bearing the name of "Basic City Chilled & Roller Iron Works Co." existed, having any interest in or right to the property in question, no right or title passed by virtue of the tax-title deed to the appellee.

In the petition for appeal it is further contended that this error in the name of the company constitutes a material irregularity, that nullifies all subsequent proceedings; that it was, in effect, a failure to give notice to the true owner of the land of its assessment for taxation, its return as delinquent, its advertisement for sale, its sale, and the successive steps leading to the execution, delivery, and recordation of the deed to appellee.

The authorities generally hold that, if a mistake in name is not calculated to mislead, it is immaterial and will be disregarded. The underlying principle in such cases is that a person whose property is liable to assessment for taxes shall not be permitted to

evade payment of his just proportion of the public burden by any errors, omissions, or irregularities that do not prejudice his rights. *Westhampton v. Searle*, 127 Mass. 502; *Lyle v. Jacques*, 101 Ill. 645; *State v. Mathews*, 40 N. J. Law, 269; *Thorndike v. Inhabitants of Camden*, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463; *State v. Diamond Val. Live Stock & Land Co.*, 21 Nev. 86, 25 Pac. 448; *O'Neal v. Bridge Co.*, 18 Md. 1, 79 Am. Dec. 689.

In the case at bar the assessment reads, "Basic City Chilled & Roller Iron Works Co.," instead of "Basic City Chilled Roll & Iron Works." This variation in the name in which the property is assessed, from the exact style of the company, is too slight to have possibly misled the Basic City Chilled Roll & Iron Works to its prejudice; and, as a matter of fact, it is abundantly shown that it did not do so. There is no evidence tending to show that the purchaser at the tax sale was guilty of any fraud, concealment, or wrongdoing. It is not pretended that the taxes for which the property was sold were not chargeable thereon, or that they had been paid.

The contention is that because the owner of the property is described in the assessment, advertisement, and sale as the "Basic City Chilled Roller & Iron Works Co.," instead of "Basic City Chilled Roll & Iron Works," all proceedings culminating in the deed to appellee are a nullity. That the Basic City Chilled Roll & Iron Works had full notice of these proceedings is not denied. Indeed, it is admitted in the bill that appellant knew of the sale for taxes, and intended to redeem the property. The record shows that there was no other company with like name, or one at all similar, that was doing business or owning property in Basic City or Augusta county. It further shows that the property had before 1897 been assessed in the same manner that it was for 1897, and the taxes paid by the owner. If further appears that, prior to the return of the property as delinquent for the nonpayment of taxes, the treasurer of the county called the attention of D. K. Joslin, who was the president, treasurer, and one of the directors of the company to which the property belonged, to the fact that the taxes for 1897 were past due and unpaid, and that unless they were paid the property would be returned delinquent. It further appears that the property was duly advertised for sale, and that, in addition to the usual advertisement, the treasurer mailed a copy of the advertisement to D. K. Joslin, and received a letter from Joslin, dated February 4, 1899, in which he says: "I have not as yet heard from you as I expected, but hope that you stopped the sale. * * * Please send me statement of taxes due on properties at Basic City, known as 'Match Factory,' 'Chilled Roll Works,' and 'Paper Fabriquil,' as my intention is to see that all these taxes are paid at an early date." The treasurer says

he is sure that in reply to this letter he told Joslin that the "Chilled Roll Works" had been sold as advertised, and that from time to time afterwards he called his attention to the fact that the property had been sold, and suggested that he redeem it. A copy of the advertisement is in the record, and its sufficiency to give the Basic City Chilled Roll & Iron Works full notice of every fact material to be known by it in connection with the sale is plain. Besides, as already seen, it is clear that Joslin, president, treasurer, and director of the company, actually knew that the property was to be sold, knew a few weeks after the sale that the property had been sold, and promised to pay the taxes at an early day. Under such circumstances, it cannot be successfully maintained that the Basic City Chilled Roll & Iron Works was misled or prejudiced by the slight and immaterial change of its corporate name by the officers of the law in their efforts to enforce the collection of the public revenue. The appellant, realizing this, makes the further contention in his petition that the legal title to this property was in the Central Trust Company, and the beneficial ownership in the creditors secured by the deed of December 5, 1895; that the Basic City Chilled Roll & Iron Works only owned an equity of redemption; and that the property should have been assessed in the name of the trustee, or the beneficiaries under the trust deed, or both, in such manner as to give them notice of the delinquency, advertisement, and sale. This contention is without merit. No such mode of assessing property is known to our law. On the contrary, section 459 of the Code provides that the clerk of every county or corporation court shall annually make out a list of all deeds for the partition and conveyance of land, giving the names of the grantors and grantees, except deeds of trust and mortgages to secure the payment of debts. These lists are sent to the auditor of public accounts, and delivered by the clerk to the commissioners for their guidance in assessing property. The other sections of the Code are in harmony with section 459, and exclude, by implication, the idea that property must be assessed in the name of the trustee in a deed of trust to secure debts, or in the names of those secured in such deed. The transfer to the trustee was not made for the purposes of taxation, but the taxes were, after the trust deed, as before, assessed properly in the name of the grantor in the trust deed.

Other grounds of objection to the proceedings culminating in the tax title, and under which the appellee claims, are assigned in the petition and urged in argument, but they need not be considered, for two reasons: First. They are outside of the case made by the pleadings, and there is nothing in the record to show that they were ever brought to the attention of the court below. We can only consider such alleged errors as are in-

voiced in the record, and have been considered and passed on by the lower court. *Union Bank v. City of Richmond*, 94 Va. 316, 28 S. E. 821. Second. Even if these objections were within the case made by the pleadings, they could not avail appellant, under the express language of the statute (Code, § 661, as amended by Acts 1899-1900, p. 1234). *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813; *Coal Co. v. Thomas*, 97 Va. 527, 34 S. E. 486. These two decisions are controlling authority in this case for the conclusion that no valid objection has been shown to the deed in question, or to the proceedings which led to its execution.

The only remaining contention involves the order of priority between the tax lien and the lien of appellant under the deed of trust.

It is well established that the tax lien has priority, and that a tax sale is made clear of prior incumbrances. *Simmons v. Lyle's Adm'r*, 32 Grat. 752; *Com. v. Ashlin's Adm'r*, 95 Va. 145, 28 S. E. 177; *Thomas v. Jones*, *supra*. These cases hold that the tax is prior in dignity to judgment liens and to the vendor's lien. There is no distinction in principle between the cases. For the same reason that the tax is held to be prior in dignity to a judgment lien and a vendor's lien, it must be paramount to a deed of trust lien. Indeed, it is said in *Thomas v. Jones*, *supra*, that taxes are prior in dignity to all other liens,—must be so from the very necessity of the case; otherwise the state would be powerless to collect her revenue. The liens upon the land would, as in the case at bar, often be greater than the value of the land, and the tax lien being inferior, the land would escape all taxation. The provision in section 661 of the Code that "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made," refers to the character of the title that shall be vested in the grantee in such deed, whether it be a fee simple or otherwise. It has no reference to liens, and does not mean, as contended, that the purchaser takes the land subject to the liens resting thereon at the time the taxes were assessed.

For these reasons, we are of opinion that there is no error in the decree complained of, and it must be affirmed.

(100 Va. 702)

VALLEY TURNPIKE CO. v. MOORE.

SAME v. STRICKLER.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

JUSTICE OF THE PEACE—APPEAL—JURISDICTION—MANDAMUS.

1. Under Code Va. § 2956, an appeal from an order of a justice is in the first instance to the county or corporation court of the county, except in a case involving the constitutionality of the ordinance or by-law of a corporation, when

the appeal is cognizable by the circuit court having jurisdiction over such county or corporation. *Held*, that a litigant claiming a right to appeal from a judgment of the justice to the circuit court must make it appear that the case comes within the exception of the statute, in which case the appeal lies directly to the circuit court, and not through the county court.

2. Where an appeal from a justice, which should have been taken to the circuit court, was taken to the county court, the county court had no jurisdiction to order its removal to the circuit court, but could only either dismiss the appeal or remand the case to the justice.

3. Where the primary object of the litigation is to enforce the collection of money demands for an amount below the jurisdiction of the supreme court, the burden is on appellants to show some other ground of jurisdiction.

4. An order of the county court dismissing an appeal from a justice for lack of jurisdiction is not a final order from which an appeal will lie.

5. On dismissal by the county court of an appeal from a justice, mandamus is the proper remedy to compel the court to proceed to the conclusion.

Error to circuit court, Augusta county.

Action by the Valley Turnpike Company against one Moore and by the same plaintiff against one Strickler. Judgments before a justice for plaintiff, and defendants appeal to the county court. The case is removed to the circuit court, and from an order remanding the cases to the county court, plaintiff brings error. Dismissed.

Sipe & Harris, for plaintiff in error. Chas. D. Harrison and D. O. Dechert, for defendants in error.

WHITTLE, J. These cases, involving cognate questions, were, by agreement of counsel, heard together.

Both originated in warrants issued by a justice of the peace on behalf of the Valley Turnpike Company to recover of the defendants certain tolls alleged to be due by them, respectively, for the use of the company's turnpike.

In the first-named case judgment was rendered for the plaintiff for the full amount of its account, \$10.57, with interest and costs, and on the application of the defendant an appeal was allowed to the county court. After the case reached that court, the attorney for the company made affidavit that he verily believed the constitutionality of an ordinance or by-law of the company, a corporation, was involved, in that the case involved the right of the company to collect the tolls ordained by its duly constituted authorities as proper and legal tolls, by it under the law entitled to be received from the defendant for and on account of the travel set out and described in the account sued on. Whereupon the county court, on motion of the company, and over the objection of the defendant, entered an order removing the case to the circuit court.

In the second-named case, the warrant, which was for \$14.63, was tried by a dif-

¶ 4. See *Mandamus*, vol. 22, Cent. Dig. § 74.

ferent justice, and judgment rendered for the plaintiff for \$3.52, the amount due for heavy hauling, with interest and costs; the justice deciding that the company had no right of action for the charges for light travel.

The company prayed an appeal from that judgment to the county court, which was allowed.

Similar proceedings to those in the first case, including the removal of the case to the circuit court, were had.

At the hearing the circuit court, being of opinion that it was without jurisdiction in the premises, remanded both cases to the county court.

Appellant seeks to have these orders reviewed upon appeal here.

It does not appear how the company has been prejudiced by the order of the circuit court in the first case. If, as it maintains, the county court has no jurisdiction, a dismissal of the appeal for that reason would leave the judgment of the justice in its favor intact.

This court is confronted at the threshold of the inquiry by a question of its own jurisdiction. The general course of appeal from an order or judgment of a justice is, in the first instance, to the county or corporation court of the county or corporation in which the order is made or judgment rendered (even in cases which may be ultimately carried to the court of last resort), except, only, that in a case involving the constitutionality or validity of an ordinance or by-law of a corporation the appeal is cognizable by the circuit court having jurisdiction over such county or corporation. Code Va. § 2956.

It is the duty of a justice from whose judgment an appeal is allowed to make an entry of the fact upon his record, and to immediately deliver to the clerk of the court which has cognizance of the appeal the original warrant, with the judgment and name of the surety indorsed thereon, together with all exhibits before him shown at the trial. Acts 1893-94, p. 486. For form of entry of appeal, see Mayo's Guide, p. 677.

The obligation rests upon a litigant who claims a right of appeal from the judgment of a justice to a circuit court, to make it appear that the case comes within the exception of the statute regulating the general course of appeals; that is to say, that it involves the constitutionality or validity of an ordinance or by-law of a corporation. If it does, the appeal lies directly to the circuit court, and not through the medium of the county court, as in other cases. These jurisdictional facts must be made to appear before the justice, in order that he may determine the court to which the appeal is to be certified, and to what clerk he must deliver the warrant and other papers, as required by statute.

In the cases under consideration this course was not pursued, but in the one instance the defendant, and in the other the company, appealed to the county court, and, as observed, after the cases were received and docketed in that court, the company sought to remove them to the circuit court upon the theory that they ought to have gone there in the first instance.

There is no authority for that practice in this state. If the county court had no jurisdiction of the cases,—as plaintiff in error insists,—it had no power to order their removal to the circuit court. Indeed, the only orders that it could lawfully make in such case would be either an order of dismissal for want of jurisdiction, or an order remanding the case to the justice for such further action therein, by way of certifying the appeal to the circuit court, as might be proper. But if, on the other hand, the county court had jurisdiction, the cases could only be removed to the circuit court upon notice, and for cause. Code Va. § 8315.

Where the jurisdiction of the circuit court is invoked under the exception contained in section 2956 of the Code, it is, as remarked, not a case for removal at all, but for original appeal from the order or judgment of the justice to that court.

The ground of appeal originally relied on by appellant was, under section 2956 of the Code, that the constitutionality or validity of an ordinance or by-law of a corporation was involved. In its petition for an appeal it also invokes the jurisdiction of this court under that provision of section 2, art. 6, of the constitution, which allows an appeal in cases where the matter in controversy concerns the right of a corporation or county to levy tolls or taxes. The general rule is that a party seeking an appeal must establish the jurisdiction of the court whose revisory powers are invoked. *Harman v. City of Lynchburg*, 33 Grat. 37; *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 Am. St. Rep. 705.

It appearing that the primary object of this litigation is to enforce the collection of money demands for amounts below the jurisdiction of this court, the onus rests upon the appellant to show some other ground of jurisdiction. That it seeks to accomplish by means of the affidavit referred to. If the affidavit can be regarded as part of the record for any purpose, it not having been incorporated into it by bill of exceptions or otherwise, it is insufficient to establish the jurisdictional facts relied on.

The conclusion of affiant that a denial of the company's right to collect the particular tolls in question necessarily involves the constitutionality or validity of one of its ordinances or by-laws, or its right to levy tolls, by no means follows.

From anything that appears to the contrary, the company's right to collect tolls for light travel in the particular case may have

been denied upon entirely different grounds; e. g., that the tolls were not due, that they had been paid, or for other like cause.

At all events, it is incumbent upon a party who seeks the jurisdiction of this court to show the existence of the jurisdictional facts relied on, and that the matter in controversy is directly, and not merely incidentally or collaterally, involved. *Cook v. Daugherty*, 99 Va. 590, 39 S. E. 223, and cases cited; *Miller v. Navigation Co.*, 82 W. Va. 46, 9 S. E. 57.

But in addition to the foregoing considerations, the orders complained of are not such final orders as this court could review on appeal in a proper case.

In *Cowan* against *Doddridge* the circuit court of Pulaski county, being of opinion that it had no jurisdiction to try the cause, directed that it be dismissed, and stricken from the docket. An appeal and supersedeas was allowed to that order, but at the hearing was dismissed as having been improvidently awarded. Afterwards, on application of appellant, a peremptory mandamus was issued by this court commanding the judge of the circuit court to hear and finally dispose of the cause. *Cowan v. Fulton*, 23 Grat. 579. And a similar course was pursued, on like facts in the case of *Kent v. Dickinson*, 25 Grat. 817.

In the case of *Railroad Co. v. Johnson*, 99 Va. 282, 38 S. E. 195, an appeal was taken by the county court of Henrico appointing commissioners to ascertain what would be just compensation to the owner for the land proposed to be taken for a highway. The circuit court of Henrico overruled a motion to dismiss the appeal as improvidently awarded, but remanded the case to the county court for further proceedings. Upon an appeal from that order this court held that the order of the circuit court was tantamount to a dismissal of the appeal, and, being of opinion that there had been no final order in the case, dismissed the appeal as improvidently awarded. *Railroad Co. v. Johnson*, 99 Va. 282, 38 S. E. 195.

These authorities are controlling in that aspect of the cases under consideration. The orders sought to be reviewed are not final orders, and the appeals in both cases must be dismissed, as having been improvidently awarded.

(100 Va. 675)

GORDON v. FUNKHOUSER.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

WITNESS—IMPEACHMENT—COMPETENCY— PARTNERSHIP—EVIDENCE.

1. Under Acts 1889-1900, pp. 124, 125, where a party having an adverse interest is examined, the party examining has a right to contradict him by other evidence, providing he first mentions to the witness the circumstances, so as to designate the particular occasion on which an alleged contradictory statement was made.

2. Where there was evidence tending to show a partnership, an alleged member of the firm

could be asked whether a letter head in question, stating the names of the individual members of the firm, was the letter head used by the firm of which he was charged with being a member.

3. Under Code, §§ 3345, 3346, a party is not disqualified from testifying by reason of interest.

4. In an action to charge defendant as a member of a firm which had executed a bond as surety, an instruction that, if defendant solicited the other alleged partner to become surety, and held himself out at the time as a member of the firm, it is a fact to be considered by the jury as tending to show that he was such a member when he denies such membership in an action on the bond, is proper.

5. In an action against a firm as a surety on a bond, before plaintiffs can recover, they must show not only that one of the parties denying such partnership was a member of the firm when the bond was executed, but also that the bond was executed by the other alleged partner under authority under seal from the defendant denying the partnership.

Error to circuit court, Rockingham county.

Action by Elizabeth A. Funkhouser against W. A. Gordon. Judgment for plaintiff, and W. A. Gordon brings error. Reversed.

O. B. Roller & Martz and Winfield Liggett, for plaintiff in error. Sipe & Harris, for defendant in error.

CARDWELL, J. Elizabeth T. Funkhouser, by notice under the statute, brought her action in the circuit court of Rockingham county against W. K. Sites and W. A. Gordon for \$500, with interest thereon from December 2, 1897; that being the amount she claimed to be entitled to recover on a bond executed to her on December 2, 1895, due one day after date, credited by interest paid to December 2, 1897, on which bond W. P. Sites (then deceased) was surety. The bond, which on the trial was introduced in evidence, and conformed to the copy attached to plaintiff's notice of motion, is signed: "W. K. Sites & Gordon. [Seal.]" "W. P. Sites. [Seal.]"

To this action W. A. Gordon (spoken of in this record as Dr. W. A. Gordon) filed his plea of non est factum, and also his plea under oath denying that he was a member of any such firm or partnership as W. K. Sites & Gordon, or that he ever signed or authorized any one else to sign the bond sued on, or ever ratified the execution of said bond.

Upon the trial the jury found for the plaintiff on both issues, whereupon the defendant, Dr. Gordon, moved the court to set aside the verdict on the ground that it was contrary to the law and the evidence, which motion was overruled, and judgment rendered on the verdict. This judgment, upon a writ of error awarded Dr. Gordon, is before us for review.

In the progress of the trial the plaintiff propounded the question to A. J. Johnson, a witness introduced in her behalf: "Did you tell Squire H. B. C. Gentry, on or about the 8th day of February, 1900, last year, that Dr.

W. A. Gordon was the original member of the firm with W. K. Sites?" To the propounding of which question the defendant, Dr. Gordon, objected. The objection was overruled, and this is assigned as error.

While it had not been shown that the witness had an adverse interest to the plaintiff, it did appear that he was adverse, and the plaintiff had the right under the statute (Acts 1890-1900, pp. 124, 125) to contradict him by other evidence, provided he first mentioned to the witness the circumstances of the supposed contradictory statement sufficiently to designate the particular occasion, and asked him whether or not he had made such statement. This statute, providing how a party having adverse interest or an adverse witness may be examined, simply applies the old and well-established rule of practice governing the introduction of proof of contrary statements. Under that rule it is generally necessary, in the case of verbal statements, first to ask the witness as to the time, place, and person involved in the supposed contradiction. 1 Greenl. Ev. § 462.

The question propounded to the witness Johnson in this case mentioned to him the time and person involved in the supposed contradiction, and only omits the place; and, while it would have been better practice to have mentioned the place also, still, as the witness answered emphatically that he never made such a statement to Squire Gentry, it is impossible that the omission to do so could have been prejudicial to the defendant, Dr. Gordon. Therefore, this assignment of error is without merit.

In the course of the examination of Dr. Gordon as a witness in his own behalf he was asked, "Is that the letter head of the old firm of Sites & Gordon?" (handing witness the letter head), and the witness answered, "Yes, sir;" to which question the plaintiff objected, because the paper itself did not indicate the time the paper was used, and also on the ground that the answer to the question was a declaration of the witness, himself the interested party; which objections were sustained, and this is assigned as error.

There was evidence tending to show that there was a partnership conducted under the style and firm name of Sites & Gordon, composed of W. K. Sites and A. Hays Gordon, at the time the bond sued on was executed by W. K. Sites, and that the firm of which Dr. Gordon is alleged to have been a member was not formed until three years thereafter. The letter head in question is in the form of letter heads generally used in the mercantile business, stating the names of the individual members of the partnership, the place at which the business of the firm is conducted, and leaving the date at which the letter head is used blank. Upon this letter head appeared the names of W. K. Sites and A. Hays Gordon as the members of the firm, and it was clearly the right of the witness to state, in answer to the question, that

it was the letter head used by that firm. That he was a party interested in the result of the suit did not disqualify him to state the fact sought to be elicited by the question. The obligee in the bond sued on is the plaintiff in the action, competent to testify on her own behalf. Therefore the defendant, Dr. Gordon, was also a competent witness, and an objection to his competency, had it been made, could not have been sustained. Sections 3345, 3346, of the Code.

The remaining assignments of error to be considered relate to the refusal of a certain instruction asked by the defendant and the giving of another in lieu thereof, and may be considered together. The instructions asked and refused are as follows:

"(1) That, before the plaintiff can recover in this action against Dr. W. A. Gordon, they must believe from the evidence that Dr. W. A. Gordon was a partner of the firm of Sites & Gordon on the 2d day of December, 1895, when the bond sued on was executed, and the burden of proving that fact is upon the plaintiff.

"(2) The jury is further instructed that, before the plaintiff can recover in this action against Dr. W. A. Gordon, they must believe from the evidence that Dr. W. A. Gordon was not only a partner of the firm of Sites & Gordon on the 2d day of December, 1895, when the bond sued on was executed, but also that the same was executed by Sites under authority under seal from Dr. W. A. Gordon, and the burden of proving that fact is upon the plaintiff."

In lieu of these instructions the court gave the first, with the modification: "But if the jury believe from the evidence that W. A. Gordon solicited W. P. Sites to become surety on the bond of \$500 sued on in this case, and at the time held himself out as a member of the firm, it is a fact for them to consider in connection with the case tending to show he was a member of the firm, but the jury must take into consideration all the evidence in the case."

We see nothing improper in this modification of the first instruction, but the effect of refusing the second instruction asked for by the defendant, Dr. Gordon, and the giving of the first with its modification, was well calculated to mislead the jury in finding a verdict against him merely on the ground that the evidence tended to show that he was a member of the firm of Sites & Gordon at the time the bond sued on was executed.

It is not pretended that the defendant, Dr. Gordon, gave prior authority, under seal, to W. K. Sites, to execute the bond, or that he thereafter ratified the act. Therefore Dr. Gordon may have been a member of the firm of Sites & Gordon when the bond was executed, and yet no recovery could be had against him thereon, unless all distinctions between sealed and unsealed instruments are abolished in Virginia, and a contract by one partner under seal is as valid and binding on

the other partner as though the instrument was not under seal.

One partner is bound in all undertakings entered into by the other partner within the scope of the business engaged in, upon the principle that each partner is the agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character of both principal and agent. Story, Partn. (8th Ed.) p. 3.

"One partner may bind his fellows, whether they may be active, nominal, or dormant, * * * by any simple (that is, unsealed) contract touching the business of the firm, but, in general, not by deed, unless he have express authority by deed for that purpose, or unless the other partners be present at the act, and thereto authorize him; and that notwithstanding the contract of partnership be under seal, if it do not contain a specific power to bind the firm by promise under seal; nor does it avail to bind them that the others afterwards acknowledge his authority, and verbally ratify the act. But whilst, by such a contract under seal, his associates may not be bound, the partner who executes it always is." 3 Minor, Inst. pt. 2, 710, and authorities cited.

Continuing, that learned commentator says: "But although, in a court of law, the bond in the name of one partner or in the partnership name, executed by one partner, without due authority, for a simple contract debt of the firm, merges the simple contract debt, yet, unless the creditor agreed to accept such bond in discharge of the partnership (a supposition which the execution of the bond in the firm name would tend to repel), if the obligor therein became insolvent, a court of equity, disregarding the legal merger of the original simple contract, will charge the demand upon the firm, and through it upon the other partners." Among the authorities cited in support of this text are *Sale v. Dishman's Ex'rs*, 3 Leigh, 548, *Galt's Ex'rs v. Calland's Ex'r*, 7 Leigh, 594, and *Weaver v. Tapscott*, 9 Leigh, 424. In all of these cases the partner who neither executed the bond or covenant nor authorized its execution, or thereafter ratified it as binding upon him, was held liable in equity for the debt sought to be recovered, upon the ground that it was a pre-existing demand against the firm, binding upon each of the partners. In other words, the court in each of those cases held that, although at law there would be no remedy on the sealed obligation, except against the partner who executed it, a court of equity has jurisdiction to hold all the partners as much bound as if there were no seal, if there was a pre-existing liability resting on the firm for the debt for which the sealed obligation was given. So in the more recent case of *Jordan v. Miller*, 75 Va. 442, cited by defendant in error, which was a suit in equity for the settlement of the transac-

tions of the firm of Brown, Miller & Jordan, it was held that, though one or more of the partners gave their bond to a party with whom they had made a contract, which, under their general authority as partners, they were authorized to make, the debt was still a partnership debt, and binding on the partner who did not join in making the contract or in giving the bond. Likewise, in *McCullough v. Summerville*, 8 Leigh, 415, also cited by defendant in error, it was held that, though one partner cannot, in general, bind his copartner by deed, so as to make it operative as a deed, yet an assignment by one partner of the effects of the firm, which would be lawful if there were no seal, will not be allowed in equity to be defeated by the circumstance of a seal being annexed to the instrument. That is not, however, the question we are dealing with, nor are we dealing with the kindred questions decided in *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797, and *McDonald v. Eggleston*, 60 Am. Dec. 306, relied on by defendant in error.

In *Hare & Wallace's* note to the case of *Livingston v. Roosevelt*, 1 Am. Lead. Cas. 554, 555, after illustrating the distinction between the implied authority of one partner, as general agent of the partnership, to bind the firm by a sealed instrument, applying only where the firm is sought to be charged, and when the object is to discharge a debt due to it, as where a seal is not essential to the nature of the contract, or where an act is done which one partner may do without deed, such as a sale or assignment, where the property may be transferred by delivery, etc., it is said: "The rule has also been applied to executory contracts; and though, perhaps, such an application of it may be allowable in certain cases where the action is brought upon something collateral or consequential to the deed, as in *Lawrence v. Taylor*, 5 Hill, 108, 113, it is not seen how it can possibly be applicable to a case where an action is brought upon the deed or contract itself, on a right having no legal existence but by the operation of the deed. The doctrine above mentioned could not, in an action on the deed on a plea of non est factum, extend to make the deed of one partner the deed of the other; nor could it so set aside the deed as to leave in force any antecedent parol contract, express or implied; and this seems to be admitted in *Anderson v. Thompson*, Fed. Cas. No. 365, 1 Brock. 456, and *Montgomery v. Boone*, 2 B. Mon. 244."

In this case, although it is an action upon notice under the statute, where the notice takes the place of both the writ and declaration in an ordinary suit at law, it is nevertheless an action at law, wherein recovery against plaintiff in error, Dr. Gordon, can be had, if at all, only by reason of his being bound by the bond sued on as a partner in the firm styled "W. K. Sites & Gordon," or "Sites & Gordon," unless, as we have said, all distinctions between sealed and

unsealed instruments have been abolished in this jurisdiction, and a contract by one partner under seal is as valid and binding upon his copartner as if it were but a simple contract touching the business of the firm.

While the principle that authority to execute a sealed instrument does not grow out of the mere relation of partnership is nowhere questioned, it is true, as often stated by law writers and in the decided cases, that a strong disposition has been evinced in a number of American cases to contest the doctrine that it requires a prior authority or a subsequent ratification under seal to make the execution of a sealed instrument by one partner valid and binding upon the other partner, notwithstanding the doctrine is established and maintained in its most rigorous extent by the whole current of decisions in England; but, as said by Mr. Minor in concluding his discussion of the subject (3 Minor, Inst. supra, 711): "In Virginia * * * and in several other states the common-law doctrine is adhered to in all its fullness and rigor, as appears from the cases cited in the last paragraph, to which may be added *Preston v. Hull*, 23 Grat. 616, 617, 14 Am. Rep. 153; *Penn v. Hamlett*, 27 Grat. 342."

The cases referred to as cited in the preceding paragraph include the Virginia cases to which we have already referred, and in each of them it was distinctly recognized as a settled rule of law that there could be no remedy in a court of law upon a sealed instrument except against the person executing it, unless he had express authority under seal for that purpose, or the other person be present at the act, and thereto authorized him, or they thereafter ratified the act by writing under seal.

In *Preston v. Hull*, supra, it was held to be settled law that a bond in which the name of the obligee was blank when it was signed by the obligors was not their deed, and that no authority by parol to fill the blank could make it valid. In the elaborate opinion in that case by Staples, J., the question whether or not the distinctions between sealed and unsealed instruments have all been destroyed is discussed. The opinion says: "The common-law rule that the authority of an agent must be commensurate with the act he performs cannot be departed from consistently with the preservation of any rule at all, for, if a departure from the rule in one particular should be permitted, we shall be carried on step by step, if we mean to be consistent, until we have destroyed all the well-settled distinctions between sealed and unsealed instruments."

It was argued in that case, as in this, that no good purpose is to be subserved by these distinctions, but the argument was answered by Staples, J.: "It is sufficient to say that they exist, having their origin in well-established principles. In the language of Chief Justice Marshall, they have taken such firm

hold of the law they can only be removed by the power of legislation."

The common-law principles thus referred to by Staples, J., apply as well to the case we have under consideration as to the case he was then discussing, for the reason that a partner is but an agent of the partnership, and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent.

In answer to the argument that the solemnity attaching to a sealed instrument no longer exists; that under the business conditions of this day no difference in fact exists between a sealed and an unsealed instrument; and that the former decisions of this court to the contrary should be overruled,—we cannot do better than to add to the quotation from *Preston v. Hull*, supra, what was so well said by Lee, J., in answering a similar argument in *Stinchcomb v. Marsh*, 15 Grat. 211, namely: "That a spirit of self-reliance and directness of purpose, as suggested by counsel in argument, will prompt the people of this age and country to disregard the formalities of conveyancing and the rules of law by which they are described, can constitute no sufficient reason nor furnish any adequate authority to the court to change the law or overthrow plain, intelligible, and well-settled legal principles. That is the province of the legislature, not of the judiciary. For the latter to undertake to mold the law so as to be adapted to the loose and careless modes of conducting business transactions which are said to prevail, would be but to inaugurate uncertainty and confusion in the administration of justice, and lead to evils which, though not at once foreseen and appreciated, might prove far greater and more to be deplored than the hardship which may occur in individual cases from an adherence to the settled rules of law, but which at last must be traced to the parties' own improvidence and want of reasonable care and precaution."

In view of the fact that the decision in the case of *Preston v. Hull*, supra, approved in *Penn v. Hamlett*, supra, and which contains the latest discussion by this court of this subject, has stood unchallenged for nearly 30 years, and the legislature, in its wisdom, not having seen fit to remove the distinctions between sealed and unsealed instruments, even as to partnership obligations, we would be unwarranted in not adhering to the principles said in that case to have taken such firm hold of the law they can only be removed by the power of the legislature.

It follows, therefore, that we are of opinion that the second instruction asked for by Dr. Gordon, the defendant (the plaintiff in error here), rightly propounded the law applicable to this case, and should also have been given.

As the judgment of the circuit court, for the reasons stated, has to be reversed and

annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with the views herein expressed, we prefer to go no farther in reviewing the evidence than has been necessary in disposing of the assignments of error relating to the rulings of the circuit court in the progress of the last trial.

(100 Va. 666)

JESSER et al. v. ARMENTROUT'S EX'R.
(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

DECREE PRO CONFESSO—APPEAL—REVIEW—HUSBAND AND WIFE—TRUSTS—EVIDENCE.

1. Where no issue was made to a bill by demurrer, plea, or answer, and witnesses were examined on behalf of plaintiff, and cross-examined by defendant, he may show on appeal that the pleadings and proof are insufficient to warrant the decree.

2. Where a husband, prior to the married woman's act of 1876-77, purchased land with money which his wife had derived from her father's estate, the presumption is that the money, when received by him, was his by virtue of his marital rights.

3. Where, prior to the married woman's act, a husband bought land with his wife's money, taking the title in his own name, no trust resulted to the wife.

4. Statements by husband, after purchase of land, that it was the property of his wife, and paid for with her money, and evidence that from the way the husband spoke of it the witness thought the land was the property of the wife, were insufficient to create a trust by parol in favor of wife.

Appeal from circuit court, Augusta county.

Action by O. S. Strole and others against ArmentROUT's executor. From the decree rendered, defendant appeals. Reversed.

A. C. Braxton, for appellant. Patrick & Gordon, for appellees.

KEITH, P. O. S. Strole and others, claiming as devisees under the will of Rebecca ArmentROUT, filed their bill in the circuit court of Augusta county, in which they allege that Jacob H. ArmentROUT purchased of Emanuel Miller a farm containing 25 acres, which was conveyed to him by deed of October 10, 1868; that Rebecca F. ArmentROUT, wife of Jacob, lived and died in the belief that this property stood in her name, and was hers absolutely; that it was bought with her money, derived from her father's estate; and that her right to control and dispose of it absolutely was never denied by her husband; and that, although standing in his name, it was the property of his wife, Rebecca, and passed to the plaintiffs under her will, as though the deed had been taken in her name. They pray that it may be decreed to belong to her, and for general relief.

This bill was taken for confessed as to all the defendants, and a decree was entered directing the master commissioner to report the real estate in Augusta county standing in the name of Jacob H. ArmentROUT and the interest

of his widow in said estate. The commissioner reported that there was a resulting trust in favor of Rebecca F. ArmentROUT in the 25 acres conveyed to her husband by deed from Emanuel Miller on the 10th of October, 1868. This report was confirmed by decree of the circuit court, and that decree is now before us for review.

Appellees contend at the outset that appellant has no standing in court, because "a defendant to a bill in chancery is not to be heard unless he sets up a defense by making an issue. While the conscience of the chancellor must be satisfied as to the truth of the allegations of the bill through testimony adduced by the complainant, when that is done the rights of the defendant are at an end upon a final decree."

It is true, there was no issue made in this case by demurrer, plea, or answer; but the averments of the bill do not warrant, and the court did not render, a decree in favor of appellees upon the bill as taken for confessed. Witnesses were examined on behalf of plaintiffs and cross-examined by defendant, and the report of the commissioner, when returned to the court, was excepted to by the defendant, so that the proceedings before us were not as upon a bill taken for confessed.

Not having demurred, pleaded, or answered, appellant's contention is presented to us in its least favorable aspect, for it stands upon the case made by plaintiffs in their pleadings and proof; but appellant is not thereby precluded from showing that those pleadings and proof are insufficient to warrant the decree rendered.

"If the bill stood wholly confessed, the plaintiff would not be entitled to a decree as of course according to its prayer, but only to such decree as would be proper upon the statements of the bill assumed to be true." *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105.

The bill in this case on its face shows that the money which Jacob H. ArmentROUT paid Emanuel Miller, and for which he received a deed on October 10, 1868, was derived by him from his wife's father's estate. It is not averred that it was her equitable separate estate, and, as the transaction was long prior to the creation of statutory separate estates, the legislation in that direction first appearing in the Acts of 1876-77, the presumption is that the money, when received by him, was his by virtue of his marital rights. It is not averred that there was any agreement, promise, or understanding which in any degree diminished his interest in, or impressed any trust or duty upon, it with respect to its investment by him. The fact seems to be to the contrary of any such hypothesis. It appears from the bill that he received the money from her father; that with it he purchased the land, and caused a deed for it to be made to himself. That she lived and died in the belief that it stood in her name, and that her right

to control and dispose of it was not controverted by her husband, are immaterial to the issue.

If the bill were sufficient, the evidence is wholly inadequate to establish either an express parol trust or a resulting trust. The testimony upon the subject is, in substance, embraced in a question and answer which appear in the deposition of Rev. Samuel Driver:

"Q. Please state whether or not, on other occasions preceding his last illness, Mr. Armentrout told you that this was his wife's property, and bought with her money?

"A. Yes, he spoke to me several times. I might say, half a dozen times; perhaps several times. He told me that that was her property, and paid for with her money. The general business was done through her."

Other witnesses, it is true, state the same thing in varying forms, but, as the appellant filed no plea or answer, and took no evidence in his own behalf, one witness on behalf of plaintiffs is as good as a multitude if he deposes to facts which prove the case. The facts and circumstances shown in evidence by the appellees are none of them coincident with the transaction by which the title to the land in controversy was acquired. They refer to statements and declarations made long after, which are entirely consistent with the record title. That the money paid was derived from the wife's father, and was her money until received by the husband, is true, and, in a popular sense, a husband would naturally speak of it, even after the event, as the wife's money; but we know that, as the law then stood, money received by the husband without any undertaking with respect to it upon his part became his to all intents, and that property purchased with it was his, and there was no trust resulting to the wife with respect to it. The self-servient declarations of Mrs. Armentrout, whether contained in her will or made during her lifetime, are of no effect. The propositions we have stated are abundantly sustained by authority.

"Previous to the married woman's act of April 4, 1877, where a woman having money not settled to her separate use marries, and the husband purchases with it real estate, and takes the conveyance in his own name, no trust results in the wife's favor." *Hannon v. Hounihan*, 85 Va. 429, 435, 12 S. E. 157; *Grayson v. George*, 85 Va. 908, 9 S. E. 13.

"If a husband receives and applies the funds, whether money, goods, or chattels, or collect choses in action, with the wife's privity and consent, and without an agreement or promise to repay or restore it, no legal obligation rests on the husband to restore it, no right of action accrues to her, and to that extent her rights are extinct."

Throckmorton v. Throckmorton, 91 Va. 46, 47, 22 S. E. 162.

The general doctrine of resulting trusts is well stated in *Pom. Eq. Jur.* § 1037, as follows:

"In pursuance of the ancient equitable principle that the beneficial estate follows the consideration, and attaches to the party from whom it comes, the doctrine is settled in England and a great majority of the American states that, where property is purchased, and conveyance of the legal title is taken in the name of one person, A., while the purchase price is paid by another person, B., a trust results at once in the favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. In order that this effect may be produced, however, it is absolutely indispensable that the payment shall be actually made by the beneficiary, or that an absolute obligation should be incurred by him, as a part of the original transaction of purchase, at or before the time of the conveyance. No subsequent or entirely independent conduct, intervention, or payment on his part would raise any resulting trust."

We are of opinion that the pleadings and proof do not establish an implied trust in favor of Mrs. Rebecca Armentrout.

It is not necessary, we think, to discuss the controverted question as to whether a trust in lands may be created by a parol declaration. We prefer to leave that question where it was placed by Judge Moncure in *Sprinkle v. Hayworth*, 26 Grat. 384, and by Burks, J., in *Borst v. Nalle*, 28 Grat. 423. If a trust could be created by parol, the declaration should be unequivocal and explicit, and established by clear and convincing testimony. As we have said, the strongest statement in the evidence is that made by the Rev. Mr. Driver, who said, "He told me that that was her property and paid for with her money."

Another witness says: "He told me it came by his wife,—this money. That he had lost his money that he had formerly had in purchasing land in the West, and he had lost some money by his brother George. He spoke as though it was a great thing his wife had this money to fall back on. I never knew of anything at the time how this deed was made. From the way he talked about it to me, I thought it was made to his wife, and from the way he talked about it I thought it was his wife's property."

Granting that a trust may be created by parol, to establish such a trust upon such declarations would be productive of great mischief.

We are of opinion that the decree of the circuit court should be reversed, and the bill dismissed, with costs to the appellant.

(100 Va. 649)

HOWBERT et al. v. CAWTHORN.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

DEED—CONSTRUCTION—CONTINGENT REMAINDER—SALE ON EXECUTION.

1. A grantor conveyed certain land on trust for the use of his wife, with remainder in fee simple to his children living at the death of said wife, and the descendants of such as might be dead, and if there were no children, nor descendants of any such, living at the death of the wife, then to a certain person named. *Held*, that the remainderman who would take after the termination of the life estate could not be ascertained until the death of the life tenant, and therefore a child had no interest during the lifetime of the mother, but only a contingent remainder.

2. A contingent remainder cannot be sold for the benefit of the creditors of a possible remainderman.

Appeal from circuit court, Bedford county.

Suit by Ella Cawthorn against Mary E. Howbert and others. Judgment for plaintiff, and defendants appeal. Reversed.

Beasley & Moon and Wm. Eubank, for appellants. Graham Clayton, for appellee.

HARRISON, J. This attachment proceeding in equity was instituted by the appellee against the appellant Mary E. Howbert, formerly Mary E. Thomas, a nonresident, alleging that appellant was entitled to an estate in remainder in certain real estate, and asking that the same might be subjected to the payment of a debt evidenced by bond executed by appellant to G. T. Cawthorn, and by him assigned to the appellee.

It appears that by deed of July 9, 1862, John F. Sale and wife conveyed to John Frederick Thomas, the father of appellant, certain real estate in Bedford City, upon trust, for the use of his wife, Lucy Ann Thomas, for life, with remainder "in fee simple to the children of the said John Frederick Thomas and the said Lucy Ann Thomas as living at the death of the said Lucy Ann Thomas, and the descendants of such as may be dead, in equal shares by stocks; and if there be no such child or children, nor descendants of any such, living at the death of the said Lucy Ann, then the said John Frederick Thomas, if living, shall stand seised of said lot or parcel of land * * * in fee simple to his own use; and, if dead, the same shall vest in fee simple to the heirs at law of the said John Frederick Thomas."

John Frederick Thomas died, leaving surviving him his wife, Lucy Ann Thomas, the life tenant, and two children, who were born to John Frederick Thomas and Lucy Ann prior to the execution of the deed of July 9, 1862, namely Mary E. Howbert, the appellant, and her brother J. Walker Thomas, all three of whom are still living.

A demurrer was filed to the bill by the appellant, which raises the sole question presented for decision by this appeal,—whether or not Mary E. Howbert owns an

interest under the deed that can be subjected to the payment of her debts. The circuit court overruled the demurrer, holding that appellant was entitled to a vested remainder in one moiety of the real estate mentioned, and decreed a sale of the interest thus established to satisfy the debts that had been reported. This action of the lower court is assigned as error, it being contended on behalf of appellant that her interest in the land is not a vested remainder, but a contingent remainder, that cannot be subjected to sale.

It is true that the law prefers vested to contingent remainders, and this preference may lawfully and properly influence the mind in cases of doubtful construction; but it can never justify the courts in making a deed or will, or in straining the language used in order to make the estate created a vested, rather than a contingent, remainder. *Olney v. Hull*, 21 Pick. 311; *Vashon's Ex'r v. Vashon*, 98 Va. 170, 35 S. E. 457. In obedience to this disposition in favor of vested remainders, this court has held, where the question involved was the period to which words of survivorship related, that, in the absence of the expression of a particular intent, the survivorship has relation to the death of the testator. *Martin v. Kirby*, 11 Gratt. 67. And in *Hansford v. Elliott*, 9 Leigh, 79, Judge Parker, in determining whether the words "surviving children" should be taken to refer to the period of the testator's death, or to the death of his widow, the tenant for life, says: "If to the former, the interest vested in all of the testator's children living at his death, and passed to their representatives; the time of distribution being alone postponed; if to the latter, then Elizabeth and Peter Manson, who alone survived the life tenant, were entitled to the whole property."

In the case at bar the language of the grantor is perfectly clear, leaving no room for question or doubt as to its meaning and purpose. After carving out the life estate in favor of Lucy Ann Thomas, the remainder is given to the children "living at the death of the said Lucy Ann Thomas"; and if there be no such child or children, nor the descendants of any such, "living at the death of the said Lucy Ann," then over. This language is too plain for construction. In express terms, the period of survivorship is fixed at the death of Lucy Ann Thomas, the life tenant. It is manifest that the remaindermen, who are to take after the termination of the life estate, cannot be known or ascertained until the life tenant is dead, for it is not given to man to know who will survive a future event, itself, in point of time, the most uncertain of all events. It is therefore clear that appellant has no interest under the deed in question during the lifetime of her mother, Lucy Ann, but a contingent remainder. Her interest is dependent upon the condition precedent that she survive the life tenant. She may, therefore, never have

an interest in the subject, for, if the life tenant should survive her, the estate would pass to others, whose identity cannot be now known or determined.

The only way in which the remainder in favor of appellant could be considered vested would be by construing the words of survivorship ("living at the death," etc.) as creating a condition subsequent, instead of precedent; this latter being plainly the nature of the condition in the case at bar, both on principle and authority. Very often a remainder will be construed to be a vested estate upon a condition subsequent, liable to be divested by the happening of the contingency, rather than declare it to be a contingent remainder, as it would be if the condition were precedent. Graves, Real Prop. p. 194, note.

Prof. Graves, in his work on Real Property, after pointing out that in considering a remainder we must assume that it still exists as a remainder, and judge of its character as vested or contingent under the facts as they are at the moment the question arises, gives the following very clear and satisfactory definition of a vested remainder: "A remainder is vested when it is subject to no condition precedent, and is always ready, during its continuance, to come into the possession of a certain person, already existing and ascertained, on the determination of the particular estate, now or hereafter, in any manner whatsoever." And he adds that "any remainder not so ready is contingent." In a note to this definition, the learned author says: "It will be observed that the definition requires that the remainderman, at the time the question arises, should already be in existence and ascertained; and it is not enough, in order to consider the remainder now vested, that he will become ascertained at the moment the particular estate ends, and the possession becomes vacant. Thus there are cases where the same event that ends the particular estate ascertains the remainderman; and, whenever the possession becomes vacant, there will then be a certain person ready to take possession, as in the limitation to A. for the life of B., remainder to the heirs of B., or to A. and B. for life, remainder to the survivor and his heirs. Here the remainder will vest and come into possession so instant on the death of B. in the one case, or the survivorship of A. or B. in the other, but meanwhile it remains contingent, because as yet there is no 'determinate person' in whom 'the estate is invariably fixed.' *Nemo est hæres viventis*, and who can now tell whether A. or B. will be the survivor? A test suggested by Prof. J. Randolph Tucker will clearly show that these remainders are contingent, viz.: Is the remainderman a person to whom you could give livery of seisin now, if his estate were present and not future? How could livery be made to the heirs of B. while B. is living, or to the survivor of A. and B. while both are alive? * * * For the reasons above stated, Fearne's test of a vested remainder, viz., 'the

present capacity of taking effect in possession, if the possession were to become vacant,' is open to exception in omitting to add, after 'taking effect in possession,' the words 'of an already existing and ascertained person'; but the whole tenor of his discussion of remainders shows that this was intended." Graves, Real Prop. pp. 190-194.

In 20 Am. & Eng. Enc. Law (1st Ed.) p. 841, we find the following very clear statement of the law bearing upon this question: "The fact that the remainder, from the very instant of its creation, is capable of taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the determination of the particular estate, does not, as is frequently asserted, necessarily show that it is vested; nor yet is it quite accurate to say that 'when it is certain the remainder may take effect in possession, on the determination of the preceding estates of freehold, at whatever time and however early, and by whatever means, these estates may determine,' the remainder must be considered as vested. Thus if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for until one of them die it is uncertain which will be the survivor; or if land be limited to A. for life, remainder to 'such of his children as shall be living at his decease,' each child has but a contingent remainder during A.'s life, since until his death it is impossible to tell which of the children will answer the description, and yet, inasmuch as under both these limitations the person or persons who are to take are ascertained immediately on the determination of the particular estate, the remainders may well be said to be capable of taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the death of the life tenant, and may even be said to be certain to take effect on that event unless the remaindermen predecease the life tenant. A moment's consideration shows that the apparent anomaly arises from the fact that whether the remainders will ever take effect in possession really depends upon two contingencies: (1) Whether the remaindermen answer the description; (2) whether they survive the life tenant,—and that the first depends upon the second, and seems to be merged in it, whereas, in reality, until the life tenant dies, it always exists, and affects the remainders with a contingency irrespective of their own duration. It is therefore submitted that, in order that a remainder may vest in interest, not only must it be capable of taking effect in possession at any moment the possession may become vacant, but there must also be some certain and determinate person in esse and ascertained who answers the description of the remainderman at some time during the continuance of the particular estate, and not merely at its determination."

The law touching the nature of vested and contingent remainders is stated by Wash-

burne on Real Property as follows: "The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. By capacity, as thus applied, is not meant simply that there is a person in esse, interested in the estate, who has a natural capacity to take and hold the estate, but that there is further no intervening circumstance, in the nature of a precedent condition, which is to happen before such person can take. As, for instance, if the limitation be to A. for life, remainder to B., B. has a capacity to take this at any moment when A. may die. But if it had been to A. for life, remainder to B. after the death of J. S., and J. S. is still alive, B. can have no capacity to take till J. S. dies. When J. S. dies, if A. is still living, the remainder becomes vested, but not before."

The author, in further considering the fact that a remainder is contingent by reason of the person who is to take it not being ascertained, says: "Thus upon a devise to A. for life, remainder to the surviving children of J. S., it is obvious that, in terms, it is equivocal whether the surviving relates to the death of the testator, or to A. If to the latter, the remainder must be a contingent, since no one can tell who will be such survivors until the death of A. Whereas, if the term relate to the testator's death, and J. S. then have children, the remainder is a vested one, since there is then an ascertained person in esse capable of taking the estate in present at any moment." 2 Washb. Real Prop. (3d Ed.) § 1, pars. 17-18, top pages 507-510.

It will be observed that the learned author treats the remainder as contingent, without question, when the period of survivorship relates to the death of the life tenant. In such case, he says, "The remainder must be contingent, since no one can tell who will be such survivors, until the death of A." the life tenant.

In *Olney v. Hull*, 21 Pick. 311, a testator, after devising to his wife the use of his real estate while she remained his widow, proceeded as follows: "Should my wife marry or die, the land then shall be equally divided among my surviving sons, with each son paying sixty dollars to my daughters, to be equally divided among them, as soon as each son may come into possession of said land." It was held that the remainder given to the sons was contingent until the marriage or death of the widow of the testator, and that upon her death the estate vested in a son who was then living, to the exclusion of the heirs of another son who died before the widow, but after the death of the testator. See, also, *Blanchard v. Blanchard*, 1 Allen, 223; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *In re Ryder*, 11 Paige, 185, 42 Am. Dec. 109; *Stump v. Findlay*, 2 Rawle,

168, 19 Am. Dec. 682; *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 635; *Nicholson v. Cousar*, 50 S. C. 206, 27 S. E. 628; *Henderson's Ex'rs v. Peachy*, 3 Leigh, 68; *Baylor's Lessee v. Dejarnette*, 13 Grat. 152; *Wallace v. Minor*, 83 Va. 550, 10 S. E. 423; *Robinson v. Robinson*, 89 Va. 916, 14 S. E. 916; *McComb v. McComb*, 96 Va. 779, 32 S. E. 453.

The very earnest contention that the estate in question is a vested, and not a contingent, remainder, has induced a more extended citation of authority than would have otherwise been considered necessary. The conclusion reached might have been rested alone upon the recent decision of this court in *Vashon's Ex'x v. Vashon*, 98 Va. 170, 35 S. E. 457, which clearly rules the case at bar. In that case the deed, after creating a life estate in favor of George S. and Martha V. Vashon, disposes of the remainder in the following words: "But if upon the death of the said Martha V. Vashon the said George S. Vashon shall not be living, or if upon the death of the said George S. Vashon the said Martha V. Vashon shall not be living, then upon the further trust to sell the said property in such manner as may seem best to the said party of the second part, his heirs, assigns, or successors in the office of trustee, and to divide the proceeds of such sale among the issue of the body of the said George S. Vashon, the same taking per stirpes and not per capita, if such issue of his body there should be, and, if there should be no such issue then living, to pay over the same to the heirs at law of the said George S. Vashon."

George S. Vashon had a numerous family of children, some of whom died during his lifetime, unmarried and without issue. The contention was that the children of George S. Vashon, living at the date of the deed, took a vested remainder; but this court denied that claim, and held that said children took contingent remainders, which were defeated upon their death without issue during the life of George S. Vashon; that the interest of the children under the deed was dependent upon their being alive at the death of their father, who survived Martha V. Vashon,—a contingency which never happened,—and that therefore they had no estate which their father could inherit. Citing *Graves*, Real Prop. supra; *Price v. Hall*, L. R. 5 Eq. 399; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *McCraw v. Davenport*, 6 Port. 319; *Nash v. Nash*, 12 Allen, 345.

Inasmuch as Lucy Ann Thomas, the life tenant in the case at bar, is still living, and J. Walker Thomas, the brother of appellant, is still living, it follows, in the light of the foregoing authorities, that the appellant has a contingent remainder in one moiety of the land mentioned, subject to be defeated by her death in the lifetime of Lucy Ann Thomas, when the interest would pass under the deed to others.

The second branch of the case involves the

question whether or not such an unsubstantial and shadowy right as that held by the appellant can be subjected to sale for the benefit of her creditors. Such an interest is a pure contingency,—a bare possibility whether it will ever exist or not. During the life of Lucy Ann Thomas, such an interest hardly rises to the dignity of an estate. On the part of a purchaser at a judicial sale, it would be a perfect hazard, for it could not be known to any one whether the supposed interest, being sold, would ever be of any value. It would be a mere speculative transaction, and ruinous in its consequences, not only to the creditors, but to all parties interested. It has not been, that we are aware of, the practice to offer at public auction such an interest for the satisfaction of debts, nor do we think that such a practice should be established. See *Watson v. Dodd*, 68 N. C. 528; *Same v. Watson*, 56 N. C. 400; *Jackson v. Waldron*, 12 N. Y. Com. Law, 176; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642. In *Watson v. Dodd*, supra, it was held that the contingent interest of one of the devisees, expectant upon the death of the life tenant without issue, could not be subjected to the payment of his debts. In *Watson v. Watson*, supra, the court declared that, the land being limited by way of contingent remainder to persons not in esse, it had no power to order a sale for the purpose of converting it into more beneficial property. The principle involved is analogous to that decided in the recent case (not yet officially reported) of *Boisseau v. Bass' Adm'r* (Va.) 40 S. E. 647, where it was held that the interest of an assured in a policy on his life which has no present market value, but is dependent for its continued existence on voluntary payments to be made in the future by the assured, is not such an interest or estate as can be reached by *ieri facias*.

For these reasons, we are of opinion that the decree appealed from should be reversed, and a decree entered here sustaining the demurrer, and dismissing the bill filed by the appellee with costs.

(100 Va. 638)

FLOOK et al. v. ARMENTROUT'S ADMR et al.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

FRAUDULENT CONVEYANCES—INTENT OF GRANTEE—NOTICE TO GRANTEE—ACTIONS—LIMITATIONS—PLEADING.

1. A creditors' suit to set aside a conveyance brought under Code, § 2458, providing that every conveyance or transfer of any estate, given with intent to defraud creditors of or from what they are or may be lawfully entitled to, shall, as to such creditors, be void, etc., is not barred by the five-year statute of limitations prescribed by Code, § 2929.

2. A bill to set aside an alleged fraudulent

conveyance under Code, § 2458, declaring that a conveyance made with intent to defraud creditors shall be void, except as against purchasers for a valuable consideration and without notice, alleging that the conveyance was made without consideration, and with intent to hinder, delay, and defraud the grantor's creditors, contains an implied allegation of notice, and is therefore sufficient.

3. Where a debtor conveyed property, the taxable value of which was \$10,376, to certain of his children, subject to his wife's right of dower therein, for \$7,000, the consideration was not so inadequate as to shock the conscience, and render the conveyance void as to creditors, for inadequacy of consideration alone.

4. Facts held insufficient to establish notice to grantees of a debtor that the deed was made in pursuance of the debtor's intent to defraud his creditors.

Appeal from circuit court, Rockingham county.

Action by the administrator of Daniel Armentrout, deceased, against Elliza Flook and others, to set aside an alleged fraudulent conveyance. From a judgment in favor of plaintiff, certain defendants appeal. Reversed.

Ed. S. Conrad and Sipe & Harris, for appellants. John E. Roller, for appellee.

HARRISON, J. By deed dated December 6, 1877, Daniel Flook conveyed to his three daughters, Elliza Flook, Martha Flook, and Frances E. Yancey, all of his real and personal property, consisting of a farm in Rockingham county containing about 400 acres, and the personal property owned by the grantor, consisting of horses, cattle, hogs, farming implements, and household and kitchen furniture, subject to the contingent dower rights of his wife, in the real estate. This deed was acknowledged January 14, 1878, and recorded February 26, 1878. The consideration for the conveyance expressed on its face is \$2,000 cash in hand paid, being for services rendered by the grantees Elliza and Martha Flook since 1858, and \$5,000 to be paid in 12 equal annual payments, bearing even date with the deed, and bearing interest from their date, each for the sum of \$416.66%, secured by vendor's lien reserved on the face of the deed. It appears that on June 1, 1878, eight of these bonds were assigned by Daniel Flook to Henry Armentrout in settlement of an indebtedness amounting to \$3,686.64. It further appears that at the December term, 1878, of the county court of Rockingham, the remaining four bonds were pledged by Daniel Flook as indemnity to his securities in an official bond as executor. This pledge of these four bonds must have been subsequently released, it appearing from the answer of Daniel Flook's administrator (his intestate having died in 1882) that these were the only bonds that came into his hands. It further appears that in a creditors' suit instituted March 20, 1878, against Daniel Flook and others, judgments aggregating \$1,793.11, as of October, 1879, were audited. Of these, \$1,543.51 were against Daniel Flook as sur-

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 779.

ety. Whether these judgments were paid off by those primarily bound therefor, or how or when they were discharged, does not appear. It does, however, appear from a final order in the cause on the 4th of April, 1888, that they had been all satisfied, and the cause retired from the docket.

The record shows that in 1858 Daniel Flook qualified in the county court of Rockingham as committee of the person and estate of Daniel Armentrout, a person of unsound mind. On the 2d day of March, 1877, the commissioner of accounts for the county court of Rockingham filed a settlement of the accounts of Daniel Flook as such committee, covering the period from the 1st day of January, 1858, to the 1st day of January, 1876, showing a balance due from the committee of \$253.10. This balance, it appears, was paid. In January, 1878, Daniel Armentrout's administrator instituted in the circuit court of Rockingham a chancery suit to surcharge and falsify this settlement of accounts of Daniel Flook, committee. This litigation depended until April 15, 1885, resulting in a final decree of that date in favor of the administrator of Daniel Armentrout against the administrator of Daniel Flook for the sum of \$2,287.61. Execution was issued on this decree, and indorsed on the back by the attorney for Daniel Armentrout's administrator, "To lie."

To January rules, 1888, Daniel Armentrout's administrator filed his bill in the suit now before us, setting up his decree, in the last-mentioned cause, of \$2,287.61, as an outstanding indebtedness against Daniel Flook at the time the deed to his daughters, in 1877, was made, and charging that said deed had been made to hinder, delay, and defraud the creditors of Daniel Flook, and especially the complainant, out of any recovery against him or his property on account of his liability as such committee. The bill further alleges that the property was conveyed for a grossly inadequate consideration; that it was worth the sum of \$20,000; that the cash payment of \$2,000, recited to be for services rendered by the grantees, was not bona fide, and set up for the fraudulent purpose of defeating the claim of complainant; that for a like reason, the deferred payments were strung out for 12 years; that the whole purpose of the deed was to cover up and conceal the property of the grantor from his creditors, and especially from the claim of the complainant. The prayer of the bill is that the deed may be declared fraudulent and void, and the property conveyed therein subjected to the satisfaction of the debt due the complainant. An answer was filed by the administrator of Daniel Flook, and a demurrer and answer by his daughters to whom the property in question was conveyed. In their answer, the grantees broadly and emphatically deny every allegation of fraud and wrongdoing asserted in the bill, and declare that the consideration expressed in the deed

was a full and fair price for the property; that the \$2,000 cash payment was justly due for services actually rendered; and that the deferred payments were not strung out for 12 years with a fraudulent intent. Respondents declare that they have acted throughout the whole matter in perfect good faith; have paid their entire purchase money, made valuable improvements upon the property, and have expended their time, labor, and money thereon, since the date of their purchase, in December, 1877. They emphatically deny that the deed was made to hinder and delay their father's creditors. On the contrary, they insist that the sale was made to enable their father to pay his debts. They deny every insinuation of fraud or notice of fraud, or fraudulent intent on their part or on the part of their deceased father. While insisting that they are entitled to the protection of a court of equity by reason of the matters set forth in their answer, they also rely upon the doctrine of laches, and the statute of limitations to protect them in the rightful possession of what they claim was a bona fide purchase. This controversy, in the court below, resulted in the decree appealed from, overruling the demurrer of appellants, setting aside the deed in question as fraudulent and void, and ordering a sale of the land thereby conveyed to satisfy the debt due the appellee.

If the conveyance under consideration, dated December 6, 1877, was assailed alone upon the ground that it was voluntary, the suit, not being brought until January rules, 1888, would be barred by the provisions of section 2929 of the Code, because not brought within five years after the right to avoid the deed on that ground had accrued. It is clear, however, that appellee is prosecuting his suit under section 2458 of the Code, upon the ground of actual fraud, and in such a case the five-year statute of limitations does not apply. So far as necessary to be quoted, section 2458 provides that "every conveyance * * * or transfer of * * * any estate, real or personal, * * * given with intent to * * * defraud creditors * * * of or from what they are or may be lawfully entitled to, shall, as to such creditors, * * * be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of fraud rendering void the title of such grantor."

That the grantees were purchasers for a valuable consideration cannot be denied, and therefore to declare the deed void, under section 2458, two elements are necessary, and these must concur, namely:

(1) The conveyance must have been made with intent to defraud the creditor of what he may be lawfully entitled; and

(2) To affect the title of the grantees, they must have had notice of the fraudulent intent of the grantor.

The demurrer was properly overruled. It rests upon the contention that the bill does not, in terms, allege that the grantees had notice of the fraud charged upon the grantor. This court has held that the privity of the grantee in the fraud of his grantor is sufficiently alleged by charging that the deed was made, not only without any consideration deemed valuable in law, but with intent to hinder, delay, and defraud the creditors of the grantor. Whilst it is clearly the better practice to charge, in terms, that the grantee had notice of the grantor's fraudulent intent, yet if the charge made necessarily implies such notice, as it does in the case at bar, it is sufficient. *Twine Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

There is no direct proof in the record of any fraudulent intent on the part of the appellants, nor of any knowledge by them of any fraudulent purpose on the part of the grantor. It is not necessary, however, that the grantees should appear to have had actual knowledge of the grantor's unlawful purpose. It is sufficient if they had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction. If such inquiry would have necessarily led to a discovery of the fact, with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made inquiry or not. But while the fact of notice may be inferred from circumstances, as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of mala fides. *Fischer v. Lee*, 98 Va. 159, 35 S. E. 441; *Newberry v. Bank*, 98 Va. 471, 36 S. E. 515.

In the light of this repeated statement of the law applicable in such cases, we will proceed to the consideration of the alleged suspicious circumstances relied on by the appellee as sufficient to affect the conscience of the appellants, and to fix upon them the imputation of mala fides. The first of these, and that chiefly relied on, is that the grantor was in embarrassed circumstances, and that the price agreed to be paid by appellants was wholly inadequate.

It is a well-settled rule of law that mere inadequacy of price is no ground for setting aside a conveyance, unless so gross as to shock the conscience and furnish decisive evidence of fraud. *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196. In this case it is said, citing *Pomeroy* on Equity Jurisdiction: "If there is nothing but mere inadequacy of price, the case must be extreme, in order to call for the interposition of equity. When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the

benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative."

In the case at bar it appears that the property conveyed by Daniel Flook to his daughters was assessed for taxation at \$10,376, the land at \$9,488, and the personal property at \$888. The depositions of about 40 witnesses have been taken. The estimated value per acre placed upon the land ranges from \$15 to \$60 per acre. A careful consideration of the evidence shows that the witnesses who practically concur in the view that the price paid was fair and reasonable have been longest and best acquainted with the land, and are better informed as to its value than those witnesses who speak on behalf of the appellee. It must be borne in mind that the land was sold and conveyed subject to the incumbrance of the contingent right of dower of the grantor's wife, and that this burden greatly depreciates the sale value of land. The evidence of value, as in most cases of this nature, is very conflicting, and therefore unsatisfactory. Upon the whole case, however, it is impossible for the court to say that the price paid was inadequate. Certainly it was not so grossly inadequate as to shock the conscience of a man of common sense, or to furnish occasion for setting aside the deed as fraudulent for that cause alone.

The contention that at the date of the deed the grantor was in such embarrassed circumstances as to have put the grantees upon notice that the conveyance, at the price agreed upon, was intended to defraud his creditors, is not sustained by the record. On the contrary, the established facts are susceptible of the construction that in making the sale the grantor was actuated by an honest purpose to provide for the payment of his debts. The presumption of law is in favor of honesty, and the court cannot presume fraud unless the terms of the instrument preclude any other inference. *Williams v. Lord*, 75 Va. 390-400. In a few months after the sale was made, eight of the purchase-money bonds had been assigned by the grantor in satisfaction of his principal debt, amounting to \$3,686.64. While it does not appear precisely when and how the judgments heretofore mentioned were paid, it does appear that every debt the grantor owed was discharged, and that when he died, in 1882, the last four purchase-money bonds, not due until January 1, 1887, 1888, 1889, and 1890, were under his control, and passed into the hands of his administrator as assets of the grantor's estate. These bonds aggregated \$1,666.66% with interest thereon from December 6, 1877,—a sum more than sufficient to satisfy the subsequently ascertained and established demand of the appellee. It is further contended that a badge of fraud is to be found in the circumstance that the deed was dated December 6, 1877, and not

acknowledged for record until January 14, 1878, without any explanation being given of this discrepancy. Daniel Flook being dead, and the grantees being incompetent witnesses, it would have been difficult to make the explanation mentioned. We cannot see, however, that this circumstance can raise a suspicion of bad faith. It is within common experience that, where parties are living in the country, it is not always convenient to get a notary or justice, and for this reason deeds are often not acknowledged for some time after they are written.

Another circumstance relied on to show that, if the grantees had made such inquiry as it was their duty to make, they would have discovered the fraudulent intent of their grantor, is that Geo. W. Yancey, the husband of one of the grantees, lived beside the grantor, attended to his business, and, from his proximity to him, must have known all about his affairs. This is a mere presumption. Yancey was not a party to the deed. There is no proof that he had any knowledge on the subject, and none that he vouchsafed any information to the grantees that would have put the most suspicious upon inquiry.

Another circumstance relied on as showing fraud is that Mrs. Flook did not unite in the deed. Under the facts of this case, we are unable to see what ground for suspicion of bad faith this circumstance affords. The wife could not be required to unite in the deed releasing her dower rights, and the fact that she was unwilling to do so, and that the absence of such release would make it difficult to sell to a stranger, may have suggested to the grantor the idea of selling to his daughters, subject to the dower rights, for the purpose of raising the means with which to pay his debts.

Another circumstance insisted upon is that Daniel Flook made a dishonest settlement of his accounts as committee for Daniel Armentrout before the commissioner of accounts in March, 1877. The bill alleges this to be the fact, but the charge is emphatically denied by the answer, and there is no proof to sustain it. Daniel Flook assumed this trust in 1858. After the intervention of years, the Civil War, and possible loss of evidence, he settled his accounts in 1877. It does not follow necessarily that because, in a subsequent settlement made after he was dead, a liability was ascertained, the first settlement was made with the dishonest purpose of defrauding appellee. The evidence shows that at the date of the deed in question the grantor was advanced in years; that he was a man of high character, and had borne a good reputation for honesty and integrity all his life among his neighbors. There is no evidence to raise a suspicion, even, that the grantees had any knowledge

of their father's accounts as committee for Daniel Armentrout. If they are chargeable with any knowledge on the subject, it is only that disclosed by the public records, viz., that he had settled his accounts before an authorized official, from which settlement it appeared that he owed nothing on that account. They can hardly be presumed to have known, if such was the fact, that the record settlement was false, and that one would be made subsequently bringing their father in debt.

We have commented upon the more important incidents connected with the transaction under consideration, and, without prolonging this opinion to consider in detail others suggested as suspicious, it must suffice to say that, when all the circumstances relied on to show that the appellants were guilty of actual fraud in making the purchase in question of their father are considered in the light of the facts disclosed by the record, the imputation of mala fides has not been fastened upon them with that clearness and force which is required in making out a case of fraud.

The record does not show what has become of the four bonds that went into the hands of the administrator of Daniel Flook. The bill alleges that they have not been paid. The answer of the administrator admits that they came into his hands, and says that they are now on file in some chancery suit. The answer of appellants declares that these bonds passed into the hands of their father's administrator, and that they will be prepared to show at any time how the same had been paid off or discharged. With the exception of these allegations, the record is silent on the subject. It is apparent that in the lower court the issue made by the pleadings as to the payment of these bonds was ignored or subordinated to the question whether or not the deed from Daniel Flook to his daughters was fraudulent. If they have been paid to the administrator of Daniel Flook, deceased, his being the proper hand to receive payment, the debt is discharged, and there is no liability on the obligors for his application of the proceeds. If, on the other hand, they have not been paid, by the terms of the deed they constitute a vendor's lien upon the land, which should be enforced in these proceedings. The matter being susceptible of proof, and none having been taken, the bill ought not to be dismissed, but the cause remanded for further prosecution or inquiry along the lines suggested, if the appellee shall be so advised.

For these reasons, the decree appealed from must be reversed, and the cause remanded for such further proceedings not in conflict with this opinion as may be proper.

(100 Va. 600)

HOY v. VARNER et al.

.(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

DOWER—EQUITY OF REDEMPTION—REDEMPTION BY HEIRS—CONTRIBUTION.

1. Where a wife, during coverture, joins in a mortgage of her husband's land, she has a right to dower only in the surplus, though the sale under the mortgage is after the husband's death, nothing to the contrary being indicated by Code, § 2269, giving a widow dower in the surplus after payment of incumbrances on the land paramount to her dower, where the land is sold in the lifetime of the husband.

2. Land of a husband being subject at his death to a mortgage in which the wife joined, and which was thereafter satisfied by sale of part of the land, and by payment by the heirs from the individual property, the wife, to have dower in the remainder of the land, must contribute her proportionate share.

Appeal from circuit court, Augusta county.

Proceedings between Hoy and Varner and others. From the decree, Hoy appeals. Reversed.

Curry & Glenn and Turner K. Hackman, for appellant. Elder & Elder, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Augusta county, and the case is as follows:

H. H. Varner died in Augusta county on or about the 25th day of April, 1887, intestate, leaving to survive him a widow, Agnes A. Varner, and five infant children. He was at his death seised and possessed of a tract of 126½ acres of land, situated in said county, upon which he had given two deeds of trust,—the one to secure to the Valley Mutual Life Association \$1,100, and the other to secure Frances Hogshead \$200,—in both of which duly recorded deeds his wife united. H. H. Varner having died before any sale of the land was made under either of the trust deeds, and the debts thereby secured, with the exception of a small balance of \$70.62, having been satisfied with the proceeds arising from the sale of a part of the land in a suit instituted for the settlement of Varner's estate, and by applying, by authority of a decree of the court in that case, the share of his five children in the proceeds from a life insurance policy he held in the Valley Mutual Life Association for the benefit of his wife and children, the circuit court in this cause held that the widow, Agnes A. Varner, was entitled to dower in the whole 126½ acres of land, and confirmed the report of the commissioners assigning to her as dower one-third of the land.

"The general rule is that, when the husband has mortgaged his lands before coverture, or the wife, during coverture, has united with him in mortgaging land belonging to him, and such land is sold under the mortgage, the widow, if the sale takes place after the death of the husband, and the wife, the sale takes place before his death, in jurisdictions where the inchoate right of

dower is regarded as such an interest as must be protected, is entitled to have her dower assigned or reserved from the surplus only after paying the whole amount of the mortgage indebtedness. The dower interest should be confined to one-third of the value of the excess of the land after deducting the entire amount owing upon the mortgage." 10 Am. & Eng. Enc. Law (2d Ed.) 169; 1 Scrib. Dower, 492.

The reason for the general rule, which confines the widow to one-third of the surplus, is thus stated by Chancellor Walworth in *Hawley v. Bradford*, 9 Paige, 200, 37 Am. Dec. 390: "It is settled law that, where the wife pledges her separate estate, or the reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety. * * * I am not aware of any decision, however, in which the principle of suretyship has been applied to a case like the present. * * * Strictly speaking, the wife has no estate or interest in the lands of her husband during his life which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage, therefore, merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband, without impairing her contingent right of dower in the equity of redemption. The master was, therefore, right in supposing that Mrs. Bradford was not entitled to be endowed of the whole proceeds of the mortgaged premises, but only of the surplus which remained after paying the mortgage debt and the costs of foreclosure." To the same effect is *Bank v. Owens*, 31 Md. 320, 60 Am. Rep. 60, citing numerous authorities.

In *Land v. Shipp*, 100 Va. —, 41 S. E. 742, it is said: "Whether there has been an alienation by the husband in fee of the equity of redemption he held in the land to satisfy a lien or incumbrance thereon superior to his wife's right of dower therein, or the conveyance be made by the husband of his equity of redemption to a trustee, without the wife's concurrence, to secure a debt of the husband, and there is a sale of the land in his lifetime by the trustee, subject to the prior lien or incumbrance, or it be paid out of the proceeds of such sale, the widow of the deceased husband can only have dower in the equity of redemption in the land (which the husband could not alien, and defeat her dower therein, without her concurrence), or of the excess from the proceeds from the sale of the land, over and above the amount of the lien or incumbrance thereon superior to her dower rights, which is the measure of the equity of redemption; and to secure this to her our statute makes ample provision."

It was, of course, there meant to confine the widow's right of dower to one-third of the surplus, thus entirely disregarding the

value of her dower in the whole land; for, if the wife was to be treated as a surety for the husband, to be exonerated out of the surplus, to the full value of her dower in the whole, the plain provision of the statute that she is to be endowed only of the excess from the proceeds from the sale of the land over and above the amount of the lien or incumbrance superior to her dower, would be transcended, and she could be given dower in the whole land, and not merely in the equity of redemption. Of that, or, what is the same thing, of the estate subject to the mortgage, as was said in *Wilson v. Davison*, 2 Rob. 403, the husband is to be considered as having died seised.

Prof. Graves, of the University of Virginia, in his forthcoming work on Real Property, quotes the general rule as laid down in 10 Am. & Eng. Enc. Law, *supra*, the reason for the rule given in *Hawley v. Bradford*, 9 Paige, *supra*, and proceeds to state his conclusion as to the extent of the dower right in Virginia as follows: "When the land is sold in the lifetime of the husband, the Code (section 2269) places the case where the wife unites with her husband in the deed creating the lien or incumbrance along with that of a lien or incumbrance 'created before the marriage, or otherwise paramount to the dower of the wife,' and declares as to all alike that, 'if a surplus of the proceeds of sale remain after satisfying the said lien or incumbrance, she shall be entitled to dower in said surplus,' which clearly confines her dower interest to one-third of the surplus. And that the law is the same in Virginia (in accord with the general rule laid down above) when the sale is made after the death of the husband would seem to be indicated (so far as the opposite view rests upon the doctrine of suretyship) by the case of *Gatewood v. Gatewood*, 75 Va. 407, 415, where it is said by Staples, J., that a married woman who joins in a mortgage by the husband on his lands is not a surety for the debt; and also by the following language of the same learned judge in *Corr v. Porter*, 33 Grat. 278, 285: 'During the life of the husband, the wife has no estate or interest in his lands. She has a mere contingent right of dower, which may be the subject of a conveyance or relinquishment under the statute. It may also constitute a valuable consideration for a postnuptial settlement, because it is in the nature of a contingent lien or incumbrance upon the realty. Beyond this, however, it is not even a right in action. When the wife unites with the husband in conveying the property to a purchaser, the effect is not to vest in the latter the dower interest, or any estate separate and distinct from that of the husband, but simply to relinquish a contingent right in the nature of an incumbrance upon the property conveyed, which, if not so relinquished, will attach and be consummated on the death of the husband. This

right, being relinquished, is gone forever, the charge upon the estate ceases, and the title of the purchaser becomes complete. The title so acquired is not to two estates or interests (that of the husband and wife), but to one estate (that of the husband, discharged of the wife's contingent claim of dower).'

In *Land v. Shipp*, 98 Va. 284, 38 S. E. 391, a number of authorities were cited with approval in support of the view that, while the wife's inchoate right of dower in her husband's land was an interest which might be released, it was not the subject of grant or assignment, nor is it in any sense an interest in real estate.

The contingent right of dower in the wife not being in any sense property, the theory that when she unites with her husband in the conveyance of his land to secure the payment of a debt of his she becomes surety of the husband for his debt, with the right of exoneration out of the remainder of the land, or the surplus from its sale after the debt is satisfied, has nothing to rest upon, for the wife neither becomes personally bound for the debt nor pledges any property as security for its payment. No personal obligation rests upon her to pay the debt, or to make up any deficit should the land sell for less than the debt.

It is not, however, the theory of the wife's suretyship that is so much relied on by the learned counsel for appellees, but that her claim to dower in the whole of the land of which her husband died possessed is authorized by the decision of this court in *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 702, cited with approval, it is contended, in *Land v. Shipp*, 41 S. E. 742.

In other words, the contention is that, as the land upon which the two deeds of trust rested was not sold to satisfy the debts thereby secured in the lifetime of the husband, section 2269 of the Code does not apply, and that, therefore, Agnes A. Varner, appellee, is entitled to her full right of dower (except as against the secured creditors) in the land, as was held by the lower court; and *Wilson v. Branch*, *supra*, and the reference to that case in *Land v. Shipp*, are mainly relied on as supporting that contention.

In the last-named case, having in mind the general rule that a widow cannot be compelled to commute her dower where it is practicable to assign it in kind, reference was made to *Wilson v. Branch* as authority for that proposition; but, if what was there said is susceptible of the construction that is here contended for, the language of the reference was unguardedly used, and in fact it was not necessary to a decision of the case under consideration.

In *Wilson v. Branch*, *supra*, there were two estates in land involved,—halves of an undivided tract called "Cedar Lawn,"—one half belonging to the husband, and (under the decision of this court) the other half belonging

to the wife, when the deed of trust of 1876 was made, by the husband and wife jointly, to secure a debt of the husband. As to the wife's half, she was, of course, surety for the husband; and, as was said by the court: "The circuit court erred in decreeing the sale of the Cedar Lawn tract without first dividing the same so as to save the wife her undivided moiety, which was her maiden property." And the lower court is also said to have erred "in selling the residue [i. e., the husband's moiety] without laying off and assigning to the widow her dower in kind by metes and bounds, or first ascertaining that it was impracticable to so assign dower." Again (without distinguishing at this point between the two halves, and apparently conceding for the moment that the circuit court was right in its view that in 1876, when the trust deed was made, the whole land belonged to the husband), the opinion further says: "It does not appear that dower could not be assigned, and the residue sold to secure the creditor secured by the trust deed, with the right reserved to proceed further against the dower if the trust deed was still unsatisfied."

These extracts undoubtedly warrant the conclusion that the court was of opinion that the widow was entitled to full dower, and in the land itself, and that it was not to be sold under the deed of trust unless it became necessary to trench upon it to pay the creditor. But there is not a word of discussion as to the extent of the widow's dower right.

After quoting the foregoing extract from *Wilson v. Branch*, Prof. Graves, in his work on Real Property, *supra*, makes the following accurate comment: "The mind of the court is entirely on the point of dower in kind. This it declares practicable, having regard to the relative amounts of the value of the land and of the debt secured. And three Virginia cases are relied on, viz., *Blair v. Thompson*, 11 Grat. 441, *White v. White*, 16 Grat. 284, 80 Am. Dec. 706, and *Simmons v. Lyles*, 27 Grat. 922, which do declare that the widow must have dower in kind, unless it be impracticable from 'the nature of the husband's interest, or from the nature and quality of the property itself'; but not a word is said about relative amounts. And in all of these three cases the widow's dower was paramount to the incumbrance, and, of course, she was entitled to dower in kind, if practicable, having regard to the nature of the husband's interest and of the property. This part of the decision in *Wilson v. Branch*, then, finds no support in any of the Virginia cases cited, and is opposed to an almost unbroken current of authority elsewhere."

The authorities elsewhere, to which he refers, are collated in an excellent article in 8 Va. Law Reg. 166, 167, 41 S. E. 742, and embrace decisions by the courts of many states.

The cases to the contrary, cited by counsel for appellee here, are *Kling v. Ballentine*, 40

Ohio St. 391, *Mandel v. McClave*, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627, and *Jones v. Bragg*, 33 Mo. 337, 84 Am. Dec. 49.

With reference to the last-named case it is only necessary to say that the decision that the widow was entitled to dower in the land was put upon the ground that the mortgage thereon was paid out of the estate of the deceased husband, and not by the purchaser of the land, who was claiming subrogation to the rights of the mortgagee as against the widow. The case, therefore, is wholly unlike the case at bar.

In the Ohio cases the decisions were avowedly placed on the theory of the wife's suretyship for her husband, and it is conceded that, where that doctrine is repudiated, the result must be to confine the widow to one-third of the surplus.

In *Heth v. Cocke*, 1 Rand. 344, it is held that the only claim of the widow in her husband's real estate, which has been mortgaged by him before marriage, is to dower in the equity of redemption; and it is said that the same principle applies as well to mortgages after marriage where the wife unites in the mortgage, etc. The opinion, by Coalter, J., further says: "If neither the heir nor the widow redeems, and the land sells for more than the debt, the excess is the value of the equity of redemption, and she can only be endowed as to one-third of that excess. * * * Suppose she had been defendant in this suit, could she have claimed to have her dower laid off and the residue sold? I apprehend the mortgagee could not have been compelled to sell in parcels. * * * But, if he could have been paid in this way, could the heir be deprived of his interest in the equity of redemption? The two-thirds may only sell for enough to pay the debt, and sell, too, at a great sacrifice, in consequence of a severance of the property."

To the same effect, practically, is the case of *Wheatley's Heirs v. Calhoun*, 12 Leigh, 269, 37 Am. Dec. 654, where the sale of the land was after the death of Calhoun, whose widow was claiming dower therein. There were two deeds of trust on the property of Wheatley and Calhoun,—one to secure a debt for purchase money paramount to the claim of dower; and the other not so as to Mrs. Calhoun, she having refused to unite in the deed. The sale was under the second deed, and the opinion by Tucker, J., speaking for the entire court, says: "Had the sale, then, been under the first deed of trust of March, 1824, there would, I think, be an end of the case. But it was not; and, of course, the equity of redemption under that deed has never been foreclosed as to any rights of the widow. She was, without question, entitled to dower in that equity of redemption to the extent to which her husband, Calhoun, had made payment of his proportion of the purchase money. In other words, if upon a sale there should be an excess over and above the debt

secured, that excess, being the measure of the equity of redemption, would belong to Calhoun and Wheatley in the proportions in which they have paid the purchase money, and Calhoun's widow would have her dower in her husband's portion."

There, again, the court clearly intended to confine the widow to one-third of the equity of redemption, or to one-third of the surplus remaining after paying the lien on the land, superior to her claim of dower.

By uniting in the deed, the wife enables the husband to convey the legal title to the creditor, and bars her dower in the land. Nothing remains in the husband but the equity of redemption, which is the creature of equity. In this equity she had no dower at all until the statute giving dower in equitable estates. The equity of redemption descends as an estate to the heirs. Why, then, should the widow, instead of receiving her dower in it, claim dower in the whole land, or in the whole to be satisfied out of the surplus where the land has been sold, as if she had never joined in her husband's deed?

The word "dower," in its ordinary acceptation, since its first introduction into this country, has been used synonymously with the word "third." 1 Scrib. Dower, 25. So, by "dower out of all lands of which the husband is seised during coverture," is meant "one-third of such lands"; "dower in the equity of redemption" means dower in the land subject to incumbrances paramount to dower,—i. e., one-third, for life, of what remains of the land after satisfying the incumbrances; and "dower in said surplus" (as is the language of the statute) means "one-third of such surplus for life."

In the case at bar the insurance money was not the husband's money, but that of the widow and children, as the policy was made payable to them. No question arises as to exoneration out of the personal estate of the husband. The liens upon the land have been paid by sale of a part of the land (in which the widow could have no dower till the liens thereon were paid) and with the children's money, and now the widow, who did not contribute, claims full dower in the land, as if she had done so.

In 1 Scrib. Dower, supra, 532, it is said: "The rule exacting contribution from the widow where a person deriving title through her husband has redeemed the lands from a mortgage binding upon her interest, as a condition upon which she may be let into her dower, is firmly established in numerous decisions made in the courts of the various states." See, also, 2 Minor, Inst. 142, and authorities cited.

An authority exactly in point, also, is the well-considered case of Swaine v. Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318, where it is said: "The plaintiff was a party to the mortgage to Dunn, and her claim to dower was only in the equity of redemption, or the interest which her husband had remaining in

the land after satisfaction of the mortgage. Her right to dower was subject to the mortgage; and, if the heir has been obliged to redeem the land by paying that mortgage to which the plaintiff was a party, she ought, in justice and equity, to contribute her ratable proportion of the moneys paid towards redeeming the mortgage. The redemption was for her benefit, so far as respected her dower. To allow her the dower in the land without contribution would be to give her the same right that she would have been entitled to if there had been no mortgage, or as if she had not duly joined in it. It would be to give her dower in the whole absolute interest and estate in the land, when she was entitled to dower only in a part of that interest and estate." See, also, Bank v. Owens, supra.

"If the heirs redeem, or the widow brings her writ of dower, she is let in for her dower on her contributing her proportion of the mortgage debt." 1 Lomax, Dig. 103.

Baldwin, J., in Wilson v. Davisson, supra, says: "A widow's right of dower, however, in an equity of redemption,—or, in other words, in the land subject to the incumbrance, legal or equitable,—is merely conditional, and dependent upon the fact of redemption. If the heir redeems, she is dowerable on contributing ratably; or she may herself redeem, to the extent of her dower, by like contribution." See, also, the general rule as stated in 10 Am. & Eng. Enc. Law (2d Ed.) 163, where numerous authorities are cited.

In Wilson v. Davisson, supra, the court held that the widow would have been entitled to dower in the equity of redemption if her dower had been consummated by the death of her husband before the sale; but that, the sale having been before her dower became consummated, her dower did not attach.

The fact that the statute, now section 2289 of the Code, was enacted, giving a widow dower in the surplus remaining after paying the lien or incumbrance on the land paramount to her dower, where the land was sold in the lifetime of her husband, neither by inference nor otherwise goes to indicate that where mortgaged lands, in which the dower is relinquished, are sold after the husband's death, or where the equity of redemption descends to the heirs, and they have redeemed the land, the widow shall take dower in the whole land. The sole object of the statute was to give the wife in her husband's lifetime an interest in the equity of redemption, contingent, however, upon her surviving her husband, in accordance with Judge Allen's dissenting opinion in Wilson v. Davisson, supra. It was to give the inchoate and contingent dower of the wife the power to attach to the equity of redemption during his lifetime, so that after a sale in her husband's lifetime it would survive, and be enforceable against

his equity of redemption in the lands, after his death, just as if the sale had been made after his death, as was held in *Land v. Shipp*, supra.

Where there was no sale of the land in the lifetime of the husband, as in the case at bar, the equity of redemption descends to the heir, subject to the widow's dower; but before she can be endowed in the whole land she must pay an equitable proportion of the liens or incumbrances on the land paramount to her dower.

The circuit court, therefore, erred in decreeing to appellee dower in the whole land of which her husband died seised and possessed, and the decree appealed from must be reversed and annulled, and the cause remanded, to be further proceeded with in accordance with this opinion.

(100 Va. 687)

AUGUSTA NAT. BANK et al. v. BEARD'S EX'R et al.

(Supreme Court of Appeals of Virginia. Nov. 20, 1902.)

HUSBAND AND WIFE—DEEDS—COVENANTS OF WARRANTY—WIFE'S SEPARATE ESTATE—INTERVENTION—CONSTRUCTION—OPERATION—STATUTES—REPEAL—IMPLICATION.

1. Code, § 2502 (amended Act March 6, 1890), provides that a writing by husband and wife, purporting to convey land, shall convey the wife's dower, but shall not affect the wife by any covenant of warranty contained therein which is not made with reference to her separate estate. *Held* that, where a husband and wife joined in a deed containing covenants of general warranty, conveying his land to a trustee to secure debts owing to the wife by the husband, the wife, by joining the husband in a subsequent similar deed of the same land to plaintiff, was not bound by the covenants of warranty in the last deed, and the first deed was not postponed to the second, there being no reference to her separate estate.

2. Under the statute there could be no implied promise to charge her estate by the covenant of warranty.

3. Where a husband and wife joined in a deed with covenants of warranty conveying his land in trust for her to secure his indebtedness to the wife, a second similar conveyance by them of the same land to secure debts to plaintiff could not be construed as a release of her interest in the land as conferred on her by the first deed, there being no intimation of such intention in the deed to plaintiff.

4. The married woman's act of 1900 (section 2), providing that married women may contract and be contracted with in the same manner as if single, does not by implication repeal Code, § 2502.

Appeal from circuit court, Augusta county.

Proceedings by the Augusta National Bank and others against Catherine Beard's executor and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Patrick & Gordon, for appellants. Quarles & Pilson, for appellees.

CARDWELL, J. The facts of this case are as follows:

E. A. Fulcher owned in his own right certain lands situated in Augusta county, and on

the 28th of April, 1883, he executed to Geo. M. Cochran, Jr., trustee, a deed, in which his wife, Emma A. Fulcher, united, conveying said lands with general warranty of title, in trust to secure the payment of two bonds,—one executed by E. A. Fulcher "to C. Beard, trustee for Emma A. Fulcher and her children under the will of Peter Engleman, deceased," for \$1,487.77, bearing even date with the deed, and payable one year after date, with interest from date; and the other executed by E. A. Fulcher to Catherine J. Beard, for \$1,550, bearing even date with the deed, and payable one year after date, with interest from date. Under the will of Peter Engleman, deceased, Emma A. Fulcher is entitled during her life to the interest on the first-named bond, and at her death the principal belongs to her children absolutely.

After the execution of the deed to Geo. M. Cochran, Jr., trustee, to wit, on the 3d day of July, 1897, E. A. Fulcher and Emma A., his wife, executed another deed to John B. Cochran, trustee, conveying with general warranty the same lands, to secure the payment of certain debts of E. A. Fulcher due the Augusta National Bank, J. B. O'Connell, and others.

The question presented is, what is the effect of Mrs. Fulcher uniting with her husband in the second deed? Counsel for appellants contend that the effect of the union of Mrs. Fulcher in the deed of trust of 1897 is to postpone the deed of 1883 to the trust deed of 1897 so far as the accumulated interest on the bond for \$1,487.77 is concerned. It is claimed that this results from (1) the operation of section 2502 of the Code, as amended, on the deed of 1897; (2) from the interpretation of the deed of 1897 as a release from Mrs. Fulcher of the accrued interest on the bond of \$1,487.77; and (3) from the effect of the married woman's act of March 7, 1900, on the warranty in the deed of 1897.

The first act in Virginia that prescribed how *femes covert* could "make good acknowledgments of sales of lands" was passed in 1674 (Henning's St. 317); and in *Nelson v. Harwood*, 3 Call, 394, decided in May, 1803, the question was whether or not, under this statute, as amended from time to time (the amendments making no substantial changes), providing for acknowledgments of husband and wife and the *privy examination* of the wife, and declaring that this mode should be as effective to convey land as if the same had been done by fine and recovery, or any way whatsoever, the wife was bound by the covenants in the deed contained. The court held that the wife was bound by such covenants. And then followed the act of 1814, which provided "that no covenant or warranty contained in any deed hereafter by any *feme covert* shall in any manner operate upon her or her heirs further than to convey effectually from such *feme covert* and her heirs any right of dower or other interests

which the said feme covert may be entitled to at the date of such deed."

In *Rorer's Heirs v. Bank*, 83 Va. 625, 4 S. E. 820, that act came under review, and the court held that it clearly exempted a married woman from liability on covenants in a deed made by her and her husband. The opinion says: "By this act the effect of a married woman's deed is limited so as to pass what estate she had at the date of the deed in the land conveyed. * * * The conveyance thus operating to pass only the estate or interest held at the date of the deed, no covenant therein contained could bind a married woman, except to the extent of making valid the conveyance as to the estate or interest actually conveyed. Therefore no estoppel could arise as to the feme."

"Doubtless, the provision in the act of 1814 that no covenant or warranty in any deed thereafter made by a feme covert should in any way operate upon her and her heirs except to convey effectually from such feme and her heirs any right of dower or other interest in the real estate conveyed which such feme may be entitled to at the date of the deed, was prompted in the decision of *Nelson v. Harwood*, supra, in which the wife was held bound by the covenants, and which was doubtless considered an innovation upon the spirit, if not the letter, of our legislative policy. Hence, at the first opportunity, the legislature corrected it."

The legislation in respect to this subject, after the passage of the act of 1814, differed in verbiage from the present statute. Section 2502 of the Code, as amended by the act of March 6, 1890, which, so far as it has any bearing upon the question in this case, is as follows:

"When a husband and his wife have signed a writing purporting or contracting to convey any estate, real or personal, * * * it shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of whatever nature, which at the date of such writing she may have in any estate conveyed or embraced therein as effectually as if she were at the date an unmarried woman. Such writing shall not operate any further upon the wife or her representatives by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which, if it related to her said right of dower or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit."

No other interpretation can be given to this statute than that which frees the wife from liability on the covenant or warranty contained in the conveyance as completely as did the prior statute, except when made with reference to her separate estate as a source of credit. No reference being made in

a deed to her separate estate, it is as if there were no covenant or warranty therein contained, so far as the wife is concerned.

Section 2205 of the Code, as amended by Acts 1895-96, provided that every contract thereafter made by a married woman which she has the power to make shall be deemed to be made with reference to her estate, which is made her separate estate by this chapter as a source of credit; and every such contract shall be deemed as intended to be made with reference to her equitable separate estate, also, if any she has, as a source of credit to the extent of her power over the same, unless the contrary intention is expressed in the contract; and in the enforcement of every such contract against her equitable separate estate a court of equity may in any case subject to the extent of her power over the same and of her interest therein the corpus of any real estate as well as the corpus of any personal estate settled to her separate use, but the corpus of such real estate shall not be subjected by a sale of the same, or any part thereof, unless it is admitted, or be made to appear, that the rents and profits of such real estate will not be sufficient to discharge the liabilities of such estate within five years; provided that, if the contract be a covenant of warranty in such writing as is mentioned in section 2502, it shall be subject to the provisions of such section.

It would clearly appear from the proviso in that statute that it was not intended to repeal, qualify, or limit that portion of section 2502 which declares that such "writing [deed] shall not operate any further upon the wife or her representatives by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit," etc.

The wife, therefore, is clearly not bound by any covenant or warranty in the deed unless made with reference to her separate estate as a source of credit. The general warranty in the trust deed of 1897 was not made with reference to Mrs. Fulcher's separate estate, either expressly or constructively. The estate or interest in the land conveyed had none of the qualities or attributes of separate estate in Mrs. Fulcher. Hence she is manifestly not bound by such warranty, and is not estopped from asserting her prior claim, through her trustee, Beard, against the land conveyed in the deed of 1883.

It is argued, however, that Mrs. Fulcher made the warranty with reference to her separate estate, which consisted of an interest in the real estate conveyed, measured by the accumulated interest on the bond for \$1,487.77 secured by the trust deed of 1883. This contention is answered by the court in *Justice v. English*, 30 Gr. 579, where it is said: "The covenant of warranty contained in it, if not wholly void, at least does not bind Mrs. Leber personally, nor does it bind

her separate estate unless so intended. To construe the covenant as an undertaking binding the lots which she was then attempting to convey, would be manifestly in opposition to her intention, if not absurd; and there is nothing in the nature and terms of the covenant, the subject-matter, the situation of the parties, or the circumstances of the transaction which indicates any intention on her part, or from which such intention may be fairly inferred, to charge the residue of her separate estate. This was a case in which the wife made a deed without her husband uniting therein, and the covenant was clearly hers, and not intended for her husband."

"In enforcing the engagement of the wife against her separate estate, equity always has respect to her intention in making the engagements, and certainly never raises an implied assumpsit to charge the estate in opposition to her intention."

But it is further contended that, aside from the covenant of warranty, the effect of the union of Mrs. Fulcher in the trust deed of 1897 was to convey or release her interest in the land thereby conveyed which was conferred upon her by the first deed of 1883, and which was independent of her dower.

If it had been the purpose and intention of the deed of 1897 to convey or release Mrs. Fulcher's interest conferred upon her by the deed of 1883, it is inconceivable that other and more apt phraseology should not have been employed. The deed simply conveys whatever interest the husband, E. A. Fulcher, had in the land, which was merely an equity of redemption; and Mrs. Fulcher's uniting in the deed was clearly for the purpose only of releasing or relinquishing her contingent right of dower in this equity of redemption. *Hoy v. Varner* (just decided by this court) 42 S. E. 690, and authorities there cited. The deed purported to convey no right, title, or interest of Mrs. Fulcher in the land, but her right, title, or interest in the estate which her husband had at the date of the deed, which was an equity of redemption; and, as we have said, the only effect of the deed, so far as Mrs. Fulcher was concerned, was to release or relinquish her actual right, title, and interest in what he actually owned at that date, namely, her contingent right of dower in his equity of redemption conveyed by the deed. She, as a creditor under the trust deed of 1883, had no interest in the equity of redemption conveyed, because a creditor has no more or greater interest in the property incumbered than the trustee; and the trustee, holding only the legal title, has no interest whatever in the equity of redemption. A mortgage or deed of trust is a simple security for the debt, and, when considered in connection with the debt secured, it is personal assets.

"A mortgage is but a mere security for the debt and collateral to it. An assign-

ment of the debt will in equity, if not in law, carry the mortgaged property along with it; for the debt is the principal and the mortgage is an accessory, which cannot exist as an independent debt." 1 Lomax, Dig. 440; 2 Minor, Inst. 382, and authorities there cited.

These authorities without doubt establish the principle that a mortgage is a chattel, and is no part of the land upon which it rests. It is true that one who has acquired a direct interest in land by way of lien, or by mortgage, or by deed of trust is often referred to by commentators and the courts as a purchaser; but this does not mean that a creditor secured by a trust deed has an interest that amounts to a right of property in the land. A deed of trust creditor or mortgagee has no estate in the land that a judgment would bind.

"A creditor does not lose his character as a creditor by being secured under a deed of trust, and he is simply regarded in the light of a purchaser within the meaning of the registry laws." *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279.

There is nothing whatever on the face of the deed of 1897 to indicate that Mrs. Fulcher intended to release her interest in the debt secured to her trustee by the deed of 1883. The lands conveyed were the property of her husband, and the debts secured were his debts. We see nothing to justify the thought that Mrs. Fulcher united in the deed to release her interest in the debt secured in the first deed in order to render more secure the debts of her husband, when there is not the slightest intimation in any part of the deed that that was her purpose. Moreover, the debt in which it is contended she released her interest is due to her trustee, and under his control and management, and there is no suggestion of a consideration for her release of her interest in the debt. 1 Jones, Mortg. § 138; 2 Jones, Mortg. § 483; *Aymar v. Bill*, 5 Johns. Ch. 570; *Power v. Lester*, 23 N. Y. 527.

The last case cited is directly in point. There one Melvin Powers executed a mortgage to Prudence E. Powers upon his land, bearing date April 1, 1851, to secure a bond of the same date for the sum of \$951.92, payable with interest. In the year 1852 Prudence E. Powers and the mortgagor intermarried. Afterwards, in May, 1856, the mortgage of Prudence A. Powers being due, but unpaid, she joined with her husband in another mortgage to one Lester on the same land and other lands to secure the husband's bonds for \$60,000; and one of the questions in the case was, did the mortgage to Lester operate to discharge or release the premises from the mortgage of Prudence E. Powers, or postpone it to the one to Lester? It was held that it did not so operate. James, J., said: "The execution and delivery of the mortgage to Lester did not pay the mortgage to the plaintiff [Prudence E. Powers]. No

consideration passed to her for the act. The defendant parted with no new consideration on its receipt, but took it as security for an antecedent debt due from the husband; and hence no equity arises in behalf of the defendant [Lester] against the wife demanding that it operate as a discharge or release of the plaintiff's prior lien. Therefore, if the mortgage to Lester worked the release or discharge of the former mortgage, it must be upon some strict technical rule. It had no equitable basis to support it.

"As wife, she [Prudence E. Powers] had an inchoate right of dower in all the lands of which her husband was seised, the premises mortgaged to her, as well as the other lands mortgaged to Lester. The purpose of her joinder in the Lester mortgage undoubtedly was to extinguish that right. This is apparent from the instrument itself. She is therein described as wife. She acknowledged as wife. The terms used are the ordinary ones used in mortgages by husband and wife to bar the wife's dower. The mortgage covered many hundred acres not covered by the mortgage to her. It was without consideration on her part. It did not purport to affect her separate estate, or any lien or interest which she held in her own right; and it contained no words of release to operate upon a chose in action, or any words indicating an intent to operate upon her mortgage. Therefore, if the plaintiff's interest as mortgagee could be released by joining her husband in a subsequent mortgage, it is apparent from the instrument itself that such was not the intent or understanding of the parties at the time it was executed, but that the sole object was to bar her inchoate right of dower."

Comstock, C. J., delivering a concurring opinion in that case, referring to the second mortgage on the property, in which the wife had united, and to the claim made that in so doing she had released or postponed her debt secured by the first mortgage, said: "It contained no reference to any particular interest of the plaintiff [the wife], nor any words purporting a release or covenant not to enforce her mortgage. The parties are described as 'Melville Powers, and Prudence, his wife.' What, then, is the fair construction of the instrument as against the wife? At the time of the execution she had a prior mortgage on one parcel of the land, described in it, and she had an inchoate right of dower in the same parcel and in others. If a person having a mortgage on land, but no other claim, should unite with the owner in a conveyance or mortgage to a third person, it might be urged with great force that the intention was to have the instrument operate on the only interest which the party had. The argument would be forcible because no other reason could be given for so uniting in the deed of mortgage. But the plaintiff (Prudence E. Powers) was not thus situated. Her act was effectual as

a release of all dower right in the land which the mortgage to the defendant embraced, and the instrument was in precisely the same form it would have taken had she possessed or claimed no other interest in the premises. And this, we think, is the true exposition of the transaction. The case of *Aymar v. Bill*, supra, is in point."

In *Gillig v. Maass*, 28 N. Y. 191, the facts were very similar to the case just referred to, and the opinion says: "The mere fact that Mrs. Maass, the wife, united with her husband in the mortgage to Jones under these circumstances, is not a ground in equity for postponing or rendering subordinate her mortgage to his. The spirit and intent of the act and of the instrument which she executed was to cut off her inchoate right of dower. This was the effect of the deed, and all that was within contemplation of the parties. The debt was the husband's, and the premises mortgaged were his. He was the mortgagor in fact, and she united in the deed, not to transfer any present right, but to cut off or convey an inchoate interest as the wife of the mortgagor in the premises mortgaged."

In *Kitchell v. Mudgett*, 37 Mich. 81, where the question presented in this case was discussed by Cooley, C. J., it is said: "Our statutes prescribe in what manner a married woman shall consent to a release of dower and to a mortgage of the homestead; and their provisions have been followed in this instance. They leave the wife at liberty to convey her separate interests in land as any other person might. But where the deed she executes is proper and suitable for the release of dower and as a consent of the mortgaging of the homestead, and is such as she would be expected to execute if she had no independent interest, we cannot suppose that she had any further purpose in becoming a party to it." And again, referring to the claim that the wife had, by joining in the second mortgage, released her interest in a prior mortgage, it is said: "How can the court know that Mrs. Mudgett would have consented to release or postpone if it had been required of her? And how can the court compel her to do that which, with competent authority to assent to or reject, she might, perhaps, at that time have rejected?" And in answer to these questions it was held that the union of the wife in the second mortgage operated only to release her contingent right of dower, and did not affect any independent interest she had in the land.

Upon a similar state of facts in *Van Amburgh v. Kramer*, 16 Hun, 205, it was held that the wife, by joining in the deed of the husband's land to secure his debts, did not release the premises from the lien of a prior mortgage thereon then owned by her. The opinion says: "A mortgage is not either a *jus in re* or a *jus ad rem*. Whatever form may be given to the instrument, the mortgagor continues to be the owner of the land,

and the mortgage is a mere lien. The mortgagee cannot, in any way, convey, devise, or encumber the land, for he has no estate in it or title thereto, nor has he any right to the possession thereof. The mortgagor can maintain an action of trespass against him. The mortgage passes to executors as a chose in action, and it is extinguished by payment or tender of the debt, to which it is incidental. * * * As Mrs. Richards had no estate or interest in the land, she could convey none, and her deed did not, for that reason, operate as a grant. Nor did it operate as a bargain and sale, for she received no consideration therefor. Its only effect was to release her inchoate right of dower. * * * Such was manifestly the intention of the parties to the conveyance, and that must govern in the construction of the instrument. (1) The habendum is restricted to the premises conveyed and the appurtenances thereto. (2) There are no apt words to discharge or release a chose in action. (3) She executed and acknowledged the instrument as wife. (4) She had a dower right, and to release that was a proper, and apparently the only, purpose of her uniting in the conveyance."

The only distinction between the cases just quoted from and the one at bar is: In the former, in each case, the wife owned and controlled the debt; in this case the debt is under the control of her trustee, Beard, and Mrs. Fulcher has only a life estate in the debt, her trustee being responsible for its safe investment, and is the only proper person to release it, or any part of it. It is manifest that appellants, in taking the second deed of trust from E. A. Fulcher, intended only to secure their debt on the land with Mrs. Fulcher's relinquishment of dower therein; not a waiver of her interest in the prior deed of trust, or an assignment of her interest therein. Therefore the deed operated no further, as to Mrs. Fulcher, than a release of her contingent right of dower in the equity of redemption in the land owned by her husband and conveyed by the deed.

Catherine J. Beard having died, and Mrs. Fulcher being one of her distributees, the contention is made that she is estopped by her deed of July, 1897, from claiming any part of the debt of \$1,550, secured to Catherine J. Beard by the deed of 1883, until the creditors secured by the deed of 1897 are satisfied.

What we have already said, and the authorities cited, fully answer that contention. The deed of 1897 admits of no such construction, and, as before stated, has no other effect upon Mrs. Fulcher than a release of her contingent right of dower in the land.

But it is argued for appellants that section 2 of the married woman's act of 1900 operates retrospectively, and validates the warranty in the deed of 1897 as to Mrs. Fulcher, and makes the warranty binding upon her personally.

This act provides: "A married woman may contract and be contracted with, sue and be sued, in the same manner and with the same consequences as if she were unmarried, whether the act or liability asserted by or against her shall have accrued before or after the passage of this act."

Section 4 of that act repeals a number of sections of the Code, including section 2295, as amended by the act of 1895-96, quoted above, but leaves intact section 2502, which, as before seen, expressly provides that a wife uniting in a deed with her husband shall not be bound by any covenant or warranty contained therein, unless made with reference to her separate estate as a source of credit.

We do not question the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, where such laws are not forbidden *eo nomine* by the constitution, and no other objection exists to them than their retrospective character; but such an act cannot operate to bind one who was never bound, either legally or equitably, nor can it create a demand against one when no such demand ever existed. Cooley, Const. Lim. 454.

In this instance, however, it is not necessary for us to discuss the power of the legislature to enact retrospective statutes, as we see nothing in the act of March, 1900, *supra*, that admits of the construction that it applies, or was intended to apply, to a warranty in a deed in which the wife united for the purpose only of relinquishing her inchoate right of dower in the property conveyed, as was the case here; but it leaves section 2502 in full force and effect, as did section 2295, in express terms. As we have seen, no reference whatever is made in the deed of 1897 to Mrs. Fulcher's separate estate as a source of credit or in any way; therefore the warranty therein, so far as Mrs. Fulcher was concerned, was a nullity, and the deed must be treated, as to her, as if it contained no warranty; nor can it operate as an estoppel as to her. There is no inconsistency whatever between the two acts referred to, and, if the former is repealed by the latter, it is, as counsel for appellants further contend, by implication. Tested by the well-settled rules for determining whether one statute repeals by implication another, the act of March, 1900, *supra*, cannot be interpreted as repealing section 2502 of the Code.

Repeal of a statute by implication is not favored by the courts, for ordinarily, where a repeal is intended by the legislature, it is declared in express terms. The presumption is always against the intention to repeal where express terms are not used. *Davies v. Creighton*, 33 Grat. 696.

In *Frost v. Wenle*, 157 U. S. 46, 15 Sup. Ct. 582, 39 L. Ed. 614, the opinion by Mr. Justice Harlan says: "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely ir-

reconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.”

The question whether one statute repeals another by implication being one of legislative intent, the two statutes here in question not being irreconcilable, and the latter, although repealing, in express terms, a number of statutes upon the same general subject, making no reference whatever to the former (section 2502), it is inconceivable that the legislature intended to repeal that section, and therefore effect is to be given to both statutes.

Upon the whole case we are of opinion that the decrees of the circuit court should be affirmed.

(131 N. C. 773)

STATE v. ELLSWORTH et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

CRIMINAL LAW—FORMER CONVICTION—TRIAL—PLEA—BURDEN OF PROOF—VERDICT—VACATION—NEW TRIAL—FORMER JEOPARDY—APPEAL.

1. The trial of a plea of former conviction is in the nature of a civil proceeding, in which the burden is on the defendant; and, where the verdict on such plea is contrary to the weight of evidence, the court is authorized to set the same aside and order a new trial.

2. Where a verdict on the trial of a plea of former conviction sustaining the plea was set aside as contrary to the evidence, and a new trial granted, such proceeding being interlocutory merely, the defendant was not placed in jeopardy thereby, so as to preclude a subsequent trial thereof.

3. An order setting aside a verdict sustaining a plea of former conviction and granting a new trial before plea on the merits is not appealable, and can be reviewed only by exceptions on appeal from a judgment on the merits.

Douglas, J., dissenting.

Appeal from superior court, Anson county; Neal, Judge.

George Ellsworth and another were indicted for larceny, and from an order setting aside a verdict sustaining a plea of former conviction and granting a new trial, defendants appeal. Appeal dismissed.

H. H. McLendon, for appellants. The Attorney General, for the State.

CLARK, J. The defendants were indicted for breaking into a storehouse with intent to commit larceny, without specifying any articles, and their sentence on conviction

was affirmed on appeal. 130 N. C. 690, 41 S. E. 548. During the pendency of that appeal, and before the decision of this court therein had been rendered, an indictment was tried against the defendants for larceny of certain articles alleged to have been stolen by them from said storehouse immediately after their felonious breaking into the same. To this the defendants interposed the preliminary plea of former conviction, declining to plead to the merits till this plea had been disposed of. The plea of former conviction is not a plea upon the merits. It is not an inquiry as to anything that the defendant has or has not done, and is not, therefore, of a criminal nature. It is a collateral civil inquiry as to what action the court has taken on a former occasion. The burden from the start is on the party offering it, and, if it is not proven by him by a preponderance of evidence, the issue must be answered, “No.” So distinct is this collateral issue from the criminal inquiry, that it is held that they should be tried separately. *State v. Winchester*, 113 N. C. 641, 18 S. E. 657; *State v. Respass*, 85 N. C. 534. It is held an “interlocutory plea,” and that no appeal lays for defendant therefrom, but he can note his exception. *State v. Pollard*, 83 N. C. 597. When the plea of former conviction or former acquittal is not sustained, then the criminal trial begins, unaffected by the interlocutory inquiry which has been taken as to the former action of the court. *Com. v. Goddard*, 13 Mass. 455. So far from involving the criminal trial, the plea of former conviction is a confession, and therefore it should be tried separately. There is a single issue on a trial for a criminal offense, to which the response must be “Guilty,” or “Not guilty.” The issue here submitted was, “Have the defendants been formerly convicted of the crime wherewith they now stand charged?” There was no conflict in the evidence, and the answer depended upon an inspection of the two indictments by the court. Being of opinion that they were, as a matter of law, for different offenses, the judge instructed the jury, if they believed the evidence, to answer the issue “No.” He might have directed a verdict, for there was no evidence in favor of the party upon whom lay the burden of proof (*Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39), if the judge was right in his legal conclusion upon inspection of the indictments. The jury, however, found the proposition of law (the only matter before them) differently from the judge, and responded, “Yes,” whereupon he set the verdict aside because “contrary to the weight of the evidence and against the instructions of the court.” The court cannot set aside a verdict of not guilty, though it may treat such verdict as a nullity when it has been procured by fraud (*State v. Tilghman*, 33 N. C. 518; *State v. Swepson*, 79 N. C. 632), and

put the defendant on trial again. But this was not a verdict of not guilty. It was an interlocutory inquiry as to former action by the court, and, the verdict by the jury being in the face of the instructions of his honor and unsustained by any evidence, he could not do otherwise than set aside the verdict. The defendants have not been in jeopardy. 17 Am. & Eng. Enc. Law, 592; *State v. Hager*, 61 Kan. 504, 59 Pac. 1080, 48 L. R. A. 254. Their guilt has not been inquired into by a jury on this bill. With this verdict set aside, there still remains a new trial upon this plea of former conviction; and, if that is found against them, then the plea of not guilty will be tried, unaffected by these preliminary inquiries which are in the nature of a plea in abatement. So purely is this a collateral inquiry, that when, as here, the plea turns upon an inspection of the two indictments, the court may decide the plea without the intervention of a jury, or may charge the jury that the plea is not sustained by the evidence. 9 Enc. Pl. & Prac. 640, and cases there cited, and *Martha v. State*, 26 Ala. 72, in which Chilton, C. J., says, "This is no invasion by the court of the province of the jury, for it is the duty of the court to declare the legal effect of the record insisted on by the prisoner as sustaining her pleas" (of former acquittal). In a somewhat similar inquiry in *State v. Haywood*, 94 N. C. (for forgery), at page 848, the preliminary issue, "Is defendant sane and capable of conducting his defense?" was found by the jury, "No." The trial court set aside this verdict because against the weight of the evidence. This was tacitly recognized on appeal as valid, for the defendant was immediately put upon trial for the forgery and convicted, and a new trial was granted on appeal for an objection to a grand juror, which it was held was not waived by the trial upon this preliminary plea, though it was held that it would have been if not made before the plea of not guilty was entered. In *State v. Lee* (Conn.) 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202, Hamersley, J., well says: "A theory seems at times to have prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens, and therefore a procedure which proves incompetent to the correct application of legal principles in criminal trials can be changed, like any other rule of practice, when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence, that cannot be altered, when the change may tend to secure his just punishment. It needs no argument to dispel such illusion, or to demonstrate that the natural rights of the individual, as well as the interests of public order, are best

served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law. * * * 'Putting in jeopardy' means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. While such prosecution remains undetermined, the one jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a nolle, nor by a nolle after the trial has commenced, when the prisoner does not claim a verdict (2 Swift, Dig. 402; *State v. Garvey*, 42 Conn. 233); nor by the discharge of a jury in case of the sickness of a judge (*Nugent v. State*, 14 Am. Dec. 748); the sickness of juror (*Rex v. Scalbert*, 2 Leach, 620; *Rex v. Edwards*, 3 Camp. 207; *Com. v. Merrill*, Thacher, Cr. Cas. 1),"—and numerous other instances which the learned judge cites with accompanying authorities; and it will be noted that all these apply to events after a trial upon the general issue has begun. Our conclusion is that "a plea of former acquittal or former conviction not being of matter involved in the general issue,—not being matter which goes to the question of guilt,—a judgment [or verdict] sustaining it cannot be in the nature of an acquittal." *State v. Hager*, 61 Kan. 507, 59 Pac. 1080, 48 L. R. A. 254. It was held in *State v. Polard*, 88 N. C. 597, as above stated, that no appeal lay from a judgment overruling an interlocutory plea of former conviction, since the criminal trial upon the plea of not guilty must still take place, and, if the defendant is acquitted on that, the appeal and incidental delay would be in vain, and therefore he should merely note his exception, and have the interlocutory judgment reviewed if the final judgment is against him. For a stronger reason, no appeal lies here from setting aside the verdict on the interlocutory plea, when there remains still both the new trial upon the interlocutory plea, and, if that should go against the defendants, then the criminal trial upon the plea of not guilty; and, if either of these go in favor of the defendants, such appeal as this would be useless. The defendants should have simply noted an exception to setting aside the verdict.

The point whether the indictment covers the same offense as that on the former trial was also discussed before us, but need not be considered, as the verdict was set aside because against the weight of the evidence, which is a matter of discretion (it not being a criminal matter), and, further, because the conviction of the defendants for the burglary having been affirmed by this court since the trial of the interlocutory plea in this case, and they being, as counsel state, now under-

going sentence therefor in the state's prison, we have no doubt a nol. pros. will be entered in this cause below.

Appeal dismissed.

DOUGLAS, J. (dissenting). I have a natural repugnance to the mixing up of criminal and civil proceedings, and the inextricable confusion necessarily arising therefrom. The Code says:

"Sec. 125. Remedies in the courts of justice are divided into:—(1) Actions. (2) Special Proceedings.

"Sec. 126. An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.

"Sec. 127. Every other remedy is by a special proceeding.

"Sec. 128. Actions are of two kinds: (1) Civil; (2) criminal."

We are told that the trial of a plea of former conviction is "a collateral civil inquiry." What is a collateral civil inquiry? Is it an action or a special proceeding? It does not seem to me to be either, and, if neither, I see neither room nor warrant in the Code for its judicial creation. The action at bar is certainly criminal, as the defendants are charged with larceny, which may send them to the penitentiary for 10 years. I do not see anything civil about it, no matter what definition of the term we may choose. It is true, the defendants are already in the penitentiary, serving a ten-year sentence for the same unlawful act, but it seems that it is not enough. This splitting up of one act into two distinct offenses cannot meet my approval. It is illogical and dangerous, and frequently false in fact,—a mere creation of judicial speculation. The plea of former conviction is neither an action nor a special proceeding. It is merely a defense to a criminal action,—just as much so as the plea of not guilty. Either plea, found in the defendant's favor, is just as effectual as the other, and in fact in some jurisdictions the defense of former conviction or acquittal may be shown under the general issue without being specially pleaded. 9 Enc. Pl. & Prac. 631. Pleas, being purely defensive, and therefore having no independent existence, are governed in their determination by the nature of the action in which they are interposed. The fact that in many of them the burden of proof is imposed upon the defendant does not turn them into civil inquiries. In trials for murder, the burden of proving self-defense rests upon the defendant, but surely it is not a civil inquiry. It is said that "the plea of former conviction is not a plea upon the merits." That is true in a moral sense, but it goes to the essence of the action. It is a plea in bar, and not in abatement, and therein it differs materially from the plea of

insanity as interposed in *State v. Haywood*, cited by the court. If a defendant is insane at the time of the commission of the offense, he is irresponsible, and therefore not guilty of the crime. This is in bar. If, however, he becomes insane after the commission of the offense, his plea is in the nature of abatement, and protects him only while he remains insane. *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357; 10 Enc. Pl. & Prac. 1215, 1216. On the other hand, the plea of former conviction, when sustained, is a complete bar to any further prosecution. The defendant stands as fully acquitted of the present charge as if there had been a verdict of not guilty. One is equally free, whether he has never owed the debt, or has paid it. Upon such a finding he is entitled to his discharge, and when that finding is set aside he is again placed in jeopardy. I cannot deyst myself of the idea that a man is in legal jeopardy when he is in danger of being sent to the penitentiary, nor can I regard any proceeding that sends him there as civil in its nature. To say that an action itself is criminal, but that the defense thereto is civil, involves an inconsistency foreign to my opinion of the law.

From my view of the law, it would follow that the court below had no power to set aside a verdict substantially of acquittal as being against the weight of evidence. I concur in the intimation of the court that a nol. pros. should be entered below.

(131 N. C. 229)

ROBINSON et al. v. LAMB.

(Supreme Court of North Carolina. Nov. 5, 1902.)

JUDGMENTS — BAR — FERRIES — COUNTIES — BOUNDARIES — TRIAL — QUESTION OF LAW — JURISDICTION.

1. A judgment in one county in proceedings to establish a ferry was not an estoppel of proceedings by the same parties in another county to establish a ferry at the same place, provided the commissioners in the second county could give any relief not given by the commissioners of the county where the first suit was brought.

2. In proceedings to establish a ferry over a certain body of water, evidence examined, and held to show that such body of water was but a cut-off, and was not the Pasquotank river, and therefore not within a prohibition of ferries over said river within a certain distance from an existing ferry.

3. Where a division of a body of water had always been regarded as the river, and as forming a county boundary, legislation relative to a ferry thereon could not be made applicable to another division of the water which formed a cut-off, by showing that the alleged cut-off was in fact the principal stream, and that the part regarded as the river was a subsidiary stream.

4. The court properly refused to submit such an issue, as, on the facts admitted, or of which the court would take judicial cognizance, the question was one of law.

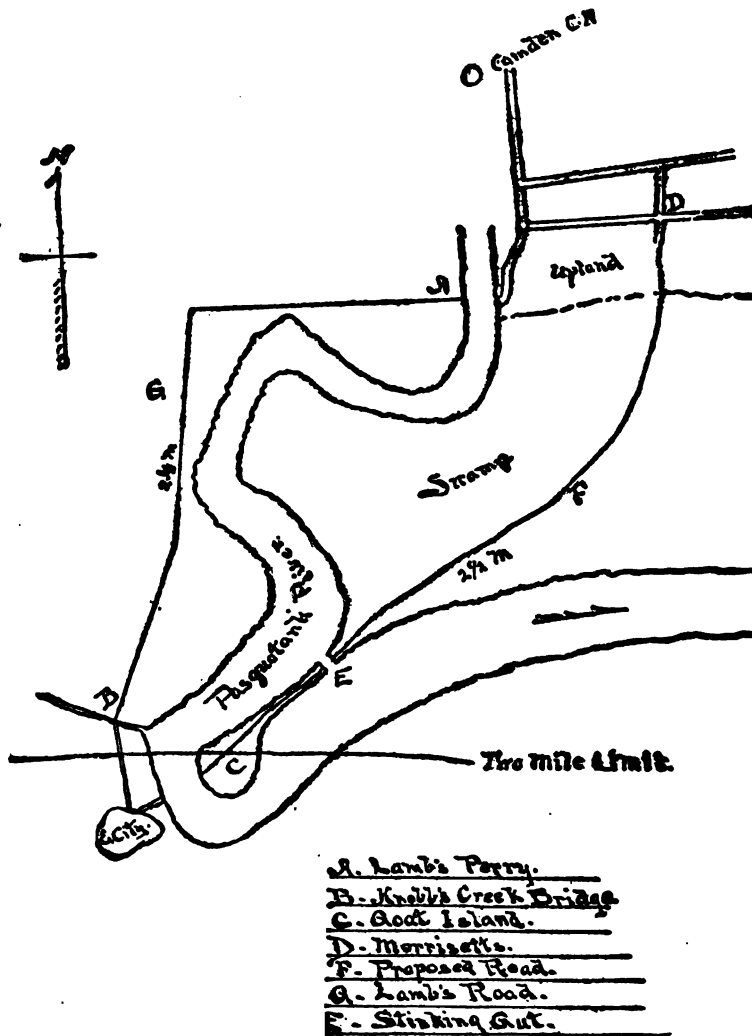
5. Under 2 Rev. St. p. 111 (Act 1777), creating Camden county, and describing it as "all

that part of Pasquotank county lying on the northeast side of Pasquotank river," the river is left wholly in Pasquotank county; and under Code, § 2014, that county had sole jurisdiction of proceedings to establish a ferry over the river.

Appeal from superior court, Camden county; Jones, Judge.

Proceedings by Charles H. Robinson and others against E. F. Lamb to establish a ferry. From a judgment for plaintiffs, defendant appeals, and moves to dismiss the action for want of jurisdiction. Action dismissed.

The following is a map of the locality:



Busbee & Busbee, for appellant. G. W. Ward, E. F. Aydtlett, and P. H. Williams, for appellees.

CLARK, J. This is a proceeding begun before the commissioners of Camden county to establish a ferry across Pasquotank river. The same proceeding to establish the same ferry at the same spot, with the same parties

plaintiff (except one person) and the same defendant, was heretofore begun before the commissioners of Pasquotank county, and the same propositions of law presented by the exceptions in this case were decided in that on appeal. Robinson v. Lamb, 128 N. C. 496, 38 S. E. 29. The judgment in the former action is pleaded by the plaintiffs as an estoppel in this, since no other relief is asked than the establishment of the ferry at the expense of the plaintiffs, as prayed in the former action. But if the commissioners of Camden could give any relief not already given by the commissioners of Pasquotank, the

judgment would not be an estoppel, though the principles of law there laid down would apply and be conclusive here. An appeal in the present action was before the court (Robinson v. Lamb, 129 N. C. 16, 39 S. E. 579), in which it is held that the court below erred in granting a motion to dismiss, because of chapter 72, Priv. Laws 1901. When the case went back, the issues were found in favor of

the plaintiffs; and, the law applicable having already been adjudged in favor of plaintiffs in the two appeals above cited, judgment was rendered accordingly, and defendant appealed.

The defendant contends that Stinking gut is Pasquotank river, or a part of it, and that a ferry over it would be illegal, because over Pasquotank river within two miles of Lamb's ferry, but we cannot assent to the proposition. This gut, with its malodorous name, is stated to be 80 to 100 feet wide and 150 yards in length. It is a cut-off 7 or 8 feet deep, through which boats sometimes pass, while what is and always has been known as "Pasquotank River" is very much larger, being 150 yards wide, and with a great curve sweeps by Elizabeth City, where the new ferry is, and then bends back; the peninsula thus formed, and whose neck is crossed by Stinking gut, being known as "Goat Island." It is, by the evidence, some 500 yards across Goat Island from the new ferry to where the road will cross Stinking gut. Even geographically speaking, it is clear that the broad stream which flows by the town is Pasquotank river, and the gut, which is one-fifth of the width of the river, or less, is merely a cut-off, like the Dutch Gap Canal, dug by Gen. Butler in James river during the war, or like similar cut-offs excavated not infrequently by floods in the Mississippi. But even if it could be shown that Stinking gut was physically the true river, and the broader stream (five times as broad) that flows by Elizabeth City was the subsidiary stream, still, the latter has always been known as "Pasquotank River," and this is the stream over which the ferry was ordered, and which for the century and a quarter since the act establishing Camden county has been the county boundary. In all that time, Goat Island, as is conceded and cannot be denied, has been in Camden county. If Stinking gut were Pasquotank river, or, legally speaking, a part of it, then Goat Island would be in Pasquotank county. It is physically and legally impossible that Pasquotank river, as it flows around Goat Island, and Stinking gut, which cuts across its narrow neck, should both be the boundary between the counties, as defendant contends. The Pasquotank river is the boundary between the counties, and has been since 1777. When the legislation under which the defendant claims was enacted, this river was the stream that flows by Elizabeth City. It could not be at two places. There has been no legislation as to Stinking gut.

The establishment of a road from the eastern end of the ferry, and a bridge or ferry across Stinking gut, are matters for the cognizance of the commissioners of Camden, since, as we have said, Stinking gut is Stink-

ing gut, and is in Camden county, and is not Pasquotank river, which lies wholly in the county of that name. A ferry or bridge over Stinking gut is not a ferry or bridge over Pasquotank river. If it could be shown and demonstrated that Stinking gut is the scientific boundary, being the true Pasquotank river, it has not been so known, styled, and treated, and hence is not, in law, any part of that stream, though it flows into and flows out of the Pasquotank. An act of the legislature would be necessary to make the change in the boundary and in the name of the stream. Doubtless the citizens of the prosperous and progressive city by the Pasquotank will some day procure an act of the legislature to bestow some name more euphonious and sweet smelling upon a stream which lies so close to their doors as malodorous Stinking gut. But no change of name, not even were that of Pasquotank river bestowed upon it, would transfer the county boundary to the cut-off, unless the act clearly so indicated. Certainly neither the court nor the jury could change a county boundary, recognized as such for a century and a quarter, upon the ground that another stream bearing another name is the scientific frontier, upon the ground that it is physically the true Pasquotank, or a part of it, and that what has been known as "Pasquotank River" all these years is physically not entitled to be solely so designated. An issue to that effect was properly refused, for, upon the facts admitted, or of which the court takes judicial notice (like a county boundary), the proposition is one of law, not of fact.

The defendant moved in this court for the first time to dismiss for want of jurisdiction, in that Pasquotank river lies wholly in Pasquotank county, and the commissioners of that county alone have jurisdiction. Code, § 2014. The act of 1777 (2 Rev. St. p. 111), creating Camden county, describes it as "all that part of Pasquotank county lying on the northeast side of said river [Pasquotank]." This, of course, leaves the river entirely in Pasquotank county, and the commissioners of that county have sole jurisdiction to establish a ferry over it; and the defendant's motion to dismiss this proceeding for want of jurisdiction in the commissioners of Camden county is well taken, and must be allowed. But as the ferry has already been established by the commissioners of Pasquotank, and their action affirmed (126 N. C. 492, 38 S. E. 29), and it has been held that the act of 1901 does not affect a ferry already ordered to be established (129 N. C. 18, 39 S. E. 579), though the motion of the defendant must be granted, we do not see that it can in any wise avail him beyond a recovery of the costs in this case.

Action dismissed.

(131 N. C. 251)

SHUTE et al. v. HEATH et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

CONTRACT IN RESTRAINT OF TRADE—INDEFINITENESS AS TO TERRITORY.

1. A provision in a contract of sale of a business of manufacturing timber and ginning cotton that the seller will not engage in the business in any territory from which he secures his patronage, so as to compete with the buyer, is void for indefiniteness as to territory.

Appeal from superior court, Union county; McNeill, Judge.

Action by H. A. Shute and others against W. C. Heath and others. Judgment for defendants, plaintiffs appeal. Action dismissed.

Maxwell & Keerans, for appellants. Armfield & Williams and Adams & Jerome, for appellees.

MONTGOMERY, J. Contracts in partial restraint of trade can be made and enforced of common right. This court said in *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 380, 56 Am. St. Rep. 650: "The modern doctrine is founded upon the basic principle that one who by his skill and industry builds up a business acquires a property at least in the good will of his patrons which is the product of his own efforts, and has the fundamental right to dispose of the fruit of his own labor, subject only to such restrictions as are imposed for the protection of society, either by expressed enactments of law or by public policy." An indefinite restriction as to duration will not make such contracts void. *Kramer v. Old*, supra. But there must be a definite limitation as to space, and the reasonableness of such limitation will depend upon the nature of the business and good will sold. A contract, for instance, for a valid consideration, not to engage in the manufacture and sale of firearms in general use, would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton. And the reasonableness of the limitation as to space is a matter of law for the court to decide. *Chitty, Cont.* 738. And the test of that reasonableness is whether the space or territory is greater than is necessary to enable the assignee to protect himself from competition on the part of his assignor, and thereby to get the benefit of what he has bought. The assignee would have the right to freedom from the competition of the assignor in the whole territory from which the assignor derived the profits of his business. The contract before us is silent as to restriction as to time, but under the decision made in *Kramer v. Old*, supra, that would be construed to be for the lives of the assignors. The trouble in the present case grows out of that part of the contract in respect to the limitation as to space. The defendants, after selling to the plaintiffs a tract of land and gin-

ning and sawmill machinery, agreed with them that they "would not erect, conduct, or carry on the business of ginning and baling cotton or making brick in any territory now occupied by them, or from which they secure their patronage, so as to compete with them or injure their business in any of the lines of ginning and baling cotton or making brick, either for ourselves, or as agents for another or others." The defendants in this court filed a motion to dismiss the action on the ground that the complaint did not state a cause of action, in that the contract set out in the complaint is void for indefiniteness as to territory within which defendants were not to gin cotton. We think the motion must be allowed. The infirmity of the contract does not consist in the reasonableness as to the extent of territory in which the plaintiffs were to conduct their business free from competition on the part of the defendants, but it is in the indefiniteness of that territory. No rule can be laid down by which the area can be made certain. No instructions could be given, even to an expert surveyor, by which he could define the bounds of the space. It is without shape,—without course or distance from any object or pointer. The fixing of the bounds would depend upon the testimony of witnesses, each testifying as to what he knew as to who were the patrons of the plaintiffs, and where they resided. The attempted enforcement of such contracts would, in the nature of things, be likely to produce litigation between the assignor and assignee as to the extent of the territory, with the probability that large numbers of witnesses would be called, and great expense incurred both by the litigants and the public. A retrospect of the course of the law in respect to contracts in restraint of trade confirms us in the view we have taken of the contract in the present case as to the limitation as to space therein set out; that is, that the agreement that the limitation as to space shall be so definitely set out in the contract as that the bounds must be determined by the same rules as apply to the description of real estate in deeds. Contracts in general restraint of trade with English-speaking peoples have always been void; and while the doctrine has been in modern days modified to the extent of permitting such contracts, to operate in limited territory, to be made and enforced, yet in all the cases we have found, except one hereafter referred to, the space has been definitely fixed in the contract, with as much certainty as is required in the description in deeds. The evil consequences likely to flow from such contracts to the parties, as well as to the public, induce us to construe the requirement of definiteness as to space strictly, and that the contracts themselves shall set out such a description as shall be definite without the aid of testimony dehors, except such as is allowed in establishing the boundaries to real estate conveyances. An opinion in the

case of *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119, is of so much interest on this subject that we feel justified in making the following quotation from it: "Among the most ancient rules of the common law, we find it laid down that bonds in restraint of trade are void. As early as the second year of Henry V. (A. D. 1415), we find by the Year Books that this was considered to be old and settled law. Through a succession of decisions it has been handed down to us unquestioned till the present time. It is true, the general rule has from time to time been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged and without exceptions. Then an attempt was made to qualify it by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started from a general and unlimited (limited) restraint of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I (A. D. 1621). *Broad v. Jollyfe*, Cro. Jac. 596, where it was holden that a contract not to use a certain trade in a particular place was an exception to the general rule, and not void. And in the great and leading case on this subject (*Michell v. Reynolds*, 10 Mod. 27, 85, 131) the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision contracts in restraint of trade generally have been held to be void, while those limited as to time or place or persons have been regarded as valid and duly enforced. * * * It is reasonable, salutary, and suited to the genius of our government and the nature of our institutions. It is founded on just principles of public policy, and carries out our constitutional prohibitions of monopolies and exclusive privileges. The unreasonableness of contracts in restraint of trade and business is very apparent, from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly. And this, especially, is applicable to wealthy companies and large corporations, which have the means, unless

restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such laws void."

The plaintiffs' counsel referred to the cases of *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, and *Moore & Handley Hardware Co. v. Towers Hardware Co.* (Ala.) 6 South. 43, as supporting the plaintiffs' contention that the limitation as to space was sufficiently definite to be enforced. In the first-mentioned case, the defendants agreed not to continue the milling business "in or in the vicinity of Elizabeth City." There the defendants did not make in this court the contention that the area was too great, and therefore unreasonable, or that it was too indefinite. The contention was over the limitation as to time. The other case, however,—the *Hardware Case*,—is toward the sustaining of the plaintiffs' position. The contract there provided that the defendants, upon a sale of their business to the plaintiffs, would sell no more "plow blades and plow stocks," without stating any particular or definite territory. The court there said: "The territory in which the vendees obtained their trade was well known to the vendors, and therefore the contract is not in general restraint of trade and invalid. A contract by which a partnership engaged in the business of selling hardware sold out their stock of plow blades and plow stocks to a rival, and agreed not to handle any more plow blades or plow stocks, was construed in connection with the attending circumstances, showing the extent of country over which the rivalry in business extended, is not an unreasonable restriction of trade." But this court decided exactly the reverse in the case of *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586, and for the reasons given there and here we will abide by that decision.

Motion allowed and action dismissed.

(116 Ga. 539)

VEAL v. STATE.

(Supreme Court of Georgia. Nov. 14, 1902.)
CRIMINAL LAW—DEMURRER TO INDICTMENT
—NEW TRIAL—IDEM SONANS—
SELLING LIQUOR.

1. The overruling of a demurrer to an indictment cannot properly be made a ground of a motion for a new trial.

2. It is too late, in absence of exceptions pendente lite, to except to the overruling of a demurrer to an indictment, when 20 days have elapsed since the ruling complained of was made.

3. Upon demurrer to, or motion to strike, a plea of misnomer, in a criminal case, the court may, as matter of law, decide that the names "Witt" and "Wid" are idem sonans.

4. The fact that an indictment which describes the accused by his Christian and surnames fails to also designate him by the initial of his middle name is immaterial.

¶ 4. See Indictment and Information, vol. 27, C. & D. Dig. § 219.

5. The evidence supported the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Moultrie; W. A. Covington, Judge.

Witt Veal was convicted of selling liquor to a minor, and brings error. Affirmed.

W. F. Way, for plaintiff in error. J. D. McKenzie, for the State.

FISH, J. The plaintiff in error was tried in the city court of Moultrie upon a presentment charging Witt Veal with selling and furnishing intoxicating liquors to a minor without written authority so to do from either a parent or guardian of such minor. He demurred to the indictment, and the demurrer was overruled. Before pleading to the merits, he filed a plea in abatement, in which he alleged that his name was not Witt Veal, that he had never been known or called by that name, that his name was Wid L. Veal, and that he had never been known or called by any other name. Upon motion of the solicitor, this plea was stricken by the court upon the ground that the two names were idem sonans. Upon the trial the accused was found guilty, whereupon he made a motion for a new trial, which being overruled, he excepted. In his motion for a new trial, in addition to the general grounds, he alleged error on the part of the court in the overruling of the demurrer to the presentment, and error in striking the plea of misnomer "without giving defendant an opportunity of sustaining said plea by proper and legal testimony." In his bill of exceptions he also alleges error upon each of these rulings.

1. The overruling of the demurrer to the presentment could not properly be made a ground of the motion for a new trial. *Palmer v. State*, 91 Ga. 164, 16 S. E. 976; *Roberts v. State*, 92 Ga. 451, 17 S. E. 202; *O'Shields v. State*, Id. 472, 17 S. E. 845; *Willbanks v. Untriner*, 98 Ga. 801, 25 S. E. 841.

2. No exceptions to the overruling of the demurrer were filed pendente lite, and, as more than 20 days elapsed after this ruling was made before the filing of the bill of exceptions in the case, it was too late to except thereto in such bill. *Thomas v. State*, 90 Ga. 437, 16 S. E. 94.

3. There was no error in striking the plea of misnomer without giving the accused an opportunity to present evidence in support of the same. The general rule, which we deduce from the authorities, is that if a demurrer to a plea of misnomer raises the issue of idem sonans, and the two names are necessarily pronounced substantially alike, the issue is to be determined as matter of law by the court. 14 Am. & Eng. Enc. Law, 303; and cases cited. In *Com. v. Warren*, 143 Mass. 568, 10 N. E. 178, it was said: "The province of the court and jury in cases

like the present is governed by the following rule: If the two names, spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be idem sonans; but, if they do not necessarily sound alike, the question whether they are idem sonans is a question for the jury." In *Munkers v. State*, 87 Ala. 96, 6 South. 358, Clifton, J., said: "Though this is strictly a question of pronunciation, when raised by demurrer it may be treated as a question of law, but in such case the judgment of the court should express the conclusion from facts or rules of which judicial notice may be taken. When there is no generally received English pronunciation of the name as one and the same, and the difference in sound is not so slight as to be scarcely perceptible, the doctrine of idem sonans cannot be applied without the aid of extrinsic evidence, unless, when sound and power are given to the letters, as required by the principles of pronunciation, the names may have the same enunciation or sound." The supreme court of Missouri held that "Blankenship" and "Blackenship" were, as matter of law, idem sonans. *State v. Blankenship*, 21 Mo. 504. The same court even held: "A court may say, as matter of law, upon demurrer to a plea in abatement to an indictment that 'Owens D. Havelly' and 'Owen D. Haverly' are idem sonans." *State v. Havelly*, Id. 498. In *Chapman v. State*, 18 Ga. 736, where there was a motion in the trial court to quash an indictment upon the ground that it appeared from the indictment that Wesly Hudson acted as a grand juror in finding the bill, when it appeared from the minutes of the court that Wesly Hutson was sworn and acted as a grand juror at the term of the court at which the indictment was found, which motion was overruled, this court held that "Hudson" and "Hutson" are idem sonans. In *Jeffries v. Bartlett*, 75 Ga. 230, an execution in favor of Bartlett against Jeffries et al. was levied upon certain land as the property of Jeffries. He interposed an affidavit of illegality, one ground of which was "that the advertisement under the levy for the sale of the land described affiant by the name of Jeffers, his real name being Jeffries." On demurrer this affidavit was dismissed, and the defendant excepted. This court held that "Jeffers" and "Jeffries" are idem sonans." See, also, *Biggers v. State*, 109 Ga. 105, 34 S. E. 210. "Witt" and "Wid," the given names now in question, are clearly idem sonans; the only difference between them being the very slight difference in the sounds of the letters "p" and "d,"—exactly the difference that there is between the names "Hudson" and "Hutson," which, as we have seen, this court has held to be idem sonans.

4. From what we have said, it is apparent that the court was right in sustaining the motion to strike the plea of misnomer, unless it was good, as against the motion, be-

cause of the failure of the indictment to also designate or describe the accused by the alleged middle initial of his name. In *Hicks v. Riley*, 83 Ga. 332, 9 S. E. 771, it was held: "The law does not regard the middle name or initial of a person as material, unless it be shown that there are two persons of the same first name and surname." And in *Banks v. Lee*, 73 Ga. 25, it was held: "The middle initial of the grantor in a deed is generally immaterial." In *Timberlake v. State*, 100 Ga. 66, 27 S. E. 158, it was held: "The accused being indicted as J. S. C. Timberlake, a plea of misnomer alleging that his name was not J. S. C. Timberlake, but was J. C. S. Timberlake, and that he has never been known or called by the name of J. S. C. Timberlake, but was always known and called by the name of J. O. S. Timberlake, and by no other name, was properly stricken on demurrer. The transposition of the two intermediate initials was immaterial." In the present case the fact that the middle initial of the accused was left out of the presentment was immaterial.

5. The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 592)

RIGGINS v. STATE.

(Supreme Court of Georgia. Nov. 14, 1902.)

LARCENY—INDICTMENT OF ACCESSORY—EVIDENCE.

1. An indictment charging one with the offense of being an accessory before the fact to the offense of simple larceny (a felony), in that he did counsel, command, and procure another to commit such larceny, is not supported by evidence showing that the person so accused was himself guilty, as the absolute perpetrator of the offense; and in the absence of evidence sufficient to show that the accused did so counsel, command, or procure the commission of the crime as charged, a verdict of guilty is not supported. (a) The verdict in the present case was contrary to the evidence, and the trial judge erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Charley Riggins was convicted of crime, and brings error. Reversed.

J. Santie Crawford, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

LITTLE, J. Riggins was indicted for the offense of being accessory before the fact to the crime of simple larceny. The specific charge is "that the said Charley Riggins, * * * being absent at the time of the commission of the crime, did procure, counsel, and command one Charley Hill" a certain mule described, and of a named value, to unlawfully take and carry away, "with intent

to steal the same." The accused was put on trial, and the jury returned a verdict of guilty. He made a motion for a new trial on the grounds that the verdict was contrary to the law and the evidence, which being overruled, he excepted. The evidence tended to show the following as the facts relating to the charge made against the accused: It was admitted that Hill had been indicted for the larceny of the mule, and had been tried and convicted. Adolphus Riggins, the owner of the mule, testified as to the larceny from his stable; that some time afterwards he ascertained, through information furnished by Hill, where the mule was, and secured its return. A witness (Rosa Saylor) said that just before the mule was stolen she saw Hill and the accused together at the house of the latter, and heard them talking, and that Hill said he was going to get the mule; that this was the night the mule was stolen; that after that Hill asked accused where the mule was, and the accused told him it was in Dolph Riggins' stable; that subsequently Hill got a bride and went off, and the next day Dolph Riggins was looking for his mule, and the accused helped him to hunt for it. Hill was introduced as a witness for the state, and testified that Riggins asked him if he would go and sell the mule, which he finally consented to do; that he was instructed by the accused to sell it for the best obtainable price; and that the first he saw of the stolen mule was when he was at the house of the accused, and came out in the yard, and the accused had it out there, hitched to a post. There was no issue as to the fact that the mule was stolen, and no question raised but that Hill had carried the mule away and sold it. The point insisted on in his brief by counsel for plaintiff in error is that there was no evidence to support the testimony of the accomplice, Hill. We think, however, that this question can hardly arise, for the reason that the accused was indicted as being accessory before the fact, while none of the evidence showed that he occupied that relation to the larceny. It is true that the evidence of the witness Rosa Saylor was to the effect that prior to the larceny Hill and the accused were talking about the mule, and the latter told the former where the mule was, and it is also true that it was shown that the accused assisted the owner of the mule in looking for it the day after the larceny; but this evidence is not inconsistent with the fact that the accused was with or without the co-operation of Hill, the absolute perpetrator of the offense, while the evidence of Hill, who was introduced as a witness for the state, shows absolutely that the accused was guilty of a larceny, while he (Hill) occupied the relation of an accessory after the fact. Under no view of the evidence, then, could the accused have been convicted of the offense of counseling, commanding, and procuring Hill to steal the mule; and, if he could

not, the verdict finding him so guilty was contrary to the evidence in the case. One who is guilty of the commission of a crime as principal in the first degree commits an entirely distinct offense from that of an accessory before the fact, and one indicted as an accessory cannot be convicted on evidence proving him to be "present, aiding and abetting at the fact." 1 East, P. C. 352; Leach, 515. In the case of *Hately v. State*, 15 Ga. 346, it was ruled that "he who procures, counsels, commands or incites his clerk or agent to commit a crime in his absence is guilty as an accessory before the fact, and cannot be convicted upon an indictment which charges him with having jointly, with his clerk, committed the offense as principal." In other words, one who counsels, commands, or procures another to commit a crime, but is absent at the time of its commission, is not a principal, and cannot be convicted as such. In some of the states the distinction has been abolished, and many decisions can be found which seem somewhat to confuse the principle upon which the distinction between the two offenses rests; but in the cases which have come under our observation, where this is true, they deal with facts showing that, as the result of a conspiracy, all the persons charged were the absolute perpetrators, and where the persons charged as accessories were declared to be present, aiding and abetting the commission of the crime. In the present case, however, the indictment distinctly alleges that plaintiff in error was absent at the time of the commission of the crime; that his guilt consists only in having counseled, procured, and commanded said crime to be done. A verdict rendered on evidence that he was the actual perpetrator of the crime does not support the charge made in the indictment; and in the absence of evidence that the accused counseled, procured, or commanded the crime to be committed, such verdict cannot be sustained, because it is contrary to the evidence.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 592)

GOVATOS v. STATE.

(Supreme Court of Georgia. Nov. 14, 1902.)

CRIMINAL CONVERSION—EVIDENCE.

1. In the trial of one charged with converting to his own use the proceeds of sales of property intrusted to him to sell, evidence is competent tending to show that at the time of the alleged conversion the accused was in debt and in need of money; such evidence to be considered by the jury in determining what was the motive of the accused. *Bridges v. State*, 29 S. E. 859, 103 Ga. 35, and cases and authorities cited.

2. There was no error in admitting evidence, nor in charging. The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Peter Govatos was convicted of criminal conversion, and brings error. Affirmed.

J. S. Crawford, W. H. Ennis, and Seaborn & Barry Wright, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding

(116 Ga. 582)

MELTON v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—INSTRUCTIONS—ACCOMPLICE TESTIMONY.

1. There being some evidence that one of the witnesses for the state was an accomplice of the accused, there was no error in charging with reference to the weight to be given to the testimony of an accomplice.

2. There was no merit in any of the other grounds of the motion for new trial, and the evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Fayette Melton was convicted of crime, and brings error. Affirmed.

Harris, Chamlee & Harris, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 582)

ANDERSON v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—REVIEW.

1. No error of law was complained of, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from city court of Americus; C. R. Crisp, Judge.

Charlie Anderson was convicted of crime, and brings error. Affirmed.

Jas. Taylor, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 582)

AARON v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

LARCENY—SUFFICIENCY OF EVIDENCE.

1. The evidence not being sufficient to establish beyond a reasonable doubt either that a larceny had been committed, or that, if committed, the accused was the perpetrator, it was er-

ror to overrule a motion for a new trial based upon the ground that the judgment of conviction was contrary to the evidence.

(Syllabus by the Court.)

Error from city court of Americus; G. R. Crisp, Judge.

Richard Aaron was convicted of larceny, and brings error. Reversed.

J. R. Williams, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 408)

ETOWAH MILLING CO. v. CRENSHAW.

(Supreme Court of Georgia. Oct. 29, 1902.)

CORPORATIONS—ACTIONS—VENUE—CORPORATE EXISTENCE.

1. A corporation of this state is not subject to a suit for equitable relief by injunction in a county other than that fixed by its charter as the county of its principal office, and this is true although the suit embraces also a claim for past damages.

2. A plaintiff who proceeds against a defendant as a corporation is estopped to deny its corporate existence, and is bound by the terms of the charter as to the principal office of the corporation.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Bill by T. C. Crenshaw against the Etowah Milling Company. From a judgment defendant brings error. Reversed.

C. D. Maddox, Jno. T. Morris, and J. M. Neel, for plaintiff in error. John W. & Paul F. Akin and A. H. Cox, for defendant in error.

ADAMS, J. The bill of exceptions in this case was filed by the plaintiff in error to the grant of a temporary injunction. This injunction was allowed in a suit brought in Bartow superior court by the defendant in error against the plaintiff in error; one of the chief, if not the chief, purposes of which was to permanently enjoin the defendant in the court below from obstructing the flow of water in the stream mentioned in the petition, from raising a dam across this stream, and from interfering with the status of the dam to the injury of the defendant in error. The declaration also claimed damages for past injuries. It appeared from the charter of the milling company, which was put in evidence, that the defendant was chartered by the superior court of Bartow county, and this charter located the principal office of the company in Fulton county. One of the contentions urged by counsel for the milling company in the court below and before this court was that the superior court of

Bartow county was without jurisdiction to grant relief by injunction. In addition to the fact that the charter fixed the domicile of the corporation in Fulton county, it appeared from the uncontradicted evidence that its books are kept in that county, its financial business transacted there, and that its supplies, purchases, and sales are made at the principal office in Fulton.

1. Assuming that, notwithstanding the constitutional provision that "equity cases shall be tried in the county where a defendant resides against whom some substantial relief is prayed," the legislature may pass a law providing that a corporation may be proceeded against for an injunction or other equitable relief in a county other than that fixed by its charter as its domicile, we do not think that the legislature has undertaken to do so as to a corporation like the plaintiff in error, so far as this character of relief is concerned. An act claimed to have this effect should, because of this constitutional principle and the policy embodied therein, be construed strictly, and not extended beyond the requirements of its terms. In the case of *Watson v. Railroad Co.*, 91 Ga. 223, 18 S. E. 307, this court, through Chief Justice Bleckley, in dealing with the question as to the residence of a railroad company, say: "Where the owner is a domestic corporation, the general rule of law that it resides also where its principal office or place of business is situated still prevails. The corporation has this common-law residence for general purposes, in conjunction with the superadded statutory residences for special purposes, which the Code ascribes to it." The general rule still is that domestic corporations must be sued in the county where the principal office is located by the charter. In the case of *Coal Co. v. Haslett*, 83 Ga. 550, 10 S. E. 435, where the corporation involved was chartered by an act of the legislature which did not locate the corporation in any particular county, it was held that, where it established its office in Atlanta for the purpose of electing its officers and conducting its financial operations, the jurisdiction was in the proper court of Fulton county. It was there recognized that, if the legislature had undertaken to locate the company in any particular county, that would have controlled. In the absence of such legislation, the ruling just noticed was made. If the constitutional provision referred to were all the law on the subject, then, obviously, equitable relief could have been obtained against this plaintiff in error only in Fulton county. Has the legislature undertaken to fix the residence of a corporation like this in the county where the cause of action arose, or where its mill was located, for the purposes of equitable relief? As we understand the distinguished counsel for the defendant in error, they contended that this provision has been made by the act approved October 18, 1885 (Acts 1884-85, p. 99), entitled "An act to define where

¶ 2. See *Corporations*, vol. 12, Cent. Dig. §§ 22, 23.

corporations, mining or joint stock companies may be sued, and to define how service of the suit may be effected," codified in section 1900 of the Civil Code. The part germane to their contention reads as follows: "Suits for damages, because of torts, wrong or injury done, may be brought in the county where the cause of action originated." It will be noticed that the law does not say "suits because of torts, wrongs, or injury done," but in terms confines these suits to those for damages. The title of an act may always be considered as one of the aids to its construction, and we are not unmindful of the argument based upon the broadness of this title. But it cannot control the plain meaning of the body of the act, or eliminate words that are material, and which we must presume were incorporated in the legislation designedly. As said by Chief Justice Marshall in *U. S. v. Palmer*, 8 Wheat. 631, 4 L. Ed. 477, "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature." The maxim, "*Verba debent intelligi cum effectu*," contains a principle of much importance in the construction of statutes. *Whitaker v. Strong*, 16 Ga. 85, 86. We know of no rule of interpretation which would justify us in disregarding the words italicized, "for damages." They are restrictive and important. We repeat in this connection that in the light of the constitutional provision which requires that "equity cases shall be tried in the county where a defendant resides against whom some substantial relief is prayed" this legislation, giving to the legislature the broad liberty assumed in its validity, ought to be strictly construed, and not extended beyond its terms. Even, however, a liberal construction would not justify us in striking from the body of the law material and significant words. The principle, however, is invoked, embodied in section 3925 of the Civil Code (although this section is not referred to), which provides that "equity seeks always to do complete justice, and hence, having the parties before it rightfully, it will proceed to give full relief to all parties in reference to the subject-matter of the suit, provided the court has jurisdiction for that purpose." Reference is made to the case of *Powell v. Cheshire*, 70 Ga. 360, 48 Am. Rep. 572. But neither the principle recognized by our Code nor this decision can help the contention of the defendant in error. The case cited holds that: "A bill in equity to enjoin a trespass upon realty by felling timber is not such a suit respecting the title to land as must be brought in the county where the land lies. The proper venue of such a case is the county of the residence of a defendant against whom substantial relief is prayed." The argument for the defendant in error seems to be that, as the jurisdiction is complete, under section 1900 of the Civil Code, in Bartow superior

court as to the action for damages, the court, having this jurisdiction, will give as incidental relief protection against future torts, through the process of injunction. The power, however (even if the relief by injunction could be called incidental relief in this case), referred to by the Code and the decisions, is the power of a court of equity, and not that of a court of common law, and the question here is, which is the proper court for equitable jurisdiction, the superior court of Bartow county or the superior court of Fulton county? The proviso in section 3925 of the Civil Code is significant. It is a proviso that would obtain even in a court of equity. A fortiori would it apply to a court of common law. The decisions of this court are inconsistent with the position that, because the superior court of Bartow county may have jurisdiction to award damages, it can also give equitable relief. The case of *Vizard v. Moody*, 115 Ga. 491, 41 S. E. 997, is directly in point. In that case it is held that: "While a petition which seeks to recover possession of land and mesne profits on a legal title must, under the constitution of this state, be instituted in the superior court of the county where the land lies, yet a court of the county where the land lies, as to a person who is a resident of another county in this state, has no jurisdiction to grant equitable relief,—such an injunction and the appointment of a receiver,—although the petition under which the land is sought to be recovered contains prayers for such equitable interposition." In the opinion delivered by Mr. Justice Little other decisions of this court are cited to the same effect. In one of them—*Johnson v. Griffin*, 80 Ga. 551, 7 S. E. 94—this court held that "the plaintiff in an action of ejectment cannot ingraft upon the declaration an amendment in the nature of a bill in equity, praying that one of the defendants be decreed to perform specifically a parol agreement for a gift of the premises in dispute, without alleging that such defendant is a resident of the county in which the suit is pending, or a nonresident of the state." We conclude, therefore, that the superior court of Bartow county had no jurisdiction to grant the equitable relief secured in this case, and that, therefore, the grant of a temporary injunction was erroneous.

2. It is contended by the defendant in error that the plaintiff in error is estopped to deny its residence in Bartow county, because it applied for and obtained its charter from the superior court of that county, submitted itself to that court, and therefore established its residence in Bartow county; and it is claimed that the superior court of Bartow county only had jurisdiction to grant its charter in the event that its principal office was to be located in that county. Section 2350 of the Civil Code provides that the superior courts of this state shall have the power to create the corporations there-

in named by compliance with the terms of that section, paragraph 1 of which provides that "the persons desiring the charter shall file in the office of the clerk of the superior court of the county in which they desire to transact business a petition or declaration," etc. The petition for incorporation of the plaintiff in error in the present case is not in the record, but it would be presumed, should the fact be a material one to the jurisdiction, that it stated that the company desired to do business in Bartow county as well as in Fulton county. It is not necessary to adjudicate in this case whether the superior court of any county in which it appears that a corporation proposes to do business can grant a charter, or whether this right is confined to the county in which the principal office is to be located. In the recent case of *McCandless v. Acid Co.*, 115 Ga. 968, 42 S. E. 449, this court held that "a charter granted by a superior court upon a petition alleging that the principal office of the company was to be located in the county in which the petition was filed was a valid charter, notwithstanding the corporation owned no property in that county, and the work in which it was to be engaged was to be carried on in another county." This decision is not inconsistent with the position that the superior court of the county in which the principal office is to be located is not the only court which can grant a charter. The reasoning of Mr. Justice Cobb, who delivered the opinion in that case, suggests arguendo that the only court which had the right was that of the county where the principal office was to be located. This, however, was not involved in the adjudication, and nothing therein said constitutes an authoritative ruling on this subject. However this may be, the principle announced in the second headnote controls this branch of the case. The defendant in error proceeded against the plaintiff in error as a corporation, alleging in the first paragraph of his petition that "the said Etowah Milling Company is a corporation created under the laws of Georgia, and has an office and is transacting business in said [Bartow] county." He is estopped, therefore, to deny its corporate existence, or the terms of the charter which give it this existence. The plaintiff in error was incorporated with its principal office in Fulton county as a resident of Fulton, and the defendant in error proceeds against this corporation, and no other. Its life and powers and the right to sue it come from the charter, and from no other source. The defendant in error cannot proceed against it as a corporation, and at the same time collaterally attack its existence, or read into its charter a provision inconsistent with its plain terms.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 392)

BRAND v. CLEMENTS.

(Supreme Court of Georgia. Oct. 29, 1902.)

EXECUTION—AFFIDAVIT OF ILLEGALITY—CROP—DEBTOR'S INTEREST—EVIDENCE.

1. When cotton has been produced by the conjoint use of exempted property and supplies furnished by the head of the family, and not connected with such property, the whole crop so produced is not subject to an individual debt of the head of the family. Only such an aliquot part as, under equitable principles, may be ascertained to be the debtor's interest, can be subjected; and where the evidence does not distinctly show amounts and values, from which such part may be ascertained, a verdict finding the whole not subject must stand. (a) The trial judge did not err in dismissing the certiorari.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; R. B. Russell, Judge.

Trial of an illegality between Marshall Clements and G. M. Brand. Judgment for plaintiff, and defendant brings error. Affirmed.

O. A. Nix, for plaintiff in error. Julian & McDonald, for defendant in error.

LITTLE, J. An execution in favor of Brand was levied on certain property of Clements, the defendant in *fi. fa.*; the property being described in the levy as "eight or ten acres of cotton now in the field and unpicked." The defendant filed an affidavit of illegality, alleging that the property levied on was exempt from levy and sale, as being the proceeds of certain personal property set apart as an exemption to him as the head of a family. After a trial of the issues so raised, an appeal was taken to a jury in the justice's court, and on the trial of the appeal the jury rendered a verdict finding the property not subject. The plaintiff in execution subsequently sued out a writ of certiorari, and on the hearing in the superior court the judge overruled and dismissed the same. The plaintiff excepted to this ruling. The error alleged in the petition for certiorari was that the verdict was contrary to law and evidence. It appears from such evidence that theretofore there had been set apart as an exception to Clements 30 bushels of corn, a wagon, some shucks, four hogs, and a small amount of household and kitchen furniture. The wife of Clements testified that she and her children made the cotton levied on, and that the exempted property was used in making the crop; that Clements himself worked in the crop while he and his family consumed the provisions which had been set apart; that in so doing two of the hogs mentioned in the schedule were killed, two were sold, and the proceeds of the sale were used to purchase corn which was used on the farm; that the corn exempted lasted only until March; that during the planting season, Clements, by outside labor, procured the cotton seed which was planted; that

while he worked some in the cultivation of the crop, he did outside work to some extent, using the proceeds of this labor for his family; that, in addition to this, he procured additional supplies from a merchant, the purchase price of which was secured by mortgage on the crop, and had been paid. The sum of the evidence for the plaintiff in execution was that Clements had done a good deal of outside work, for which he received money with which he purchased supplies for his family, and that he had also been furnished with supplies for his family on credit from outside sources.

Under the contentions of the parties, the legal question arises whether a crop of cotton partially raised by the use of exempted personality is, because of such use, itself exempt. Our Civil Code (section 2848) declares that all produce, rents, or profits arising from homesteads in this state are likewise exempt; and inasmuch as exempted personality stands in all respects on the same footing, under our law, as a homestead, and by the statute seems to be included in the latter term, the declaration of the Code applies directly to property which has been set aside as exempt. But it is apparent, under the evidence in this case, that the cotton levied on and claimed to be exempt was not entirely the product or profits of the exempted personality. The evidence clearly establishes that it was only partially the product arising from such use. While it is very clear that if, in the production of the cotton, only exempted personality or its proceeds was used, it would not be subject, the conclusion is not the same when the proceeds of property exempt and property not exempt were jointly used in its production. In the case of *Kupferman v. Buckholts*, 73 Ga. 778, it was distinctly ruled that where personality was set apart as exempt, and it was subsequently used on rented land in making a crop, such crop, after payment of the rent, would not be subject to the prior debts of the head of the family, although there was an increase in the amount of the crop over the amount of the exemption used in making it. In laying down this legal proposition, however, Chief Justice Jackson confined its application to cases only where the product of the land arose strictly from the use of exempted personality, for he says in the opinion by which he supports the proposition that "we do not say that if the head of a family has property of his own individual right,—either land or personality,—wherewith, in conjunction with that exempted, he makes increase in the shape of other property, justice and equity would not require that a portion thereof should go to his creditors." The reported facts in the case of *King v. Skellie*, 79 Ga. 147, 3 S. E. 614, showed that personal property which had been set apart as exempt for the family of King, who was a debtor of Skellie, was used in producing a crop on land which King had acquired subsequently to

the setting apart of his exemption. When the crop so raised was levied on to enforce the execution of Skellie, King claimed it as the proceeds of exempt property. Skellie tendered an equitable issue, seeking to subject a portion of it, which he alleged equitably belonged to King as an individual. This court recognized that this right existed, but ruled that Skellie could not subject to his execution any portion of the crop greater than the value of the rent of the land on which it was made. Again, in the case of *Vining v. Officers*, 82 Ga. 222, 8 S. E. 185, an execution was levied on land which was claimed as being a homestead of the debtor, and therefore exempt. It appeared that the land was purchased in part with funds derived from certain policies of insurance, the claimant's interest in which had been set aside as exempt, but that in purchasing the land the sum of \$109.03 more than "the exemption estate" was invested in the land. The trial judge instructed the jury to find the land subject, to the extent of the amount of the excess. It was ruled by this court, however, that such an instruction was erroneous; that the whole property was not subject for any amount, but only about one-sixth of the property could be made subject. Subsequently, under practically the same evidence, the case was tried again, and resulted in a verdict finding $\frac{22}{65}$ of the property subject to the execution. In passing on the exceptions taken to this verdict, this court ruled (86 Ga. 127, 12 S. E. 298) that only the aliquot part of the head of the family unaffected by the homestead in the property levied on was subject to the execution. The effect of the rulings made in the cases cited is to recognize two propositions: First, where a crop is produced by the conjoint use of property which is exempt and that which belongs to the debtor individually, the whole of it cannot be made subject to the claim of a creditor of the head of the family individually; second, that in such a case only an aliquot part of the crop which represented equitably the interest of the debtor, unaffected by the homestead, could be legally subjected. While, as we have said before, the evidence showed that the debtor, Clements, did contribute towards the production of the cotton some amounts of money, and some supplies which were not included in and did not arise from the exempted property, yet the amount and value of the property so contributed cannot be definitely ascertained from the evidence. We have seen, under such circumstances, that the whole crop is not subject to the creditor's claim, but only the aliquot part of the debtor's interest therein which is unaffected by the homestead can be made subject. This can only be done by showing what aliquot part the debtor is equitably entitled to, and, if this is not done, then no part of the crop can lawfully be found subject. *King v. Skellie*, supra. There being in the record no

evidence showing either the value of the cotton which was levied on while ungathered, or any definite amount of money, or supplies of a definite value contributed by the debtor towards the production of the crop, it follows that a verdict finding the cotton not subject was sustained by the evidence, and authorized by law. There was no error in dismissing the certiorari.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 396)

STUBINGER v. FREY.

(Supreme Court of Georgia. Oct. 29, 1902.)
ATTORNEY AND CLIENT—PURCHASE OF CLAIM OF CLIENT.

1. Because of a wise public policy, which carefully guards the relation of attorney and client, and seeks to secure the absolute fidelity of the former to the latter, a purchase by an attorney at law from a client or her agent of a judgment or execution belonging to the client, in the hands of the attorney for collection, is presumptively invalid; and the attorney making such purchase, in order to sustain the same, must prove clearly (the burden being upon him) the perfect fairness, adequacy as to consideration, and equity of the purchase. The evidence in this case not meeting this requirement, the judgment of the court below, overruling the motion for a new trial made by the client, must be reversed.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by B. T. Frey against S. T. Stubinger. Judgment for plaintiff, and defendant brings error. Reversed.

Sessions & Moss, for plaintiff in error.
Mozley & Weaver, for defendant in error.

ADAMS, J. The defendant in error obtained a verdict and judgment against the plaintiff in error on two notes executed by the plaintiff in error on April 18, 1901, involved in two separate suits, which by a consent order were consolidated. A motion for a new trial was made upon the general grounds, and a bill of exceptions has been filed to the overruling of this motion.

The undisputed evidence shows that a judgment was obtained by C. H. Stubinger, agent for Mrs. S. T. Stubinger (the latter being the present plaintiff in error), through a firm of attorneys of which the defendant in error was a member, on which execution issued on the 30th day of December, 1899, for the principal sum of \$198.16, with interest from November 1, 1897, and costs. While this execution was in the hands of the defendant in error as an attorney at law, he, according to his evidence, purchased the judgment and execution from C. H. Stubinger as agent of Mrs. S. T. Stubinger, under a contract of purchase dated January 13, 1900, which re-

cites that the judgment and execution are transferred to the defendant in error for the sum of \$25 to be paid cash, and for the further sum of \$75 to be paid if collected, and, further, that "it is expressly understood that, if there is nothing collected on said *fi. fa.*, that there is not anything more to be paid to the said C. H. Stubinger, agent for Mrs. S. T. Stubinger." The testimony for the plaintiff in error was to the effect that, when she gave the two notes sold on (given because of taxes paid and money advanced for her by the defendant in error), she did not know that her judgment had been collected, in whole or in part, but was informed by the defendant in error that he had not collected any money on the judgment, and the reason stated in the evidence was given her why it would take some time to do so. In this she was corroborated by her two sons. It was proven by the receipt of the defendant in error and his own evidence that on the 19th of September, 1900, he received from the defendant in *fi. fa.* \$203.06 in full settlement of the judgment. The plaintiff in error pleaded this collection as a set-off against her two notes, and asked for a judgment against the defendant in error allowing this set-off.

Assuming, as we do, that the verdict of the jury resolved the conflict in the evidence in favor of the defendant in error, the principle laid down in the headnote is announced in the light of his evidence. His testimony is to the effect that he bought the *fi. fa.* because C. H. Stubinger, the agent of the plaintiff in error, came to him and stated that a suit had been brought against him, and that an effort would be made to show that the *fi. fa.* was his property, in order to subject it to his debts; that he and his mother's family (this plaintiff in error is the mother of C. H. Stubinger) were without anything to eat, and that he wanted to sell the *fi. fa.* in order to get money to live on, and thereupon the agreement heretofore noticed was made, under which the defendant in error paid cash \$25 on the day of the purchase; that he later on indorsed a note of C. H. Stubinger for another \$25, which he paid; and that he subsequently paid the other \$50. The dates of the indorsement of the note and the payment of the \$50 are not given, but we assume, in view of the terms of the contract, that these amounts were paid after the collection of the *fi. fa.* The defendant in error further testified that he did not ask Stubinger to transfer this *fi. fa.* for the purpose of hindering and delaying his creditors from collecting their debts, but, on the contrary, bought the *fi. fa.* "straight out," and paid him the amount he agreed to take for it. He denied in general terms the conversation testified to by the plaintiff in error. The defendant in error concluded his testimony as follows: "Frey & Frey represented C. H. Stubinger against Mrs. Jane Shriver [who was the defendant in *fi. fa.*] in

1. See *Attorney and Client*, vol. 5, Cent. Dig. § 344.

management of said case. Said O. H. Stubinger claimed to be agent for his mother, Mrs. S. T. Stubinger. In the sale of the *fi. fa.* to me he acted as agent for his mother, Mrs. S. T. Stubinger, and she knew all about it at the time we settled and she gave me the two notes now sued on." This shows that the defendant in error understood that he was representing the mother, and that the subject-matter of the purchase was her property. The evidence of the plaintiff in error and of her sons, if accepted by the jury, would have required a verdict in her favor on the set-off, without regard to the relation between the parties and the principle stated in the headnote. According to this evidence, there was no intention on the part of the son to sell the judgment, and he received no consideration therefor; and if he did undertake to sell, and to receive the consideration, it was without the knowledge of his principal, or her subsequent ratification. As already stated, however, we assume that the verdict recognized the correctness of the version of the matter given by the defendant in error himself. There was nothing in his evidence to suggest that the judgment was not collectible, or that the solvency or responsibility of the defendant in *fi. fa.* was at all doubtful, or that there was any reason for its sacrifice upon what seems to be a grossly inadequate consideration.

The doctrine covered by the headnote is sound, wholesome, and well established. It cannot be too emphatically stressed or too completely heeded. The dignity and real worth of what is, when properly regarded, a learned and honorable profession, as well as the best interests of society and the demands of good faith, conduce to the importance and value of the principle. Judge Story, in his work on Equity Jurisprudence (volume 1, § 310), has well said, on this general subject: "It is obvious that this relation [that of client and attorney] must give rise to great confidence between the parties, and to very strong influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties. By establishing the principle that, while the relation of client and attorney subsists

in its full vigor the latter shall derive no benefit to himself from the contracts, or bounty or other negotiations of the former, it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case,—a task often difficult, and ill-supported by evidence which can be drawn from any satisfactory source. This doctrine is not necessarily limited to cases where the contract or other transaction respects the rights or property in controversy in the particular suit in respect to which the attorney or solicitor is advising or acting for his client; but it may extend to other contracts and transactions, disconnected therefrom, or at least where, from the attendant circumstances, there is reason to presume that the attorney and solicitor possessed some marked influence, ascendancy, or other advantage over his client in respect to them. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and, on the other hand, it is not necessarily void throughout, *ipso facto*. But the burthen of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence,—a rule applying equally to all persons standing in confidential relations with each other." We entirely approve the following statement of this important principle made by Bispham in his work on the Principles of Equity (section 236): "Indeed, even in cases of contract, where the property is the subject-matter of the litigation in which the attorney is acting, it is with great difficulty that the purchase can, under any circumstances, be sustained. The utmost good faith (*uberrima fides*) is required on the part of the legal adviser; and the general rule of public policy, which discountenances transactions between persons who are situated in a confidential relation towards each other, applies with particular force to attorneys at law, who are officers of the court, and are on that ground, as well as on account of the powerful influence which they exercise over the minds of their clients, restrained from dealing with those whose interests they have in charge." See, in this connection, *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; 2 Pom. Eq. Jur. § 960; and *Weeks*, Attys. § 273 et seq. There are authorities which sustain the propositions that such a purchase, though made without fraud or undue advantage, and upon the payment of an adequate price, is nevertheless voidable at the option of the client. See, for example, *Lane v. Black*, 21 W. Va. 618; *Newcomb v. Brooks*, 16 W. Va. 59, and cases cited. In the case of *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386, where an attorney had obtained in his own name a judgment against his debtor, and who represented also a claim for his client against

the same debtor, the court held that he was not necessarily bound to apply the money realized to the payment of his client's claim, under the showing made by the attorney. The court nevertheless recognized the general principle involved in the quotations above made, when, through Nisbet, J., it used the following language concerning an attorney at law: "He is bound to the highest honor and integrity,—to the utmost good faith. As a general rule, he will not be permitted to pursue his own interests when they conflict with those of his client. By assuming the trust to collect, he pledges himself to protect his interests against all others,—even his own. * * * It is the interest of the community and also of a profession distinguished for its liberal views, its lofty honor, and its great social and moral influence, that the liability of its members, upon the score of good faith, should be subject to an exceedingly stringent rule."

Under the principle announced in paragraph 2 of section 2695 of the Civil Code, a purchase by an attorney under the facts disclosed by the evidence in this case would seem to be void as against a client's creditors. Ordinarily the principle embodied in the legal maxim, "In pari delicto," etc., would deny relief to either party, but this principle does not operate so as to prevent recovery by a client. 4 Cyc. 962; *Place v. Hayward* (N. Y.) 23 N. E. 25. This exception to a general rule is mentioned for the purpose of illustrating the great care of the law to protect a client dealing with his attorney at law. We do not overlook the fact that in this case the creditors referred to by the agent were his, and not his principal's. In the case at bar, after proof of the collection of the judgment by the defendant in error, the burden was put upon him to prove clearly that the purchase was valid, notwithstanding the relation between himself and his client; and it was the duty of the court and jury to closely scrutinize the transaction, and to see to it that this burden was fully carried. We need not add that this burden would not be met unless the attorney showed clearly a full knowledge of the transaction on the part of his real client, this plaintiff in error, complete adequacy of consideration, and particularly that he was not speculating in any way upon her necessities. Without meaning to say that the attorney in this case has been consciously or wittingly guilty of any lack of fidelity to his client, we do mean to hold that this record, without further testimony, shows that this sale was invalid, and that the client is entitled to all the money received by the attorney, less what it may appear he has paid to her, or to her agent with her knowledge or her subsequent ratification.

Let the judgment of the court below be reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 395)

NEAL LOAN & BANKING CO. v. WRIGHT.

(Supreme Court of Georgia. Oct. 29, 1902.)

BILL OF EXCEPTIONS—SUFFICIENCY—LEVY OF EXECUTION—ILLEGALITY.

1. Following the ruling made in *Kimball v. Williams*, 33 S. E. 994, 108 Ga. 812, and the cases therein cited, and which was followed in *Wheeler v. Worley*, 35 S. E. 639, 110 Ga. 513, in *Collins v. Carr*, 36 S. E. 959, 111 Ga. 867, in *Long v. Harrison*, 36 S. E. 925, 111 Ga. 884, and again in *City of Fitzgerald v. Merchants' & Planters' Bank*, 39 S. E. 479, 113 Ga. 1151, where issues raised by the levy of an execution and an illegality thereto were submitted to the determination of the trial judge upon an agreed statement of facts, and he rendered a judgment sustaining the illegality, a bill of exceptions, sued out by the losing party, which attempts to assign error upon such judgment only in these words: "to which said judgment defendant excepted, and now excepts, and assigns the same as error," does not contain an assignment of error sufficiently specific to authorize this court to determine whether the judge did or did not err in rendering the judgment sustaining the illegality.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; R. B. Russell, Judge.

Action between the Neal Loan & Banking Company against Asa Wright on an illegality filed to an execution. From the judgment the banking company brings error. Dismissed.

D. K. Johnston and J. A. Hunt, for plaintiff in error. Julian & McDonald, for defendant in error.

PER CURIAM. Writ of error dismissed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 382)

RICHARDS v. GILBERT.

(Supreme Court of Georgia. Oct. 29, 1902.)

MORTGAGES—FIXTURES—EVIDENCE.

1. The question whether counters, tables, etc., used in connection with the business carried on in a certain storeroom, are covered by a mortgage which simply creates a lien on the land whereon the storeroom is situated, and its appurtenances, becomes immaterial when it is shown that at the time of the execution of the mortgage it was understood between the parties thereto that such articles were not included in the mortgage. As a matter of law, the articles are not covered by the mortgage, when such an agreement is established; the agreement would control, even if, as a matter of law, such property would generally pass with the land as trade fixtures.

2. An agreement of the nature indicated was proved by one of the witnesses who testified at the trial. Under this evidence, which was neither challenged nor contradicted, a verdict for the defendant in an action by the mortgagor to recover possession of the property from one claiming title under a sale made after foreclosure of the mortgage is not supported by the evidence.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; H. M. Holden, Judge.

Action by Titus Richards against Mamie Gilbert. Judgment for defendant, and plaintiff brings error. Reversed.

W. N. Matthies and Saml. H. Sibley, for plaintiff in error. Hawes Cloud, for defendant in error.

LITTLE, J. Richards instituted an action against Mrs. Gilbert to recover possession of seven table counters, certain platform counters, an iron grate, etc. The defendant averred that she purchased the property from one Boswell, and that title to the same was in her; that, if the plaintiff ever had title, he was estopped to assert it, because he stood by when the property was sold at sheriff's sale to Boswell, and in no manner attempted to assert title. The evidence for the plaintiff tended to establish the following facts: That the plaintiff had the counters made and placed in his store. They were not attached, and could be readily moved. The grate was originally put in the fireplace, but, on account of a defect, was detached and laid aside in the store. Originally plaintiff gave a mortgage to Boswell on the lot on which the store was situated, to secure a debt; and it was understood between Boswell and himself that the counters, the grate, and the iron safe were not included in the mortgage. Subsequently Boswell foreclosed his mortgage, and the lot was sold by the sheriff and purchased by Boswell. By agreement between plaintiff and Boswell, the property sued for, together with other articles, was allowed to remain in the store. Subsequent to this agreement, plaintiff had some of the counters removed from the store and put in use. He did not know that defendant had purchased the store from Boswell until after it had been accomplished. After the sale to defendant, plaintiff went to the store to get the counters and other articles, and defendant refused to deliver them, and subsequently obtained possession of the other counters which plaintiff had theretofore caused to be removed from the store. The defendant introduced in evidence the mortgage from plaintiff to Boswell, which described his property covered by the mortgage as "a certain lot or parcel of land in the town of Crawfordville, whereon a storehouse is situated [fully describing the lot by metes and bounds], * * * with all the rights, members, and appurtenances to said property in any way appertaining or belonging"; also the foreclosure proceedings, the facts in relation to the sale, and the deed from the sheriff to Boswell, which described the property in the same language as was used in the mortgage. The deed from Boswell to the defendant, containing the same description relative to the property, was also in evidence. The husband of the defendant testified that Mr. Bird concluded the purchase for his wife; that, when witness went to see the property purchased, he found only four pairs of coun-

ters, and, learning that there ought to be seven, he afterwards obtained possession of those for his wife. Bird testified that he advanced the money to Boswell to buy the store, and was really the party interested in the sale to Mrs. Gilbert, and that he sold the store to her with everything in it except the safe. The sale was in writing, and evidenced by the deed from Boswell. At the time of the sale the store was not used as such, but was being used by witness as a buggy warehouse; the counters having been moved to one side. Another witness, who testified as to the value of the counters, also stated that the table counters were never attached to anything, but the platform counters were originally nailed down.

The jury returned a verdict for the defendant. The plaintiff made a motion for a new trial, which being overruled, he excepted. The motion contains, besides the general grounds that the verdict was contrary to the law and the evidence, a number of special grounds, complaining of the admission of certain evidence, and of certain instructions to the jury given by the trial judge; also certain refusals to charge. The two last named grounds relate to the law of fixtures, and the position taken by counsel for defendant in error is that the counters, etc., were included in the mortgage, and the title to them passed to Boswell by the sale under the foreclosure of the mortgage, and to defendant by the conveyance from Boswell, and that she purchased the property without any knowledge of the claim of the plaintiff to the property sued for. The contention made raises a very interesting question, relating to what is known as "trade fixtures"; but, under the view which we take of the evidence, even if we were to rule that the articles of property passed to the defendant under the deed from Boswell to her, as necessary adjuncts to the business carried on in the house which she purchased, and that as trade fixtures they would generally pass to the purchaser of the lot and storehouse situated thereon, we would yet be unable to sanction the recovery in this case. We therefore do not enter into a discussion of the law governing trade fixtures, or of the question whether such fixtures pass by an alienation of the land to which they are annexed or of which they became a part. Undoubtedly the plaintiff was originally the owner of the lot, the storehouse thereon, and the property sued for. In executing the mortgage to Boswell, the property on which the lien was created was the lot, its rights, members, and appurtenances. It is a plain principle, as to the right, as between landlord and tenant, to remove fixtures attached to the land, which are not trade fixtures, that the intention of the parties in relation thereto must govern. Trade fixtures, as between landlord and tenant, are governed by a different rule. See *Wright v. Du Bignon*, 114 Ga. 765, 40 S. E. 747. But independently of these rules the maxim, "Modus et conventio

vincunt legem," applies as well to the question of fixtures as to other branches of the law. Tyler, *Fixt.* p. 129. The evidence of the plaintiff is to the effect that previously to his mortgage of the lot, including the storehouse, to Boswell, he had mortgaged the property sued for, with other articles of personal property, to another person, and, at the time of the mortgage to Boswell was executed, it was understood by both that the counters and other property sued for were not included in the mortgage. If this evidence is true, then, even if such property would generally have passed to Boswell by a sale and conveyance of the lot, it could not do so in this case, in the face of such an agreement, for certainly Boswell, with this understanding, had no mortgage lien on this property; nor did he acquire any at the foreclosure sale, for as purchaser at such sale he stands in the same position that he did as original mortgagee. If Boswell obtained no title by his purchase, he could convey none. It is true, as a general proposition, that the intention of the parties is to be determined by a construction of the language used in the conveyance, but it is also undoubtedly true that collateral agreements extrinsic to the conveyance may control the question as to what articles pass as a part of realty conveyed. *Foster v. Prentiss*, 75 Me. 279; *Elliot v. Wright*, 30 Mo. App. 217. It has been ruled that this question may also be controlled by evidence of other transactions which show that the intention of the parties to the conveyance was that particular fixtures should be treated as personality. *Zeller v. Adam*, 30 N. J. Eq. 421; *Fortman v. Goepper*, 14 Ohio St. 558. We are not, of course, passing on the truth of this, or any other part of the evidence in this case; but the fact of the agreement appears as a part of the evidence, and the denial of the right of the plaintiff to recover was not based on the falsity of this part of the evidence. As it was not questioned, and no objection was urged to its competency, that agreement must control, even if the position taken, that generally the counters would be covered by the lien of the mortgage, is a correct proposition of law. Therefore the verdict in favor of the defendant was contrary to the evidence, and the court erred in overruling the motion for a new trial on this ground.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 415)

ENGLISH et al. v. HILL.

(Supreme Court of Georgia. Oct. 29, 1902.)

CONDITIONAL BILL OF SALE—PURCHASE-MONEY NOTE—ASSIGNMENT—INDORSEMENT—NECESSITY—RECORDING—BILL OF EXCEPTIONS.

1. It is not necessary to the validity of the assignee's title that the vendor, holding a conditional bill of sale which secures a purchase-money note, shall indorse the note or guaranty its payment when he assigns in writing to such

assignee the note, and the personal property described therein, and all of his rights under the entire paper, which paper covers the note and the security.

2. The assignment and transfer of a conditional bill of sale need not be recorded in order to constitute a good muniment of title as against an innocent third person purchasing the personal property from the original vendor.

3. Where a direct bill of exceptions is taken to the direction of a verdict, the propriety of such direction cannot be dealt with unless the direction is complained of in the assignments of error, and the error therein is specified.

(Syllabus by the Court.)

Error from superior court, Warren county; A. W. Evans, Judge pro hac.

Action by J. L. Hill against English & Davenport. Judgment for plaintiff, and defendants bring error. Affirmed.

E. P. Davis, for plaintiffs in error. Jno. T. West and E. T. Shurley, for defendant in error.

ADAMS, J. The defendant in error obtained a verdict against the plaintiffs in error in a trover suit involving livestock. This verdict was directed by the judge of the court below, and a direct bill of exceptions was taken to this court. The evidence fully justified, if it did not require, the verdict rendered.

1, 2. The first two headnotes need no elaboration.

3. We are not authorized, under the assignment of error made in this bill of exceptions, to determine whether the evidence so plainly required the verdict as to justify its direction by the court below. The Civil Code (section 5527) provides that a bill of exceptions "shall specify plainly the decision complained of, and the alleged error." The present bill of exceptions recites, as matter of fact, that the judge of the court below did direct a verdict; but it is nowhere averred, directly or indirectly, that this is complained of or was erroneous. The third assignment illustrates all except those covered by the first two headnotes. It is as follows: "Because there was evidence sufficient to authorize the jury to find that C. C. Caldwell, by implication, if not by express agreement, had authorized Mullins to sell the stock in controversy, and there was no evidence that J. L. Hill, the plaintiff in the court below, had ever withdrawn this consent." It is not stated that the court erred in directing the verdict for the reason suggested in the assignment, and it nowhere appears in the bill of exceptions that it was filed to such direction. On the contrary, it is stated that the bill of exceptions is filed to the verdict, and the judgment rendered on the verdict. Even if it were true that there was evidence upon which the jury might have found that the sale of the live stock was binding upon the defendant in error, it does not follow that the verdict rendered and the judgment entered thereon were illegal or not justified. Had the bill of exceptions stated that the direction of the

verdict was illegal, we could have dealt with any assignment of error complaining in proper terms of this direction. The question of the sufficiency of the evidence (assuming that there is evidence on both sides as to any controlling question) cannot be raised without a motion for a new trial.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 374)

WILLIS v. BURCH.

BURCH v. WILLIS.

(Supreme Court of Georgia. Oct. 29, 1902.)

TROVER—PETITION—AMENDMENT.

1. A petition in an action of trover, brought by one person suing for the use of another, cannot be amended by striking therefrom the name of the nominal plaintiff, so that the action may proceed in the name of the usee.

(Syllabus by the Court.)

Error from superior court, Lincoln county; H. M. Holden, Judge.

Action by Pedigo & Lyons, for the use of B. H. Willis, against J. J. Burch. From the judgment, Willis brings error, and Burch assigns cross-error. Judgment on cross-bill of exceptions reversed. On main bill of exceptions, dismissed.

Colley & Sims, for plaintiff in error. John T. West, for defendant in error.

FISH, J. Pedigo & Lyons, suing for the use of Willis, brought an action of trover against Burch. Upon the trial the court, over the objection of the defendant, allowed the petition to be amended by striking therefrom the names of Pedigo & Lyons and the words "for the use of," so that the case might proceed solely in the name of Willis. Other amendments to the petition were offered at the same time, which were disallowed. A nonsuit was granted. Willis, in the main bill of exceptions, excepts to the disallowance of the amendments and the granting of a nonsuit, while Burch, in a cross-bill, complains of the allowance of the amendment striking the names of the nominal plaintiffs from the petition.

From the view we take of the question presented by the cross-bill, it controls the case, and renders it unnecessary to pass upon the questions made in the main bill of exceptions. Trover is an action ex delicto; it is a suit brought for a tort; and the rule is that the proper person to bring an action ex delicto or for a tort is he in whom the legal right or property was vested, and whose legal right has been affected by the injury complained of. *Barb. Parties*, p. 158. This rule is recognized by our Civil Code, wherein it is provided that an action for a tort must, in general, be brought in the name of the

person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed. *Civ. Code*, § 4940. If the legal right or title to the property converted was at the time of its conversion in Pedigo & Lyons, the action should have been brought in their names alone, and the striking of them as plaintiffs from the petition as brought would leave no cause of action in the usee. On the other hand, if the legal right or title to the property was in Willis at the time of its conversion, the suit should have been instituted in his name. If he was the proper party to have instituted the suit, no reason appears why he should not have done so. In actions of tort there cannot be a usee, and, if one is named, his rights must be disregarded, and the plaintiff will fall of recovery unless the right of the nominal plaintiff be proved. See *Hundley v. Buckner*, 6 Smedes & M. 70; *Lacoste v. Pipkin*, 13 Smedes & M. 589; *Brown v. Thomas*, 26 Miss. 335; *Meyer v. Mosler*, 64 Miss. 610, 1 South. 837; *Railroad Co. v. Cantrell*, 70 Miss. 329, 12 South. 344; *Moore v. Watson* (R. I.) 40 Atl. 345; *Roof v. Pulley Co.*, 86 Fla. 284, 18 South. 597. According to these decisions, the name of the usee is mere surplusage, and should be stricken as such. See, also, *Mitchell v. Railroad Co.*, 111 Ga. 771, 36 S. E. 971, 51 L. R. A. 622.

When the case under consideration was formerly before this court (113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808), Mr. Justice Little, in delivering the opinion, strongly intimated that the action was improperly brought by Pedigo & Lyons for the use of Willis, saying: "We think it is somewhat inconsistent, under the rules governing actions of this character, that one man should sue for the use of another, inasmuch as no one can recover as plaintiff unless he shows three things: Right of possession of the property in himself, wrongful conversion by the defendant, and the value." We are aware that this court has ruled in a number of cases, as in *Wilson v. First Presbyterian Church*, 56 Ga. 554, and *McLewis v. Furgerson*, 59 Ga. 644, that, where the action is by a nominal plaintiff for the use of the person who should have been the real plaintiff, the petition is amendable by striking the name of the nominal plaintiff and substituting the usee as suing in his own right; but none of the cases was an action for a tort, and we are not aware that any court has held that such an amendment is allowable in an action ex delicto. It was held in *Central Railroad & Banking Co. v. Brunswick & W. R. Co.*, 87 Ga. 386, 13 S. E. 520, that ordinarily an employer cannot sue for the use of an employé for a personal injury to the latter.

Judgment on cross-bill of exceptions reversed. Main bill of exceptions dismissed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 386)

NOWELL v. HAIRE.

(Supreme Court of Georgia. Oct. 29, 1902.)

EXECUTION—ENTRY—FAILURE TO RECORD—DORMANT JUDGMENT.

An entry made by a proper officer upon an execution issued from a judgment, unless recorded upon the execution docket of the court from which the execution issued, will not, even as between the parties to the judgment, arrest the running of the dormancy statute.

(Syllabus by the Court.)

Error from city court of Lexington; P. W. Davis, Judge.

Action by J. E. M. Haire against T. Q. Nowell. Judgment for plaintiff, and defendant brings error. Reversed.

Joel Cloud and Saml. H. Sibley, for plaintiff in error. Hamilton McWhorter and Hamilton McWhorter, Jr., for defendant in error.

FISH, J. The plaintiff brought suit on a judgment. The defendant demurred to the petition upon the ground that it showed upon its face that the judgment was not merely dormant, but was barred by the statute. The court overruled the demurrer, and the defendant excepted. There is only one question involved in the case, and that is whether an entry made by a proper officer upon the execution which issued from the judgment, but not recorded on the execution docket, would, as between the parties to the judgment, arrest the running of the dormancy statute, and constitute a new point from which to compute the dormancy period. From the plaintiff's petition, it appears that the judgment, sued upon, was rendered in the superior court on December 1, 1890; that execution thereon was issued on December 12, 1890, and upon the same day was entered on the execution docket of the court and on the sheriff's docket. On November 14, 1894, an entry of nulla bona was made upon the execution by the sheriff. This entry, however, was not recorded on the execution docket of the superior court until more than seven years after the entry thereon of the execution. If this entry upon the *fi. fa.*, without being recorded upon the execution docket, was sufficient to arrest the running of the dormancy statute, then the court below was right in overruling the demurrer to the petition, for in that event the judgment would not have become dormant until seven years after the 14th of November, 1894; and hence the suit upon the judgment, which was instituted on April 5, 1902, was not barred by the statute, which allows such a suit to be instituted within three years after dormancy. On the other hand, if this entry, in and of itself, was not sufficient to arrest the running of the dormancy statute, then the court erred in not sustaining the demurrer. Section 3761 of the Civil Code provides: "No judgment shall be enforced after

seven years from its rendition, when no execution has been issued upon it and the same placed upon the execution docket, or when execution has been issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, of the last entry upon the execution made by an officer authorized to execute and return the same. Such judgments may be revived by *scire facias*, or be sued on within three years from the time they become dormant." According to this section, no judgment shall be enforced when execution has been issued upon it, and seven years have expired from the time of the record upon the execution docket of the court from which the execution issued of the last entry upon the execution made by an officer authorized to execute and return the same. The able counsel for the defendant in error contend that the requirement that the entry upon an execution, by which it is sought to keep the judgment from which it issued from becoming dormant, shall be recorded on the execution docket, applies only when the interests of third parties are involved; that, as against the rights of third parties, a judgment will become dormant if no entry from the *fi. fa.* is recorded on the execution docket within a period of seven years, but that, as between the parties to the judgment, a simple entry upon the execution by a proper officer, without more, will arrest the running of the dormancy statute. There is nothing in the statute upon which to base this distinction. The statute, as we have seen, provides that "no judgment shall be enforced * * * when execution has been issued and seven years have expired from the time of the record, upon the execution docket * * * of the last entry upon the execution made by an officer authorized to execute and return the same." It is therefore clear that the failure to record the necessary entry upon the execution docket within the time prescribed will prevent the enforcement of the judgment. A judgment is enforced against the defendant therein. Enforcing it against him may or may not affect the rights of others. It seems almost superfluous to say that a judgment which cannot be enforced has no power to seize and sell the property of the defendant, even in a case where by so doing the rights of third persons will not be affected. The construction contended for by counsel would require us to read into the statute the qualification that, under the conditions laid down, no judgment shall be enforced when its enforcement will affect the rights of third persons. We have no authority to do this. The statute is free from ambiguity, and must be construed according to its plain and unmistakable terms. So construed, it is perfectly clear that the plaintiff's petition showed that the suit upon the judgment in question was barred, as before its institution more than three years had elapsed since the judgment became dormant.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 401)

LEGG et al. v. ANDERSON.

(Supreme Court of Georgia. Oct. 29, 1902.)

PETITION—PARTIES—SURPLUSAGE—"BLIND TIGER"—ABATEMENT.

1. A suit brought upon the petition of a number of individuals describing themselves as citizens of a given county and residents of a named city, and as "mayor and councilmen" of such city, is the suit of the individuals named in the petition, and the words describing the plaintiffs as "mayor and councilmen" of the city may be properly stricken as surplusage.

2. The remedy provided in the act of December 19, 1899, for abating by injunction as a public nuisance a "blind tiger" is cumulative of other remedies provided in the law of this state, and may be made available even in a case where the other remedies are themselves complete and adequate.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Application by J. P. Legg and others against J. A. G. Anderson for an injunction. Judgment for defendant, and plaintiffs bring error. Reversed.

J. E. Mozley and D. W. Blair, for plaintiffs in error. J. Z. Foster, for defendant in error.

COBB, J. This was an application, under what is known as the "Blind Tiger Law of 1899" (Acts 1899, p. 73; Van Epps' Code Supp. § 6654 et seq.), to enjoin the defendant from maintaining a blind tiger upon premises owned by him. The plaintiffs alleged that they were citizens of the county in which the suit was brought, and resided in the city of Marietta, and were mayor and councilmen of that city. The latter allegation was stricken by amendment. It was alleged that the defendant was the owner of a livery stable in the city of Marietta, that the blind tiger was operated upon the premises on which the stable was located, that liquor was stored on the premises for the purpose of unlawful sale, and that the defendant kept in his employ a number of persons who made sales of liquors in violation of law, with the knowledge and consent of the defendant. The prayer of the petition was that the defendant be enjoined from selling spirituous, malt, or intoxicating liquors upon the premises above referred to, and from authorizing or permitting any one else to sell or exchange such liquors in violation of law. The defendant filed an answer in which he denied all of the material averments of the petition, and also, as cause why the injunction should not be granted, offered a demurrer which set up that there was no equity in the petition, and that the plaintiffs had an adequate and complete remedy at law, by pursuing the method provided in the Civil Code for the abatement of nuisances, or that

provided in the charter of the city of Marietta, or by prosecution under the penal laws of the state. The judge refused to grant the injunction, and the plaintiffs excepted.

This was a suit by the plaintiffs as citizens of the county of Cobb, and not a suit by them in their capacity as mayor and councilmen of the city of Marietta. Even as originally filed, the words "mayor and councilmen of the city of Marietta" did not make the suit one, by the corporation, and it was not improper to allow an amendment striking these words, because they were simply *descriptio personarum*.

Under the uncontradicted evidence, a blind tiger, within the meaning of the act of 1899, was being operated upon the premises of the defendant. The evidence disclosed that an employé of the defendant was habitually engaged in the sale of liquor upon the premises, such sales being conducted in a portion of a building to which the general public was not admitted. Without regard to the difference of opinion that existed among the members of this court at the time the case of *Cannon v. Merry*, 116 Ga. 288, 42 S. E. 274, was decided, as to what was a "blind tiger," within the meaning of the act under consideration, we all agree that the evidence in this case demanded a finding that a blind tiger was being operated upon the premises of the defendant. While the evidence does not show that the defendant was present at any time when sales of liquors were made by his employé, it does appear that the sales were conducted upon the defendant's premises, in his building, in a room adjoining his bedroom, for at least two years prior to the filing of the petition, by a person who had been in his employment for ten years or more, who had been more than once indicted by the grand jury for the illegal sale of liquor, had pleaded guilty under these indictments, with the knowledge and apparently with the approval of the defendant, and had been thereafter retained by the defendant in his employment. The evidence demanded a finding that this employé was operating a blind tiger upon the premises of the defendant with the knowledge and consent of the defendant.

It is said, though, that a court of equity will not take jurisdiction of an application to abate a nuisance in any case where there is a complete and adequate remedy at law for this purpose; and we are referred to the cases of *Harrell v. Hannum*, 56 Ga. 508, *Powell v. Foster*, 59 Ga. 790, and *Broomhead v. Grant*, 83 Ga. 451, 10 S. E. 116, as authority for this proposition. It is suggested that both the Civil Code and the charter of Marietta provide ample remedies for abating nuisances, and that a prosecution for a violation of the criminal law would be effectual to prevent the further illegal sale of liquors on the defendant's premises. It is then argued that there is nothing in what is known as the "Blind Tiger Law" which ab-

rogates the rule that the extraordinary remedies of a court of equity will not be called into operation when there is a remedy at law both adequate and complete. Even if it be conceded that equity would not enjoin the operation of any other nuisance than a blind tiger, unless some special equitable reason for so doing was shown, the act of 1899 was, in our opinion, designed to make the remedy by injunction available to prevent the operation of what are commonly known as "blind tigers," without regard to whether other remedies provided by the law for the abatement of such a nuisance might be adequate and complete or not. The title of the act just referred to is in the following words: "An act to declare as a nuisance any place where spirituous, malt or intoxicating liquors are sold in violation of law, to provide for abating or enjoining such nuisance, and for other purposes." The first section of the act is as follows: "Be it enacted by the general assembly of Georgia, that from and after the passage of this act, any place commonly known as a 'blind tiger,' where spirituous, malt or intoxicating liquors are sold, in violation of law, shall be deemed a nuisance, and the same may be abated or enjoined as such, as now provided by law, on the application of any citizen or citizens of the county where the same may be located." A "blind tiger," using that term to describe a place where liquors are sold on the sly in violation of the law (that is, giving to the term the meaning applied to it in the opinion of the majority of this court in the case of *Cannon v. Merry*, *supra*), is a public nuisance, independently of any provision in the act under consideration; and before the passage of this act a court of equity would have had jurisdiction to abate such a nuisance when a proper case was made for the grant of an injunction. The so-called "Blind Tiger Law," if construed in the way contended for in this case by the defendant in error, would be simply a declaratory statute, and work no change whatever in the existing law. We do not think it made any change in regard to the status of the blind tiger, and to this extent the law is declaratory.

If that part of the act which refers to the manner in which such nuisance shall be abated is also declaratory of existing law, nothing has been accomplished by the passage of the act. The general assembly may, and often does, pass statutes which are merely declaratory in their nature, and work no change in the existing law, but simply call attention to what is the law of the land. A statute dealing with the subject of remedy which is equivocal and capable of being construed as affording an efficient remedy for an existing undoubted evil, and also capable of being construed as declaring that such evil shall be remedied by existing methods only, should always be construed as one providing a new remedy for the evil referred to, rather than as a mere legislative declaration that existing

remedies should be put into operation. The title of the act indicates that the legislative purpose was not limited to a declaration that a blind tiger should be treated as a nuisance, but indicates a legislative intent to provide a method for abating such a nuisance. The legislature not only intended that places of the character referred to in the act should be nuisances, but also to provide that a court of equity might take jurisdiction of an application to abate the same under the operation of the writ of injunction. The purpose of the act was to give to any citizen of the county the right to appeal to a court of equity to abate such a nuisance by injunction. The remedy thus provided in the act was not to prevent proceedings under any existing law of the state against one who maintains such a nuisance; but the remedy provided in the act is cumulative of other remedies, and can be made available whether proceedings under other laws have been begun or not, and without regard to whether they would constitute an adequate and complete remedy. It is contended that under the terms of the act the nuisance is to be "abated or enjoined as such, as now provided by law," and that the words "as now provided by law," properly construed, mean that a nuisance may be abated under existing remedies provided in the Code, or in the charter of a city, if the blind tiger is located in a city, or by a court of equity under existing rules, which provides that a court of equity will not enjoin a nuisance when there is an adequate remedy at law. We do not think the words "as now provided by law" should be given the meaning contended for. The purpose of the act was to provide that a nuisance may be abated by injunction, to be issued in the manner provided by law; that is, upon application to the judge of the superior court, upon a sworn petition, and after a hearing; the judge having a right to grant a temporary restraining order until the interlocutory hearing, and a temporary injunction until the final hearing, and a permanent injunction after a hearing before a jury under existing rules. When the act is so construed, it is, in effect, a declaration by the legislature that a blind tiger is a public nuisance, and may be abated by injunction issued upon the application of any citizen of the county, without regard to whether there are other remedies which might or might not bring about this result. A place where intoxicating liquors are sold in violation of law is a menace to the peace, good order, and happiness of any community, and legislation declaring such a place to be a public nuisance is wise and salutary. The purpose of the act under consideration was to give a remedy for the abatement of this nuisance which would be speedy and effectual. The legislation, being remedial in its character, should receive a liberal construction, and the wise and beneficent purposes intended to be accomplished by the law should not be allowed to fail of accomplishment by giv-

ing to the act too strict a construction. The illegal sale of liquor has become a great evil in this state, not only in those localities where the sale is altogether prohibited, but also where the sale is permitted under given restrictions. Prosecutions in the criminal courts have not in all instances been so effective as to deter the unscrupulous and lawless from engaging in the illegal traffic. The law-abiding have a right not only to demand that existing laws be enforced, but also to call upon the lawmaking department to change the law as to remedies so as to provide an effective remedy. It was a recognition of this fact that prompted the legislature to pass the act now under consideration. The existence of the evil will not be questioned. Let the remedy provided be given a thorough and impartial test, and it may be that it will accomplish the results desired by those who framed it. The writ of injunction has arrested many things, and it may be that in this writ the legislature has found an effective way to arrest the illegal traffic in liquor in this state. A law having for its purpose the suppression of an acknowledged existing evil, which is destructive of the public peace and order, as well as the welfare and happiness of individuals, should not, of all laws, be frittered away by construction.

Upon the uncontradicted evidence introduced in behalf of the plaintiffs, it appeared that a blind tiger was being operated on the premises of the defendant with his knowledge and consent, and the court should have granted an injunction until there could be a final hearing on the petition.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 388)

DUKE et al. v. STORY et al.

(Supreme Court of Georgia. Oct. 29, 1902.)

EQUITABLE MORTGAGE—LIMITATIONS.

1. A security deed which does not refer in any way to the debt to secure which it was given, or furnish any evidence of its existence, cannot be foreclosed as an equitable mortgage, and a money judgment obtained thereon, if the obligation secured by the deed is barred by the statute of limitations.

(Syllabus by the Court.)

Error from superior court, Jackson county; R. B. Russell, Judge.

Action by H. E. Story and others, executors, against M. N. Duke and wife. Judgment for plaintiffs, and defendants bring error. Reversed.

W. I. Pike and Strickland & Green, for plaintiffs in error. H. H. Perry and C. B. Henry, for defendants in error.

ADAMS, J. The executors of Mary M. Long proceeded against Duke for the possession

of certain real estate described in their petition. Subsequently the defendant's wife, who, according to his answer, claimed the property, was made a party defendant by amendment, without objection, and the petition was amended, also without objection, so as to pray for a money judgment against the land described in the deed from the original defendant to the plaintiffs' testatrix, upon the ground that this deed was given to secure a note given by the defendant to the testatrix. This instrument did not refer to the obligation in any way. Upon its face it is an absolute deed, and recites a consideration of \$600. The statute of limitations was pleaded, on the ground that the note secured by this deed was barred, and, this being so, the deed could not be foreclosed as an equitable mortgage, and a money judgment obtained thereon, whatever may be the rights of the plaintiffs in the court below under the declaration as originally framed. This plea was not sustained in the charge of the court or by the verdict of the jury, and the defense indicated is made in the motion for new trial and the bill of exceptions in this case.

We are constrained to sustain the defense. It seems to us that the case is substantially covered by the decision of this court in the case of *Story v. Doris*, 110 Ga. 65, 35 S. E. 314. We do not think that the law which permits a mortgage to be foreclosed at any time within 20 years, notwithstanding the bar of the debt secured by the mortgage, applies, because the mortgage, as required by the Code, "specifies the debt to secure which it is given." A mortgage, therefore, furnishes written evidence, under the hand and seal of the mortgagor, of the existence of the debt against the property specified, and its foreclosure is within the terms of the specialty agreement. We have not been able to find any authority that requires another conclusion from that reached in this case. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142, involved the foreclosure of a mortgage. *Lewis v. Hawkins*, 90 U. S. 119, 23 L. Ed. 113, is a case where the vendor of lands gave a bond for titles, and took purchase-money notes from his vendor, and it arose in a state where the vendor's lien was recognized. It was held that a discharge in bankruptcy of the purchaser, while it would relieve him from paying the notes, would not give him title to the land, and that the vendor could proceed notwithstanding the bar of the statute of limitations as to the notes. Some of the observations of the court may seem to sustain the defendants in error, but they cannot be followed, in view of the adjudication of this court referred to above, and our conclusion as to the law in Georgia. In *Oriss v. Oriss*, 28 W. Va. 388, the trust deed involved plainly described the debt, and the fact that the deed was given to secure the same. This is also true of the case of *Arrington v. Rowland*, 97 N. C. 127, 1 S. E. 555, and that of *Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed.

1. See *Limitation of Actions*, vol. 23, Cent. Dig. § 22.

335. The case of *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96, also cited by the defendants in error, involved the foreclosure of a mortgage which described the debt; and the court, in its opinion, quotes with approval the following language of the court of appeals in the case of *Borst v. Corey*, 15 N. Y. 510: "The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and, by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six-years limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom." The Florida court also quotes with approval the decision of this court in the case of *Elkins v. Edwards*, 8 Ga. 323, where, through Judge Warner, the court answers in the negative the following question: "When a mortgage has been taken to secure the payment of a promissory note, and the remedy on the note is barred by the statute of limitations, is the remedy on the mortgage also barred?" The significant answer to the question is as follows: "We think not, for the reason that the creditor stipulated by contract for two remedies against his debtor to enforce the collection of his demand. One remedy was by suit upon the note, and, having obtained judgment for the amount of the note, such judgment would bind all the property of the defendant. The other remedy was upon the mortgage, by petition and foreclosure, in the manner pointed out by the statute." (*Italics ours*.) Section 2735 of the Civil Code, which provides that the fact "that the note or other evidence of debt is barred does not prevent the creditor thereafter availing himself of the mortgage or other security," is referred to by counsel for the defendants in error with special emphasis on the words "or other security." This section appears in the present Code for the first time, and is codified from the decision in 8 Ga., above cited, and from that in the case of *Reid v. Flippen*, 47 Ga. 273; the latter case being to the effect that mere delay by a creditor to sue the principal debtor until the bar of the statute of limitations has attached as between them does not discharge the security, if he has been sued in time. The words "or other security" will therefore be read in the light of the decisions of this court from which they are codified, and will be presumed to go no further than this court has hitherto gone, unless a different construction is required. The action can be applied in its entirety, and be thoroughly consistent with the ruling now made. Besides, the note and deed in this case were made in 1882, and the remedy then provided for the creditor was that specified in sections 1969 et seq. of the Code of 1882. The law then provided that "when any judgment shall be rendered in any of the courts of this state upon any note or

other evidence of debt, which such conveyance of realty was made and intended to secure, it shall and may be lawful for the vendee to make and file, and have recorded in the clerk's office of the superior court of the county wherein the land lies, a good and sufficient deed of conveyance to the defendant for said land." This was the special remedy of procedure, although the right existed under the law as it then stood, and exists as it now stands, for the creditor, armed with an absolute deed, to recover the land by an action of ejectment, unless the debtor sets up in his defense the fact that the deed was given as security for a debt, and pays or tenders payment of the debt; assuming, of course, that the deed is not tainted with any invalidity. We mean to say that the note and security deed in this case were given under the law as it existed at the time they were given, and there was certainly nothing in the law inconsistent with the view now announced. Indeed, the provision just quoted from section 1970 of the Code of 1882, with reference to the special remedy given in this class of cases, suggests that the note or other evidence of debt must be in life, or a judgment might not otherwise be obtainable. Counsel for the plaintiffs in error have cited decisions of other states which sustain the proposition that this security deed cannot be foreclosed, and a money judgment obtained thereon, if the note be barred, but we need not refer to them here.

There is nothing in the foregoing inconsistent with the right of defendants in error to proceed under their original declaration, so far as the statute of limitations is concerned. A party cannot hold land against his absolute deed conveying title out of himself, upon the ground that the obligation which it is given to secure is barred by the statute of limitations.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 376)

STOVALL v. COGGINS GRANITE CO. et al.
(Supreme Court of Georgia. Oct. 29, 1902.)

• EASEMENT—CONVEYANCE—EFFECT.

1. A written conveyance, under seal, from the owner of land to S. & E., conveying a strip of land to the latter for the purpose of building a spur track from the main stem of a railroad to the stone quarry, the stone and the right to mine it having been previously purchased from another by S. & E., and reserving the right to re-enter when S. & E. "get through using said road in working quarry," conveyed an easement which is appurtenant to the dominant estate of S. & E., and which passed to their successors in title in the quarry, although the conveyance of the strip contained no words of assignability.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. M. Holden, Judge.

Action by J. T. Stovall against the Coggins Granite Company and others. Judgment for

defendants, and plaintiff brings error. Affirmed.

I. C. Van Duzer and W. D. Tutt & Son, for plaintiff in error. J. N. Worley and P. P. Proffitt, for defendants in error.

SIMMONS, C. J. On April 27, 1894, Swift & Etheridge, a partnership, purchased from Almand "all the rock on" a certain tract of land, with the right to erect all buildings that might be "needed to carry on the business of mining or quarrying of stone on said land," and a strip of land 50 feet wide, extending from the quarry toward a named railroad, as far as the line of the land of Stovall. On May 5, 1894, Stovall executed an instrument under seal, which, after acknowledging receipt of \$100 from Swift & Etheridge, conveyed to them a strip of his land about 100 feet wide and 350 feet long, "for the purpose of building and grading and using as a sidetrack" from the railroad to the line between the land of Stovall and the 50-foot strip granted by Almand. In this instrument it was provided that: "Stovall shall have the exclusive right to cultivate as much of said land as does not interfere with its use for railroad purposes. This property is conveyed to said Swift and Etheridge to be used by them for railroad purposes only. When said Swift and Etheridge get through using said road in working quarry, the land to revert to said Jas. T. Stovall. If the work is not commenced in two years, then the said described property to revert to" Stovall. In June, 1895, Almand, by deed, conveyed to Thomas M. Swift and John W. Etheridge (the two partners) the entire lot of land on which the quarry was located. In 1896 the firm of Swift & Etheridge was dissolved. In January, 1898, Swift conveyed to Long his half interest in the land on which the quarry was located, together with his interest in the "tools, derricks, and fixtures now used or which have been used in the quarrying business" heretofore mentioned. In 1901 Stovall brought suit against certain persons, including Long and a partnership of which Long and Etheridge were members, for the recovery of the strip of land on which the right of way was located. In their answer the defendants denied any interference with the fee in the land, but claimed that the right of way over it from the quarry to the railroad track was an easement appurtenant to the quarry, and was the right and property of the defendants. On the trial there was no conflict in the evidence as to any material fact. The conveyances above mentioned were introduced, and the evidence showed that the firm of Swift & Etheridge had been dissolved in 1896. It also appeared that the spur track had been constructed from the quarry to the main stem of the railroad, and that the land here involved was rough and uneven, and, independently of this spur track and of its use in connec-

tion with the quarry, worth not more than \$10. The defendants are now operating the quarry and using the right of way in connection with the business. The judge directed a verdict for the defendants. The plaintiff moved for a new trial, and the judge overruled the motion. To this ruling exception is taken. The principal question made in the motion for new trial, and the only one argued here, was whether the judge erred in directing a verdict for the defendants.

The right of way granted by the plaintiff was to Swift & Etheridge, and the conveyance is by both sides treated as a conveyance to a partnership. This firm was subsequently dissolved, and the new firm, which is one of the defendants, is a distinct entity, although it includes among its members Etheridge and the assignee of Swift's interest in the quarry. If the instrument executed by Stovall created but a right of way in gross, such right could be exercised only by the old firm, as such, operating and working the quarry, and determined when the partnership was dissolved. If, on the other hand, the right was an easement appurtenant to the quarry, it ran with the quarry, and may be exercised by the grantees' successors in title so long as they are operating and working the quarry. If the easement was appurtenant, it passed with the dominant estate, although the conveyance thereof may not have expressly mentioned the easement, or contained a general conveyance of the appurtenances of the estate. *U. S. v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463; *Taylor v. Dyches*, 69 Ga. 455; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Barnes v. Lloyd*, 112 Mass. 224; *Hollenbeck v. McDonald*, Id. 247; *Washb. Easem.* (4th Ed.) *26; 10 Am. & Eng. Enc. Law (2d Ed.) p. 418. The decision of this case must therefore depend upon the question whether the right granted by Stovall was a right of way in gross or an easement appurtenant. An easement has been defined to be "a privilege without profit which the owner of one neighboring tenement has of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner." 10 Am. & Eng. Enc. Law (2d Ed.) p. 398. An easement in gross, as the term is now commonly used, is a mere personal right in the land of another, while an easement appurtenant is an incorporeal right which is attached to and belongs to some greater or superior right. Id. p. 403. In determining whether a right granted is appurtenant or in gross, courts must consider the terms of the grant, the nature of the right, and the surrounding circumstances; giving effect as far as possible to the legally ascertained intention of the parties, but favoring always the construction of the grant as of an easement appurtenant rather than of a right in gross. Id. p. 405; *Washb. Easem.* 29. The

present case is not free from difficulty, and, before deciding it, we have examined many decisions. Among these is the case of *Merriman v. Russell*, 55 N. C. 470, in which one party had by deed "bargained and sold as much of my land * * * as will conveniently convey the water to a sawmill, so as to be to his [grantee's] profit and advantage." The court, after considering the terms of the instrument in the light of the facts existing at the time of its execution, came to the conclusion that as the professed purpose was to convey water to a mill, and as few would be at the expense of erecting a mill if the water supply depended upon the uncertainty of life, the intention was to make the easement appurtenant to the mill, and that the heirs and assigns of the grantee were entitled to enjoy the easement as long as they continued to operate the mill. This case was approved and followed in *Hall v. Turner*, 110 N. C. 292, 14 S. E. 791. In the latter case, Hall and Turner entered into a written agreement, under seal, "that the said Hall agrees and consents for the said Turner to back water, if necessary, up into his field [on certain conditions]. * * * This agreement to remain good so long as Turner keeps up a mill at the Wagoner place; afterwards to be null and void." Following the reasoning in the *Merriman* Case, and calling attention to the absence of language plainly restricting the grant to the life of the grantee, the court concluded that it was not the intention of the parties that Turner should have a mere personal right, but that the easement should descend with the land to the heirs of Turner, who would hold it in a base or qualified fee, as had their ancestor. In *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338, certain land was devised to a daughter of the testator, and the will contained a provision that the devisee (naming her) should have a wagon road to this land allotted to her, free of charge, over other lands lying between it and the public road, and devised to other children. The court held that this right of way was an easement appurtenant to the land devised to the daughter, and not a right in gross, and passed by a conveyance of the land to the alienee without express mention of the appurtenances. In *Karmuller v. Krotz*, 18 Iowa, 352, two tenants in common partitioned their land by a written contract signed by both parties. This contract contained the following stipulations: "John has the privilege of a road and landing upon the bank of the Mississippi river at or near the mouth of Cattese creek." "It is further distinctly understood that the said John Krotz shall have the privilege of a road through the land of the said Bernhart, so as to enable him to take the nearest and best road to Dubuque." John subsequently conveyed these lands to the plaintiff, making no mention of these rights of way. The court carefully considered the terms of the contract, and studied them in the light of

the circumstances which surrounded the parties at the time of its execution. Attention was called to the fact that in Iowa, as in Georgia, there is a statute which provides that the term "heirs," or other technical words of inheritance, is not necessary to create and convey an estate in fee simple; the deduction being that the words "heirs" or "assigns" would not be absolutely essential in order to make a right of way appurtenant to the land. It was held that the use of the word "privilege," and the provision that the right was "to enable him to take the nearest and best road," did not show an intention to make the right personal merely, but that, under a proper construction, the contract created an easement appurtenant to the land. The court then said, speaking through Dillon, J.: "If * * * the road was not a personal privilege, but one annexed to the land, then it is appurtenant, and will pass to the heir, or by a devise or conveyance of the land, although not particularly specified in the will or deed. The use of the word, 'appurtenances' is not necessary, for, being an incident, it passes with the grant of the principal thing."

In the light of these authorities, we think the right of way granted by Stovall was not personal, but was appurtenant to the quarry. A right of way in gross is personal to the grantee, and is not appurtenant to any other premises, while in the case of an easement appurtenant there is always a dominant tenement. It was argued here that the estate of Swift & Etheridge in the quarry was itself an incorporeal right, and that an easement cannot be appurtenant to incorporeal property. Even conceding that an easement appurtenant must be imposed for the benefit of corporeal property, the doctrine can have no application in the present case, for Swift & Etheridge had not merely a mining or quarry right in the land of the purchase of the right of way, but a deed to the rocks or stone on such land, together with the right to quarry and remove it. Their property was therefore corporeal, and such as might be a dominant tenement if the easement were granted for its benefit. "Private ways are never presumed to be personal when they can be construed to be appurtenant to the land." *Taylor v. Dyches*, 69 Ga. 455. If the right granted is in its nature an appropriate and useful adjunct of the estate of the grantee, and there is nothing to show an intention to create a mere personal right, the easement should be held to be appurtenant. 10 Am. & Eng. Enc. Law (2d Ed.) p. 405. The grantees here owned a quarry. This quarry was near a railroad track, but separated from it by the land of Stovall. That the stone quarried might be easily and readily removed to the railroad, a right of way over Stovall's land was necessary. The land over which the right of way was granted by Stovall was rough and uneven, and of practically no value independ-

ently of its connection with the quarry. The grantees paid for the right of way a sum far in excess of the real value of the land for any other purposes, constructed over it a spur track to the railroad, and operated the stone quarry. Is it reasonable to suppose that this would have been done if it was understood that the right of way was to exist only during the life of the partnership as such, and while the firm operated the quarry? Is it not much more reasonable to suppose, in view of all the then existing facts, that the parties intended that the right of way should continue during the life of the enterprise,—for all the time the quarry was worked, whether by Swift & Etheridge, or by their successors in title? And even without regard to the extrinsic facts, does not the instrument itself show that the right of way was granted for the benefit of the quarry, and not for the benefit of the grantees, except in connection with the quarry? To us it appears that the intention was to create an easement for the benefit of the quarry, and not of the grantees personally; that this easement was an appropriate and useful, if not a necessary, adjunct of the quarry; that it was useful to the grantees for no other purpose, and could be used by them for this purpose only; that the words "when Swift & Etheridge get through using said road in working quarry" were intended to mean "when the operation of the quarry is at an end"; that there is nothing in the instrument which plainly restricts the right of way to the duration of the partnership, and the operation of the quarry by the partnership. We therefore hold that the right of way was an easement appurtenant annexed to the quarry so as to pass with it to the successors in title of Swift & Etheridge. This easement is, of course, qualified, and may be determined by the abandonment of the quarry, or by the cessation, from any cause, to work the quarry. While the quarry is worked by the successors of Swift & Etheridge, they are entitled to use the right of way granted by Stovall. The judge did not err in directing a verdict against the plaintiff.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 372)

CARR v. BERRY, Sheriff.

(Supreme Court of Georgia. Oct. 29, 1902.)

SHERIFF—RULE BY HEIR OF DEFENDANT IN FI. FA.—TITLE TO SURPLUS.

1. A sheriff is not subject to rule by a party alleging that he is the son and sole heir at law of a defendant in *fi. fa.*, upon the theory that the sheriff has in his hands a surplus arising from the sale of the decedent's property under a judgment subjecting the property because of a security deed given by the testator in his lifetime, and that there are no debts due by his estate.

2. Under the allegations of the petition, read in connection with the will, a copy of which is attached to the petition, the title to this surplus, if any, was in the trustee under the will, and would be controlled by its terms.
(Syllabus by the Court.)

Error from superior court, Hancock county; H. M. Holden, Judge.

Petition of J. H. Carr for a rule on W. M. Berry, sheriff. Petition denied, and petitioner brings error. Affirmed.

W. H. Burwell and R. H. Lewis, for plaintiff in error.

ADAMS, J. Carr brought a petition for a rule against the sheriff of Hancock county, setting up the will of his father, Josiah Carr, which he alleged had been duly probated, but was no longer represented, because the executor named therein had renounced his right to qualify, and the administrator with the will annexed had been removed; that there were no debts against the estate of his father, except a small execution; that petitioner was his sole heir at law; that certain real estate conveyed by his father during his lifetime, and after making the will, to secure an indebtedness, had been sold at the instance of the creditors, after appropriate proceedings, and there would be a surplus in the hands of the sheriff, which he, as the sole heir at law, claimed, and to recover which he sought a rule against the sheriff. The copy of the will attached showed that the testator had devised all of his real estate to a named trustee, in trust for the petitioner during his life, but with provision for a wife or children in the event the petitioner should marry and leave any surviving him. There was no provision in the will affecting personal property, and the theory of the petitioner seems to have been that the legacy to him was adeemed by the conveyance of the property for the purpose of security, and that the balance of the money in the hands of the sheriff was personal property, and therefore not affected by the will.

1. Even if it were true that there was a balance in the hands of the sheriff, and this balance was not operated upon in any way by the will of the testator, the judgment of the court below dismissing the petition would be sound. Section 3353 of the Civil Code provides that: "Upon the death of the owner of any estate in realty, which estate survives him, the title vests immediately in his heirs at law. The title to all other property owned by him vests in the administrator of his estate for the benefit of the heirs and creditors." The next two sections provide for the right of the wife and husband, respectively, to take possession of property, under the conditions named, without administration. Section 3357 provides that: "Upon the appointment of an administrator, the right to the possession of the whole estate is in him, and so long as such administrator

continues, the right to recover possession of the estate from third persons is solely in him. If there be no administration, or if the administrator appointed consents thereto, the heirs at law may take possession of the lands, or may sue therefor in their own right." These sections codify familiar general principles of the law. It is well settled that the law lays hold of personality, and deposits it in the hands of its own appointed agencies for the purpose of protecting it against the title of the heirs, in order that the debts of the ancestor may be paid. This is the general rule, and the exceptions to it are carefully guarded. See *Worthy v. Johnson*, 8 Ga. 239; *Morgan v. Woods*, 69 Ga. 601; *Mason v. Fire Co.*, 70 Ga. 607, 48 Am. Rep. 585. If the estate be now unrepresented, no reason appears why there should not be an administrator with the will annexed appointed. If the proposition noticed be true as to an ordinary suit, it is particularly true that this petitioner cannot recover this money by the summary remedy of a rule, which could not, in any event, be used for a purpose of this kind.

2. The ademption in this case was not complete, but only partial. The party who gives a security deed has still a large equitable interest in the property. He remains in its possession, and, in a very important sense, is its owner. The provisions of this will would be operative upon the balance of the money in the hands of the sheriff arising from the sale of the property specifically devised by the will. It may also be noticed, in conclusion, that, according to the sheriff's answer, there were quite a number of executions and claims against the estate in addition to the small judgment mentioned by the petitioner.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 371)

SEYMORE v. ELBERT COUNTY.

(Supreme Court of Georgia. Oct. 29, 1902.)

DEFECTIVE BRIDGE—INJURY TO CATTLE—PLEADING.

1. A declaration which asserts a primary liability on the part of a county because of injuries to live stock, alleged to have been due to the defective condition of a bridge over a gully or gulch, and which does not allege that the bridge was a public bridge, and that it was erected after the passage of the act approved December 29, 1888, was properly dismissed on demurrer.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by W. C. Seymore against Elbert county. From a judgment dismissing the complaint, plaintiff brings error. Affirmed.

Jas. N. Worley, for plaintiff in error. W. D. Tutt & Son, for defendant in error.

ADAMS, J. Seymore sued the county of Elbert upon the ground that his live stock and wagon were injured because of the defective condition of a bridge built over and across a gully or gulch in that county. His petition was dismissed on demurrer, and a writ of error is filed to the judgment of the court sustaining the demurrer.

The petition alleges a primary liability against the county. The allegations in the declaration are that petitioner's wagon was being driven along a public road in the county, which road the county worked, repaired, and used as one of its public roads, and across which it built a bridge 18 feet long, so as to span a gully or gulch 18 feet wide crossing said road. It is nowhere stated that the bridge was a public bridge, or that it was erected after the passage of the act approved December 29, 1888 (Acts 1888, p. 39). "A county is not liable to suit for any cause of action unless made so by statute." Pol. Code, § 341. "The county, being a political division of the state, is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit." *Millwood v. De Kalb Co.*, 106 Ga. 747, 32 S. E. 577. In view of these principles, the declaration in this case ought to have distinctly and clearly shown that the bridge complained of was a public bridge, within the meaning of the law. Furthermore, as held by this court in the case of *Bibb and Crawford Cos. v. Dorsey*, 90 Ga. 72, 15 S. E. 647, and in subsequent cases, the act approved December 29, 1888, the passage of which was essential to any recovery against a county in the first instance, is not applicable to any county bridge erected before the passage of that act. This being true, there could be no liability set forth in the petition without an allegation that the bridge was erected after the passage of that act. For both of the reasons indicated, the petition was fatally defective, and was properly dismissed on demurrer.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 471)

BALDWIN v. BALDWIN.

(Supreme Court of Georgia. Oct. 30, 1902.)

PROCEEDING FOR ALIMONY—SERVICE OF NOTICE.

1. The provision in section 2467 of the Civil Code for "three days' notice" to the defendant in a proceeding for alimony instituted under that section contemplates personal service of a written notice. Leaving such notice at the defendant's most notorious place of abode is insufficient to give the court jurisdiction.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Proceeding by Josephine Baldwin against

Thomas Baldwin for alimony. Judgment for plaintiff, and defendant brings error. Reversed.

Starr & Erwin, for plaintiff in error. W. R. Rankin, for defendant in error.

SIMMONS, C. J. A proceeding for alimony was instituted by Josephine Baldwin against her husband, Thomas Baldwin, under section 2467 of the Civil Code. The judge granted a rule nisi, and process issued. The sheriff made a return showing that he had "served Thomas Baldwin, by leaving a copy of the within petition at his most notorious place of abode." When the case came on for trial, counsel for the defendant moved "to dismiss the plaintiff's cause of action on the ground that there had been no personal service of said petition on defendant." The defendant did not appear generally, and did not waive service. The judge overruled the motion to dismiss, and, after hearing evidence, entered up a judgment against the defendant. Exception is taken to the refusal to dismiss the plaintiff's action.

The sole question to be determined in this case is whether the defendant should have been served personally, or whether the substituted service, by leaving a copy at his place of abode, was sufficient. The Code section under which this proceeding was instituted provides for alimony in cases where the husband and wife are living in a state of separation, and there is no suit for divorce pending. Under its provisions the judge may grant alimony, in term or vacation, "upon three days' notice to the husband." No method of giving this notice is prescribed. "The general rule in regard to the service of process or legal notice is that it must be served personally on the party or the individual in question, unless some other mode is especially provided for that purpose by statute, or has been otherwise established by long and recognized practice to the contrary." 19 Enc. Pl. & Prac. pp. 614, 620; Wade, Notice (2d Ed.) §§ 1137 et seq., 1334 et seq. Our Civil Code (section 4985) provides that "leaving a copy at the defendant's residence shall be a sufficient service," but the context makes it obvious that this provision is applicable to those suits and proceedings only which are triable at a regular term of the court, and can have no application to a summary remedy, such as the one invoked in the present case. Not more than three days' notice is required in such a proceeding as the present, — a proceeding which involves the property and the liberty of the defendant; and, when the legislature has provided for notice in terms that mean personal service, it cannot be held that any other form of service is sufficient. Substituted service, by leaving the notice at one's residence, might be made during

the defendant's temporary absence from home; and, in the absence of a legislative provision to that effect, we cannot say that such service would give the court jurisdiction to hear and determine the case after three days had expired. The Code provides for notice to the defendant, and the defendant himself must be served personally with notice before the court can acquire jurisdiction to proceed with the case. If the legislature desires to make some other method of service sufficient, substituted service may be provided for by statute, as has been done in ordinary suits. In the absence of such a statutory provision, service by leaving a copy of the petition at the defendant's most notorious place of abode is not sufficient. Indeed, it amounts to no service or notice at all. *Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 118, 20 Am. St. Rep. 801. For these reasons, we think that there was no sufficient notice given to the defendant, and that the judge erred in overruling the motion to dismiss the plaintiff's action. The subsequent ruling made on a traverse of the sheriff's return, and the evidence introduced in support of such traverse, need not, in view of what has just been decided, be considered. If the return was, on its face, insufficient, there was no need to traverse it, and all that was done by the court after overruling the motion to dismiss was nugatory.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 470)

SOUTHERN RY. CO. v. HILL.

(Supreme Court of Georgia. Oct. 30, 1902.)

RAILROADS—KILLING STOCK—PRESUMPTIONS.

1. The killing of the live stock by the train of the plaintiff in error being admitted, and the presumption being against the company, this court is not prepared to say, in the light of the entire testimony, the verdict of the jury, and its approval by the presiding judge, that this presumption was so clearly overcome as to require the reversal of the judgment of the court below, overruling the motion for a new trial based on the general grounds.

(Syllabus by the Court.)

Error from superior court, Gordon county; W. M. Henry, Judge.

Action by J. W. Hill, Jr., against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Shumate & Maddox and Harkins & Dodd, for plaintiff in error. Starr & Erwin, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 459)

MORRISON v. WHITESIDE.(Supreme Court of Georgia. Oct. 30, 1902.)
QUITCLAIM DEED—AFTER-ACQUIRED TITLE—ESTOPPEL.

1. The execution and delivery of an instrument in writing by which a purchaser of land sold under a tax execution released and quitclaimed to one who claimed to be its owner, made within the period in which the law gives to the owner a right to redeem the same, the consideration for which was the amount of the tax, with interest and penalty as fixed by law, created no new title in the owner, passed no other interest of the maker than that acquired under the tax sale, and did not estop such maker from thereafter setting up, as against the grantee, a claim to the land acquired subsequently to the execution of the quitclaim deed.

(Syllabus by the Court.)

Error from superior court, Dade county; A. W. Fite, Judge.

Action by W. G. Morrison against H. L. Whiteside. Judgment for defendant, and plaintiff brings error. Reversed.

B. T. Brock and J. P. Jacoway, for plaintiff in error. Payne & Payne, for defendant in error.

LITTLE, J. The record before us makes the following case: Morrison instituted an action against Mrs. Whiteside to recover a one-fourth interest in lot of land No. 52 in the Tenth district, Fourth section, of Dade county and for mesne profits. Defendant denied that the plaintiff held title to any part of said lot, and alleged that he was not entitled to possession. It appeared that James Cummings was the common grantor of each of the parties, and that in 1887 he conveyed the whole of the lot to Hugh Whiteside and J. M. Turney, and that on February 28, 1898, Turney and wife conveyed a one-fourth interest in the same to Morrison, the plaintiff. It was shown on the part of the defendant that the lot of land in question was offered for sale by the sheriff of Dade county under an execution issued by the tax collector of that county against the lot as unreturned wild land, and that plaintiff became the purchaser at a sale which was held in August, 1896, and that on August 27, 1896, he executed to Mrs. Whiteside, the defendant, his quitclaim deed to said lot. Plaintiff objected to the introduction of the deed from the sheriff to Morrison, and also to the introduction of the tax execution which accompanied the deed; the grounds of objection being that the execution did not recite that the taxes upon the land were due and unpaid. He also objected to the admission of the deed on the ground that it recited that the land had been advertised for 30 days, whereas the law prescribes that such advertisement shall be made for 90 days, and for the reason that it did not show that the lot had been offered for lease, nor for sale in fractional parts. There was other evidence showing that the advertisement had not been

made for 90 days. From the evidence of the plaintiff, which, so far as appears in the record, was unchallenged and uncontroverted, it appeared that the sale was made by the sheriff for taxes for the year 1896, and that after the sale, and purchase by the plaintiff, the defendant, through her agent, redeemed from him the land so sold, claiming to be the owner of a part or the whole of the lot; that in consequence thereof he made to her a quitclaim deed. There was uncontradicted evidence also to the effect that the land was reasonably worth \$1,000; that it was not wild land, but a part of it was cleared, and buildings had been erected thereon; and that it had been cultivated and the buildings erected for as much as 20 years. The trial judge directed a verdict in favor of the defendant, and to such direction, and the finding of the jury in accordance therewith, Morrison excepted.

It cannot be contested that, under the evidence which appears in the record, the plaintiff, when he concluded his evidence, had made a prima facie case to recover an undivided one-fourth interest in the land. It is claimed, however, that this right of recovery was defeated by the exhibition of the quitclaim deed which Morrison had made to the defendant in August, 1896, and that, even if Morrison had shown that he acquired title in 1898, he was estopped from asserting it against the defendant. Section 3609 of the Civil Code recognizes and declares a fundamental rule of the law of estoppel when it provides that the maker of a deed cannot subsequently claim adversely to his deed under a title acquired since the making thereof. He is estopped from denying his right to sell and convey. As a corollary to the proposition, counsel for the defendant in error cites as a rule laid down by Mr. Washburne, in his treatise on Real Property, that "a quitclaim deed passes the title of the vendor as effectually as it could with covenants of warranty." To meet this contention, it was insisted that the tax sale at which Morrison became the purchaser was void for want of proper advertisement; that the land was sold as wild land, when it really was not; and that the conveyance made thereunder carried no title. While, for a number of reasons, it appears that the sale was irregular, and not made in accordance with law, and that no title vested in Morrison under the deed made by the sheriff in 1896, it is not necessary that this point be considered or passed upon, for the reason that the question is not what title Morrison acquired by the sheriff's sale, but whether the quitclaim deed made by him to Mrs. Whiteside in 1896 operated as an estoppel from the assertion by him against the defendant of the title which he acquired in 1898, without regard to whether he had taken any title under the tax sale. It is conceded that the instrument was, in form and effect, a quitclaim by Morrison in favor of Mrs. White-

¶ 1. See Estoppel, vol. 19, Cent. Dig. § 100.

side to the land in question. The contention made that a quitclaim deed has the same effect as a deed of conveyance with covenants of warranty is not sound. The rule, as stated by Mr. Washburne, as will be found in the third volume of his treatise on Real Property (section 2239), is this, the italics being ours: "*If the grantor have a title to the land, a deed of quitclaim is just as effective to pass that title as a deed with covenants of warranty.*" The rule in relation to estoppels which arise from former conveyances is treated by the same author in section 1913 of the same volume. After declaring that some forms of conveyance operate as an estoppel against those who make them, he says in section 1918: "There are various reasons why a deed of simple release passes only such interest or estate as the releaser has at the time, and never operates by way of estoppel to convey any interest which he may afterwards acquire." And from a number of adjudicated cases and law writers he announces the doctrine to be this in section 1917: "In one sense a deed of acquittance or release may be said to be an estoppel, as it is a valid and final bar to all existing claims, and all the possibilities arising from previous contracts of which it imports a relinquishment, [but] it cannot affect rights of which the foundation is laid afterwards." Mr. Devlin, in note 1 to section 27 of the first volume of his treatise on the Law of Deeds, cites numerous cases which on examination have been found to support the principles which he announces in the following language: "A quitclaim deed purports to release and quitclaim only whatever interest the grantor possesses at the time. By the use of this form of conveyance he does not thereby affirm the possession of any title, and is not precluded from subsequently acquiring a valid title, and from attempting to enforce it; and, conversely, a grantee in a quitclaim deed may deny that he received any estate by the deed." In *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 231, the court expressly ruled that "a quitclaim deed will not estop the maker thereof from afterwards purchasing or acquiring an adverse title or interest, and holding it as against his grantee," for which proposition a number of cases are cited. See, also, *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491. It being conceded that the instrument relied on to work an estoppel in this case is in the form of a release or quitclaim deed, it would seem that the contention of the defendant cannot prevail.

There is, however, another equally as good reason why Morrison would not be estopped by the quitclaim deed to Mrs. Whiteside. It is practically conceded—certainly not denied—that the execution of that instrument was brought about by an application of Mrs. Whiteside to redeem the land which Morrison had bought at the tax sale. Whether it be true that she was so interested in it

as owner as to have this right is not the question, because the evidence shows that she represented herself to be the owner, in whole or in part, and, as such owner, claimed the right of redemption. Consequently she would not now be heard to question her ownership. Having a claim on the land as owner, she had the right to redeem on payment to the purchaser of the amount of tax, the interest, and the penalty which the law fixes. Not only so, but, even if Morrison acquired a title, it was in subordination to this right of Mrs. Whiteside; and, until the expiration of the period which the law fixes in which she might exercise this right, her title as owner was not divested. The purchase by Morrison gave him an inchoate right to the land, which would not ripen into absolute title until the expiration of the time during which Mrs. Whiteside had the right to defeat it by redemption. If these propositions are correct, then it was the legal duty to accept the amount which the law fixed, on tender of the same by Mrs. Whiteside. Hence, in such acceptance his inchoate right acquired by the purchase was extinguished, and, as a matter of law, Mrs. Whiteside became entitled to have from Morrison evidence of that extinguishment. In this case it came in the form of a quitclaim deed. By the execution of such an instrument, Morrison conveyed no title to Mrs. Whiteside. He had none. It was already vested in her, and the effect of the tax sale was one to defeat it, if she failed to redeem. Judge Cooley, in his work on Taxation (page 542), says, when treating on this subject: "The purchaser has no title to the land until the time for redemption has expired. He has consequently no constructive possession of the premises, and no more right to go upon and make use of them than any stranger to the title would have." Again, the same author, on page 543 of the same work, says: "Redemption gives no new title. It simply relieves the land from the sale which had been made." And, "If the purchaser had any other title or interest in the land besides that redeemed from, it remains entirely unaffected. His acceptance of the redemption money cannot estop him from setting it up and relying upon it." Mr. Black, in section 348 of his work on Tax Titles, declares: "The privilege of redemption, then, is an act of grace, affording the taxpayer a last chance to retrieve his misfortunes, repair his negligence, or correct his mistake. If accomplished with a due regard to all the requirements of the statute, it will annihilate the interest of the tax purchaser, expunge the incumbrance of the tax, and restore the estate to the position it would have occupied had the tax been paid when due." The same author, in section 377 of the same work, declares, on authority, that "where a tax purchaser, upon claim of a right to redeem, conveys or assigns the legal title to the claimant, on receiving the amount of the redemp-

tion money, the transaction is a redemption, and the conveyance or assignment, as such, passes no title." In the case of *Ivey v. Griffin*, 94 Ga. 689, 21 S. E. 709, this court ruled that "one who, as owner, redeems land sold for taxes, within the time limited by law, acquires no title to the land by reason of the act of redemption of a conveyance made to him founded upon and recognizing his right to redeem." So, by the execution of the conveyance in this case, Mrs. Whiteside acquired no more title than she had before. If she acquired none, Morrison passed none. As to the latter, the effect of the instrument was to extinguish an inchoate right which before that time he held by his purchase at the tax sale. The conclusion is inevitable that this is not the kind and character of a deed which precludes the maker from thereafter asserting a claim to the property sold, under a title acquired subsequent to its execution. Inasmuch as the plaintiff in the trial of the case was, under the evidence as it appears in the record, entitled to recover an undivided one-fourth interest in the land, and as the defenses thereto were not sufficient in law to bar this right, the trial judge erred in directing a verdict for the defendant.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 468)

ELROD v. GROVES et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

TAX SALE—RIGHTS OF PURCHASER.

1. The purchaser of land at a tax sale is not entitled to be placed in possession until after the time for redemption has expired.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Fite, Judge.

Action by D. M. Elrod against W. O. Groves and others. Judgment for defendants, and plaintiff brings error. Affirmed.

S. T. Gourdine and R. J. & J. McCamy, for plaintiff in error. O. N. King, for defendants in error.

COBB, J. This was a suit upon a sheriff's bond. The petition alleged that the sheriff had levied a tax execution upon a tract of land, and had sold the same in the manner prescribed by law, and that after the sale, and before the time for redemption had expired, the sheriff had ejected the defendant in the tax execution from the premises, and placed the purchaser at the tax sale in possession. It was alleged that this constituted a breach of the bond. The defendants demurred to the petition upon the ground that under the law of this state it was the duty of the sheriff, upon the application of the purchaser at the tax sale, to place him in possession of the property at

any time after the sale had taken place and a deed had been delivered. The judge sustained the demurrer and dismissed the case. The plaintiff excepted.

What effect has a tax sale of land upon the title to the property and the right of possession? Is the right of the purchaser to the possession of the property postponed until after the time for redemption has expired? In the case of *Jones v. Johnson*, 60 Ga. 260, it was distinctly ruled that the rents accruing during the period allowed for redemption belonged to the owner, and not to the purchaser at the tax sale. It is true that that case was dealing with a tax sale had under the provisions of a municipal charter, but the principle in such a case is equally controlling in a case arising under a sale had under the general tax laws of the state. It was said in that case that for a year the purchaser at a tax sale has no absolute title, but a defeasible or conditional title only. In *Lamar v. Sheppard*, 84 Ga. 561, 567, 10 S. E. 1084, it was said that the owner had a legal right to occupy the premises during the first year after a tax sale without paying rent. While the question as to who was entitled to possession was not directly involved in the case last referred to, it is at least settled by the rulings in the two cases that the owner is entitled to the rents during the time allowed for redemption. If this is true, it would seem to follow that the owner is entitled to the possession during that time. The right to collect rents from one in actual possession necessarily carries with it the right to determine who shall be the possessor during the time for which the rents are collected. If the owner can during the period allowed for redemption place a tenant in possession, certainly the owner can himself be the possessor during that time. Judge Cooley says: "The purchaser has no title to the land until the time for redemption has expired. He has consequently no constructive possession of the premises, and no more right to go upon and make use of them than any stranger to the title would have. His entry upon the premises would be a trespass upon the possession, actual or constructive, of the owner, who might recover against him for any injury committed." Cooley, Tax'n, p. 542 (11). See, also, Black, Tax Tit. §§ 169, 171; 25 Am. & Eng. Enc. Law (1st Ed.) p. 716; Hibbard v. Brown, 51 Ala. 469; Shalemiller v. McCarty, 55 Pa. 186; Mayo v. Woods, 31 Cal. 269; Morrison v. Whiteside (this day decided) 116 Ga. —, 42 S. E. 729. Our Code provides that the officer selling at tax sales "has the authority to put purchasers in possession of land sold, as in other cases." Pol. Code, § 914. Under the general law of this state, when real estate is sold by the sheriff or other officer, it is provided that the officer conducting the sale may put the purchaser in possession; and ordinarily the purchaser at such a sale acquires the right to be placed in possession

by the officer immediately upon paying the amount of his bid, and receiving a deed from the officer conducting the sale. It is argued from this that, under the section of the Political Code above quoted, the purchaser at a tax sale is entitled to immediate possession if he demands it. We do not think this a proper construction to be placed upon that section. Properly construed, that section simply means that the officer selling at a tax sale is authorized to put the purchaser in possession of the land sold in the same manner in which other purchasers at judicial sales are put in possession, whenever such purchaser is entitled, under the law, to the possession of the land. This section does not purport to fix the rights of the purchaser, but simply to give him an appropriate remedy whenever he is entitled to demand possession of the property bought.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 457)

CUMMINGS v. MONTAGUE et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

FOREIGN STATUTES—PLEADING.

1. Where a plaintiff relies for his right of action and recovery upon the provisions of a statute of another state, that statute must be pleaded.

(Syllabus by the Court.)

Error from superior court, Dade county; A. W. Fite, Judge.

Action by Thomas Cummings against T. G. Montague and another. Demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

J. P. Jacoway, by R. J. McCamy, for plaintiff in error. J. H. McLean, for defendants in error.

SIMMONS, C. J. Suit to recover damages for malicious prosecution was brought by Cummings against Montague and Bush. The petition was demurred to, and the demurrers sustained. To this the plaintiff excepted.

The petition alleged that the damages had been caused by the defendants' causing process of garnishment to be served upon certain creditors of the plaintiff in Tennessee, in violation of the laws of that state; the defendants knowing at the time that plaintiff had in the same county ample property, subject to execution, to have satisfied the claims against him. One of the grounds of demurrer was that the petition stated no cause of action, and another that it did not allege wherein the garnishment was wrongful. Tested by the laws of Georgia, we are clear that no action was set forth. There is no reason, in this state, why a claim may not be collected by garnishment, regardless of the existence of tangible leviable property of the debtor in the same jurisdiction. Garnishment is a purely statutory remedy (Rood, Garnish.

§ 6), and, unless the statute restricts its use to cases where the debtor has no property subject to levy and sale, such restriction does not exist. There is no such statutory restriction in Georgia, and under the Georgia laws the petition set forth no cause of action. The petition seems, however, to have been based upon the laws of Tennessee, and in the brief of the plaintiff in error a Tennessee statute is set out. Under this statute it would seem that resort to garnishment should not be had if there can be found in the county property of the debtor sufficient to satisfy the execution. No such statute was set out or referred to in the petition. There was a general statement that the garnishments "were in violation of the laws of the state of Tennessee," but no statement as to what those laws were, nor wherein they had been violated. If the plaintiff wished to base his suit upon a Tennessee statute, that statute should have been pleaded. The courts of Georgia cannot take judicial cognizance of the statutes of a foreign state, and, within the meaning of this rule, the other states of this country are foreign. When the statute of such a state is relied upon, it must be pleaded and proved, just as any essential fact of which the court cannot take judicial notice. See *Bolton v. Railway Co.*, 83 Ga. 659, 10 S. E. 352. There was nothing in the petition to give information of the statute relied upon in the plaintiff in error's brief, and the demurrer to the petition was properly sustained.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 464)

BAGWELL et al. v. JOHNSON.

(Supreme Court of Georgia. Oct. 30, 1902.)

ACTIONS—PARTIES—EQUITY.

1. A person against whom no charge of wrongdoing is made, and who is not shown to have any interest in the outcome of a case, cannot properly be joined as a codefendant with another who is alleged to have perpetrated a fraud upon the plaintiff.

2. He who seeks equitable relief must come into court with clean hands, and one who confesses to have voluntarily conspired with another to defeat a creditor of the latter cannot be heard to complain that his partner in the fraudulent enterprise did not keep faith with him, but victimized him also.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Fite, Judge.

Action by J. E. Johnson against B. W. Bagwell and others. Judgment for plaintiff, and defendants bring error. Reversed.

John W. Akin, C. L. Henry, and Jones & Martin, for plaintiffs in error. C. N. King and R. J. & J. McCamy, for defendant in error.

FISH, J. The assignment of error made in the bill of exceptions sued out in this case

¶ 2. See Equity, vol. 19, Cent. Dig. §§ 155, 156.

is that the trial judge overruled a demurrer to the plaintiff's petition. He relied as a basis for the relief therein prayed upon the following allegations of fact: On or about the last of March, 1901, he purchased from Bagwell a certain tract of land, consisting of $3\frac{1}{2}$ acres; giving to the latter five notes covering the purchase price of the property, and receiving from him a bond for titles. Subsequently Bagwell came to plaintiff and said to him that "he wanted him to do him a favor; that he had signed a note for a man back where he came from, and he was afraid that he was going to have it to pay, and didn't think he should have to pay it, and that he wanted a little time, and that he wanted to get him to let him take up the bond for titles that he had made him, and give him back his notes, and that he would make a deed to his wife to said property, and have her to make him a bond; and he (Johnson) could execute the notes, making them payable to his wife. The said Johnson and Bagwell being the warmest friends, and he having the utmost confidence in said Bagwell, and believing that he would do just what he said he would, readily agreed to allow the change made as requested." So soon as Bagwell obtained plaintiff's consent to this arrangement, the former remarked that in order to make plaintiff "perfectly easy," and to let him know that he (Bagwell) meant to treat him "perfectly right," he had "drawn a little instrument of writing" to be signed by plaintiff, himself, and his wife, to the effect that, "should the trade not again occur," she would deed plaintiff "five acres of her land." Replying that "that was kind" on the part of Bagwell, plaintiff "at once signed the instrument of writing," a copy of which is as follows: "Georgia, Murray County. This is an indenture made between B. W. & S. J. Bagwell, of the first part, and J. E. Johnson, as party of the second part. Whereas, the said B. W. Bagwell and J. E. Johnson have this day recanted a certain trade on real estate for the purpose of otherwise arranging said trade, having turned back to each other papers in said trade, for reasons better known to ourselves: Now, to fully satisfy the said J. E. Johnson, I, S. J. Bagwell, agree to deed the said J. E. Johnson five acres of my land, provided said trade is not again made. Said five acres is to be deeded to him without cost to the said J. E. Johnson, in event the trade fails to again occur; and, shall the trade above mentioned be well and satisfactorily made again, this contract to be void; otherwise of full effect. This May 8, 1901." This writing bore the signature of Bagwell, who also signed his wife's name thereto, without, as plaintiff afterwards learned, any authority from her to do so. Some time in June, 1901, plaintiff ascertained that Bagwell "was making some improvements on the property that he had bought from him, [and] this being unnatural, he thought that he had best see said Bagwell, and have his bond made, and give

his notes to Mrs. S. J. Bagwell." The plaintiff accordingly went to Bagwell, who "told him they would fix the matter up any day"; but, as Bagwell did not take any steps to do so, plaintiff waited several days, and then "mentioned the matter again, and then the third time, and was put off without the papers. Soon after this, he had C. N. King to approach said Bagwell, as a friend to both parties, to see if he could get the matter adjusted; and said Bagwell refused to make deed to his wife to said land, and have her to make bond for titles to said Johnson, but, instead, offered to have his wife make said Johnson a deed to five acres of land that the said Johnson had never before heard of, and, on inquiry, learned that said land was situated somewhere east of Spring Place, and not worth more than one dollar per acre, The only land spoken of to said Johnson being the plot and the other land contiguous to that purchased from said Bagwell, and being a part of the same tract, which contiguous land said Bagwell had offered to sell him at the time he purchased the $3\frac{1}{2}$ acres," it was not until Bagwell refused to do more than just stated that plaintiff "saw that he had been defrauded out of his home." He "has since learned that the said Bagwell had made to his wife, by A. L. Keith, a paper purporting to be a deed to her," covering the land which Bagwell proposed to have his wife convey to plaintiff; but this paper was not recorded, and he had no notice as to its contents. The said Bagwell knew "all the time that your petitioner was in the dark," and believed that "this 5 acres of land mentioned was the tract which he had purchased and enough around it to make 5 acres, and that the extra $1\frac{1}{2}$ acres were put up as a forfeit with the balance, if they failed to comply with the agreement." He "signed said written agreement under fraudulent representations of said B. W. Bagwell as to his purposes for wanting the change made in the trade," who withheld "the real facts as to what his wife should deed," and whose true intention was to wrong plaintiff "out of his land, which he had in good faith purchased." These "were all latent facts which should have been disclosed; and, had they been disclosed," plaintiff, who "had no other purpose in signing said writing but to favor said Bagwell," would not have signed the same. This "instrument was not signed by Mrs. S. J. Bagwell, but was signed by B. W. Bagwell without proper authority of law, and hence she could not be required to make deed to any land under said contract." Plaintiff stands "ready to execute notes as per his contract, and will when a bond for titles has been made to him from B. W. & S. J. Bagwell, as the court may direct." The prayers of the petition were "(1) that the said B. W. Bagwell be required to execute bond for titles to said Johnson as per original contract, and that, should said B. W. Bagwell have made deed to the lands in dispute to his wife in pursuance to his

agreement with the said Johnson, that the same be decreed void; (2) that should the court believe," after hearing the evidence, that Bagwell "was authorized to sign said written agreement for his wife, and there was no fraud on the part of said Bagwell, then the said Mrs. S. J. Bagwell be required to make bond for titles for the land so formerly conveyed by said B. W. Bagwell to your petitioner, and that all the terms be complied with as in said former contract"; (3) that the defendants "be required to pay such damages as may seem reasonable, not less than fifty dollars as attorney's fees"; and (4) that they be required to produce in court "the deed made by A. L. Keith to Mrs. S. J. Bagwell, and also * * * all the deeds which they have to the premises in dispute." The demurrer filed by the defendants was based on several grounds, only two of which need be noticed. They were (1) that the plaintiff does not, in his petition, allege "any act of Mrs. Bagwell that entitles him to complain against her," and accordingly there is a misjoinder of parties defendant; and (2) that his "petition, on its face, shows that he surrendered whatever rights he had under the trade voluntarily, and for the distinct and avowed purpose of aiding the defendant B. W. Bagwell in hiding his property from his creditors, and that he could not be heard in a court of equity to complain, because he comes with unclean hands."

1. As has been seen, the plaintiff distinctly alleged in his petition that Mrs. Bagwell did not sign the written instrument therein set forth, but that her husband signed her name thereto "without proper authority of law, and hence she could not be required to make deed to any land under said contract." In other words, the plaintiff admitted that she had never entered into any contract with him respecting the land in controversy, and was not bound by the terms of that writing. It is further to be noted that he does not charge her with having any connection with the alleged fraud perpetrated upon him by her husband, or allege that she has been guilty of any wrongdoing whatsoever. Indeed, the plaintiff does not undertake to say that, in point of fact, Bagwell has deeded the land to his wife, or that she is asserting any interest therein. Why, then, she should have been joined with her husband as a party defendant, we are unable to conceive. Certain it is that, under the facts disclosed by the plaintiff's petition, he is not, as against Mrs. Bagwell, entitled to any of the relief for which he prays.

2. Nor can he properly be permitted to maintain his action as against B. W. Bagwell. There is no allegation that the representations made by the latter to the effect that he had "signed a note for a man back where he came from, and he was afraid that he was going to have it to pay," and therefore wished to place his property beyond the reach of the holder of that note, were false,

and that Bagwell merely made these representations in order to deceive the plaintiff and perpetrate a fraud upon him alone. Even if such an allegation had been made, we do not say that the plaintiff would then be entitled to the relief sought. As presented by the petition, it is to be presumed that this is simply a case where two persons conspired to hinder, delay, and defeat a creditor of one of them, with the result that one of the wrongdoers himself falls a victim to the wiles of the other. In all such cases this court has uniformly held that no relief can be afforded the victimized wrongdoer, but that the parties are to be left as they stand. See *Heineman v. Newman*, 55 Ga. 262, 21 Am. Rep. 279, *Flewellen v. Fontaine*, 58 Ga. 471, and *Parrott v. Baker*, 82 Ga. 365, 9 S. E. 1068, for instances in point. Furthermore, the present case calls for an application of the rule stated in *Sandeford v. Lewis*, 68 Ga. 482, that "he who seeks equitable relief must come with clean hands and without laches." The plaintiff occupies the position of a confessed wrongdoer, in that he willingly and knowingly entered into a scheme whereby a fraud was to be perpetrated upon a creditor of Bagwell. The plaintiff's petition discloses that his intent was fraudulent, and that he was influenced not only by ties of friendship existing between Bagwell and himself, but by the hope and expectation that he would probably gain by the transaction precisely $1\frac{1}{2}$ acres of land. His ready assent to the proposition that he should surrender his bond for titles, and enter into a colorable transaction with Mrs. Bagwell whereby she should pretend to resell the land to him, was purely voluntary and without any justifiable excuse. Accordingly he has no standing whatever in a court of equity, but must be left to pursue whatever legal remedies, if any, he can invoke.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

CANNON v. HUNT.

(116 Ga. 452)

(Supreme Court of Georgia. Oct. 30, 1902.)

BUILDING CONTRACTS—TECHNICAL TERMS—PAROL EXPLANATION—CONTRACTOR'S DUTIES—SUBSTITUTION OF MATERIALS—EVIDENCE—RELEVANCY—WAIVER.

1. Where a contract with regard to the erection of a building by a contractor contains technical terms, prescribing how he is to perform certain work, parol evidence is admissible to explain the meaning of the language so employed; and if he has fully complied with his obligations under the contract, both as to the materials used and the manner of doing the work, he is not to be held accountable for unsatisfactory results. If, on the other hand, the particular kind of materials to be furnished, and the manner in which the work is to be done, are not specified in the contract, he is at liberty, and is under a corresponding duty, to himself make a selection of proper materials, and to perform the work in the manner in which it should be done.

2. In view of the evidence adduced at the trial of this case, the court erred in charging

the jury upon the contention of the plaintiff that the contractor was delayed by the act of the owner of the building from sooner commencing the erection thereof, and would have completed it within the time limited had he not been prevented from doing so by providential cause.

3. Whether or not lumber furnished by a contractor be just as "good and durable" as lumber of a different kind, called for by his contract, is not the proper test for determining whether there has been a substantial compliance on his part with the terms thereof. On the contrary, the owner of the building is entitled to damages where material different from that specified in the contract is used in the construction of a building, even though the materials used be in all respects equally as good as those the contractor agreed to furnish.

4. Where the issue on trial is whether a contractor has or has not complied with the terms of his contract, proof that he enjoys a good reputation "for fair and honorable dealings" is wholly irrelevant, and therefore inadmissible.

5. Where, after the expiration of the time within which the contractor stipulated to complete the building, the owner enters into possession of the premises, as it is his right to do, he cannot be held to have waived all defects of which he knew, or could have known "by the exercise of ordinary care."

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by A. E. Hunt, as administratrix, against A. E. Cannon. Judgment for plaintiff, and defendant brings error. Reversed.

R. J. & J. McCamy, for plaintiff in error.
F. S. Yaeger and Shumate & Maddox, for defendant in error.

LITTLE, J. The nature of this case is disclosed by the report made of it when it was here at the March term, 1901. See 113 Ga. 501, 38 S. E. 983. The jury having returned another verdict against Mrs. Cannon, the owner of the building which Hunt, the plaintiff's intestate, had undertaken to erect according to certain plans and specifications, she made a motion for a new trial, which was overruled, and she excepted. As the case must undergo still another investigation in the court below, we shall endeavor to dispose of all questions now presented which are likely to influence the result of the next hearing.

1. At the last trial Mrs. Cannon appears to have strenuously pressed her contention that "by reason of the imperfect condition of the roof, and the rain leaking through the same," goods and merchandise which she had placed in the building had been damaged to the amount of \$300, and that it would cost a like amount to put the roof in the condition called for by the contract, which embraced the following stipulation: "All tin used to be N. & G. Taylor Company's old style redipped tin, best quality; roof to have standing seams not less than three-fourths; the sheets of tin to be laid the narrow way, with locked and soldered joints, well nailed

in place by metal cleats and barbed nails." One of the issues which arose was whether or not, in view of this stipulation, it was the duty of the contractor to not only lock, but also solder, all cross-seams; and the trial judge allowed the plaintiff to introduce the testimony of experts to the effect that cross-seams were not usually soldered, and were not to be confounded with "locked and soldered joints," soldered joints being used only in fittings "around chimneys and scuttle holes," and in making connections "onto valleys where they run diagonally along." We have no hesitation in saying this testimony was properly admitted, under the rule that parol evidence is competent to explain the meaning of technical terms employed in contracts which have been reduced to writing. It was insisted by Mrs. Cannon that, even if the above-quoted stipulation did not impose upon the contractor the express obligation of soldering all cross-seams, he should nevertheless have done so, in view of the fact that the roof was unusually flat, because the contract contained this additional stipulation: "All work and materials to be the best of their several kinds, suitable in all respects for the purpose for which they are used." In instructing the jury as to this branch of the case, his honor charged, in substance, that they were not to consider at all the slant of the roof, but should confine their attention to the determination of the question whether or not the materials used in covering the roof were of the kind specified in the contract, and the work was done in the manner therein pointed out. This charge was precisely adjusted to the defense set up in the defendant's answer, and the facts brought to light on the trial. The complaint urged in her pleadings was not that the slant of the roof was different from that called for by the specifications, but that "the roofing on the house was to be well soldered, according to the contract and that plaintiff's intestate did not have the roof soldered at all." So far as the evidence disclosed, the slant of the roof was neither more nor less than that fixed by the plans drawn by the architect whom Mrs. Cannon employed; and if the slant of the roof should have been greater, or the covering of it should have been done in a manner different from that which he prescribed, he, and not the contractor, was responsible for the defective roof, if the contractor fully complied with the terms of his contract, both as to materials used and workmanship. Whether he did or did not do this was the sole question for determination by the jury. On the other hand, where plans and specifications do not prescribe a particular kind of material to be used for a given purpose and in a specified way, but, in general terms, impose upon the contractor the obligation of bringing about given results, he is under the duty of selecting the proper and usual materials, and deciding for himself the precise manner in which they shall be used,

¶ *See Contracts*, vol. 11, Cent. Dig. §§ 1452, 1462.

in order to comply with his contract to produce a workmanlike job. The trial judge, in charging upon another feature of the controversy, appears to have overlooked the distinction just indicated between specific directions and mere "general orders." It appears that the plans called for a certain tower, of a given radius, to be built of brick, but neither the shape nor size of the brick was specified. In point of fact, ordinary brick was used; and the defendant contended that brick of a given size and shape, specially adapted to such purposes, should have been selected by the contractor. As to whether or not this contention was well founded, the evidence was conflicting. Nevertheless his honor charged the jury: "The fact that the tower was not built of round brick, but was built of straight brick, need not be considered by you. The question is, and the only question I submit you as to the tower is, whether or not it was done in a workmanlike manner. Was it put up in a workmanlike manner? If so, notwithstanding straight brick were used instead of round brick, the defendant would not be entitled to recover by reason of that fact." The criticism made upon this charge by counsel for Mrs. Cannon is that the court should not have assumed, as matter of law, "that good workmanship did not require round brick in a round tower"; this being "a question of fact for the jury, the more especially so as the testimony of plaintiff's brick contractor shows that he first attempted to construct the tower of round brick, but owing to the fact that its radius did not correspond with the brick he got, and that it was inconvenient to get others of the proper radius," he substituted "the square brick." It requires, we think, no argument to show that this criticism is just.

2. When the case made its former appearance before us, we ruled explicitly that inclement weather, such as is frequently experienced in this climate, is not to be regarded as "the act of God," in the sense in which that phrase is to be judicially understood, in determining whether a party to a contract such as that under consideration should be excused for noncompliance therewith simply because he was prevented from performing his obligations in the premises by "rains and freezes" which were natural and to be expected. In view of this express ruling, and of the evidence introduced on the trial now under review, the presiding judge erred in submitting to the jury the question whether or not the plaintiff had supported by proof her contention that her intestate was prevented by "the act of God" from sooner completing the building. It was likewise erroneous to charge upon the contention of the plaintiff that the delay in commencing work upon the building was brought about by the failure of the owner of the premises to comply with an undertaking on her part to make needful excavations. While it does appear that these excavations were not made until

some time after the execution of the contract, there was no evidence which would have warranted a finding by the jury that the contractor was desirous of beginning work sooner than he did, and would have done so had he not been delayed by the plaintiff's failure to comply with her obligations under their agreement.

3. It was expressly stipulated in the contract that the contractor was to use only "¾ inch beaded yellow pine first standard ceiling," and first and second grade "long leaf yellow pine flooring, not over 3 and ¼ inches wide." He actually furnished a much less expensive and altogether different kind of pine ceiling and flooring. As to this matter the court charged the jury that, notwithstanding he may have used lumber of a different kind from that called for by the specifications, yet, if the lumber furnished by him was "as good and durable for that specific work, then that would be a substantial compliance with that part of the contract, and no damage on that account should be allowed." This charge was clearly erroneous, for it was the undoubted right of the owner of the building to recover damages for failure to furnish the kind of material specified, even though that used was in every respect equally as good; and, furthermore, the "durability" test applied by the court left entirely out of view the difference in finish and appearance, if any, between the two kinds of lumber, and other equally important considerations, such as market price, etc. *Means v. Subers' Sons*, 115 Ga. 371, 41 S. E. 633.

4. Over the objection of the defendant, the court allowed the plaintiff to show that the reputation of the contractor "for fair and honorable dealings" was good. What relevancy this evidence had to any issue on trial, we are wholly at a loss to perceive. On the argument here, counsel for the defendant in error explained that this evidence was offered and admitted on the idea that the character of the contractor was put in issue by proof introduced by the defendant to the effect that he had made a breach of his contract by using material inferior to that he had agreed to furnish. It can make no difference for what purpose the evidence was allowed to come in. The owner contracted for certain material in the construction of the house. The substitution of a different material was a breach of the terms of the contract. The comparative character of the substituted material was admissible as affecting the amount of damage sustained by such breach. But the character of the contractor was not in issue, and the evidence was wholly inadmissible.

5. Complaint is made of another charge of the court to the effect that if Mrs. Cannon, or her husband, acting as her authorized agent, "accepted the house after it was completed, * * * with full knowledge of all the defects, or ought to have known of the defects by the exercise of ordinary care, then

she" would not be entitled to "recover any damages at all." As there has never been any final adjustment between the respective parties at interest which amounted to a compromise and settlement of their differences respecting the manner in which the contractor performed his contract, it is only necessary to say that we concur in the view entertained by the plaintiff in error that the charge just referred to was erroneous, "because there is no evidence that defendant's husband had any right to waive any defects; because there is no evidence that he knew of any of these defects when the house was turned over, nor was he bound to the exercise of ordinary care to find defects, as she had a right to rely on her contract"; and "because, further, if defendant had known in full of all defects, she had a right to accept the house, and have a reduction in price for such defects." Indeed, as soon as the time elapsed within which the contractor had stipulated to finish the building, she had a right to enter into possession of the premises, and hold him to account for noncompliance with his undertakings under the contract.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 441)

WESTERN & A. R. CO. v. MORAN.

(Supreme Court of Georgia. Oct. 30, 1902.)
INJURY TO EMPLOYEE—ASSUMPTION OF RISK.

1. Although it appeared that the defendant company failed in its duty to furnish to its employees reasonably safe machinery, yet, as the plaintiff's deceased husband, who was a servant of the company, knew of the defect in the machinery which she alleged was the proximate cause of his death, but nevertheless voluntarily assumed the risk of being injured thereby, a verdict in her favor was wholly unwarranted. (Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by Alice Moran against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Jones & Martin, for defendant in error.

SIMMONS, C. J. This case was before this court at the March term, 1901; it then sounding, "Western & Atlantic Railroad Co. v. Jackson." See 113 Ga. 355, 38 S. E. 820. The judgment of the court below having been reversed, and the case again coming on for a hearing in that court, counsel for the plaintiff announced that she "had married one John Moran, and he took an order that the case thereafter proceed in the name of Alice Mo-

ran." The result of the trial was a verdict in her favor, whereupon the railroad company made a motion for a new trial, which was overruled, and it excepted. While the motion contains several special grounds, we deem it unnecessary to deal specifically with any of them, for, in view of the evidence upon which the plaintiff relied as sustaining her allegations of negligence on the part of the company, and as showing that her deceased husband was free from fault, we are constrained to hold that the verdict in her favor was wholly unwarranted. The following uncontroverted facts were brought to light at the last hearing: On the day Jackson received the injuries from which he afterwards died, the section gang of which he was a member "was directed by John McFarland, the section boss, to put a lever car on the track and go down the road." By his orders the car was stopped at a designated point in order that some scrap iron might be loaded upon it. The first piece put on was a crooked rail, some 15 feet long, which had been bent "nearly into a half circle." On top of this was placed a straight piece of rail, about 20 feet long. The section boss said he did not believe these rails could be safely carried that way, but Jackson replied that they could; saying he would get on one end of them, one of his fellow workmen on the other, and in this way they could be held on the car. To this plan the section boss assented, and the car was started up the road. After arriving at a certain crossing, the car was, by his direction, unloaded and lifted off the track in order to allow a train to pass. After it came along, the car was again put upon the track, and reloaded in the same way with the two pieces of rail. The car was started down grade, and attained a speed which made it wobble. "Jackson was on the rail out in front of the car," and, by reason of the fact that "the car was wobbling and the iron bouncing," he fell or was thrown off the rail. Every possible effort to stop the car was made by his fellow laborers and the section boss, but, the brake on the car being defective, it "ran seven rails and a piece of an eighth before it was stopped." Jackson was caught by "the cogwheel on the main axle" of the car, and dragged that distance. "The lever car was out of order at the time * * * The axle of the front wheels had been sprung, making the car wobble as it ran." Jackson had full knowledge of this defect in the car, which had been occasioned by "a collision with an engine about a month or six weeks before," and had commented on it, saying that the bent axle made the car "harder to pull." A witness introduced by the plaintiff testified that when; after the train had passed, the section hands were preparing to reload the car, he said, "Let's not put on the crooked rail first;" but the boss said, "By God! put it on like it was. I am boss here,"—and that his order was complied with. Jackson, however, made no protest,

1. See Master and Servant, vol. 34. Cent. Dig. § 557.

but assisted in reloading the car in the same manner in which he had previously suggested it should be loaded, and voluntarily again assumed the dangerous position he had occupied when the car was first started on its journey. In going to the point where the stop was made to let the train pass, he had kept his feet on the car, and possibly his hands also; but, after the car was reloaded and again started, "he had both hands on the rails, and was swinging his feet down." So far as appears, he was a man of ordinary intelligence, and familiar with the dangers incident to the work in which he was engaged. Indeed, McFarland, the section boss, testified: "George was a good hand, and the brightest negro I had. When I had to leave, I left him in charge of the other hands."

While the duty rests upon a master to provide "machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence" (Civ. Code, § 2611), it is equally true that "a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." So it follows that, although a master may be negligent in furnishing defective machinery, a servant who is injured because of the fact that it is not in a reasonably safe condition is not entitled to recover unless it appears that he "did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof." Id. § 2612. In the present case it affirmatively appeared that Jackson had full knowledge concerning the defective condition of the axle of the car, and, this being so, he must be held to have voluntarily assumed all risks incident to using the car while in that condition. It is also apparent that he took the chances of being injured on account of the manner in which the car was loaded, for whatever danger attended the running of the car while thus loaded was certainly an open and obvious peril, with knowledge of which he was chargeable. Nor was the plaintiff entitled to recover on the theory that, although Jackson may have been negligent in voluntarily exposing himself to an obvious danger, this was not the proximate cause of his injuries, and he would not have been seriously hurt had not his fellow servants negligently failed to take prompt and effective measures to stop the car as soon as the fact that he had fallen upon the track and was in a perilous situation became known to them. This theory was, it is true, distinctly presented by the allegations in the plaintiff's petition; but, as has been seen, the testimony showed unequivocally that every possible effort to stop the car was promptly made, and that the sole reason why it was not more quickly stopped was that the brake on the car was defective and did not work properly.

On the argument of the case before this court, counsel for the defendant in error laid great stress upon the fact that the evidence

disclosed that the car was furnished with a brake which was out of order, and upon the further fact that Jackson was not shown to have been aware of its defective condition. We cannot, however, uphold the verdict on the ground that the company was negligent in the respect just indicated, for the reason that the plaintiff nowhere in her petition makes mention of the defective condition of the brake, or predicates her alleged right to recover on the theory which her counsel for the first time urge before us. That a plaintiff must recover, if at all, upon the case made by his pleadings, is an axiom which we are not at liberty to overlook or disregard.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 439)

BAIRD et al. v. BATE.

(Supreme Court of Georgia. Oct. 30, 1902.)

APPEAL—REVIEW.

1. There was no error in admitting or rejecting evidence, the alleged newly discovered evidence could have been discovered by the exercise of ordinary diligence, the charges complained of were substantially correct, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action between R. T. Bate and J. M. Baird and others. From the judgment, Baird and others bring error. Affirmed.

Sessions & Moss, for plaintiffs in error. B. T. Frey and D. W. Blair, for defendant in error.

FISH, J. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 436)

SHERIFF v. THOMPSON.

(Supreme Court of Georgia. Oct. 30, 1902.)

POSSESSORY WARRANT—RECOVERY OF PERSONALTY—CERTIORARI FROM JUSTICE.

1. One who intrusts personal property to an agent to be cared for, giving such agent authority to use it, may, upon the refusal of the agent to return the property after demand, maintain proceedings by possessory warrant to recover his possession.

2. Under the provisions of the Code, the judge of the superior court, in passing upon a certiorari from the decision of a justice of the peace in a possessory warrant case, may, in his discretion, make a final disposition of the case without sending it back for a new trial.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by Jack Thompson against Anna Sheriff. On the death of plaintiff, Ida Thompson was substituted. Judgment for defendant before a justice, and plaintiff

brought certiorari. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. D. Anderson and Mozley & Weaver, for plaintiff in error. U. A. Morris and E. P. Green, for defendant in error.

SIMMONS, C. J. Proceedings by possessory warrant to recover certain personal property were instituted by Jack Thompson against Anna Sheriff. On the trial before the justice of the peace, the justice granted a nonsuit, and the plaintiff sued out a writ of certiorari from the superior court. Pending the hearing of the certiorari, the plaintiff died, and Ida Thompson, his widow and sole heir, was made a party by consent. The judge of the superior court sustained the certiorari, and made a final disposition of the case in favor of the plaintiff. To this judgment, exception is taken.

1. The petition for certiorari assigned error upon the judgment of the magistrate upon the grounds that he had no authority to grant a nonsuit in the case, and should have awarded the property to the plaintiff, and that it was error not to award the property to plaintiff, the defendant having produced no evidence. The defendant moved to dismiss the certiorari upon the grounds that the errors of the magistrate were not plainly and distinctly set forth, that it did not appear that any objection was made to his order at the time it was made, and that the last ground did not set forth any error. This motion the judge overruled. It was entirely unnecessary to allege any objection made to the judgment at the time it was rendered, and the assignments of error upon the judgment seem to us to be sufficiently plain and specific. The evidence of the plaintiff showed clearly that the property in dispute was his, and the only questions in the case are (1) whether the facts made a case in which possessory warrant could be maintained as the remedy; and (2) whether the judge of the superior court could properly have made a final disposition of the case, or should have remanded it to the justice for a new trial. Under the provisions of Civil Code (section 4789 et seq.) of this state, possessory warrant is made available for the recovery of personal property which has been taken or carried away, "either by fraud, violence, seduction or other means, from the possession of the party complaining." On the trial the judge or justice shall hear evidence on the question of possession, without investigating the title, "and shall cause the property to be delivered to the party from whose possession the same was violently or fraudulently taken or enticed away * * * or in whose peaceable and lawful possession it last was." In the present case the evidence of the plaintiff (there being none introduced by the defendant) showed that plaintiff was the son-in-law of the defendant. Plaintiff's wife died, leaving plaintiff as her sole heir. All

of the property in dispute belonged to plaintiff and his wife, or to his wife. The plaintiff, the wife, and the defendant lived in the same house; defendant having a room to herself, which she still occupies. After the death of plaintiff's wife, he married a second time, and moved to another place. The property in dispute was left in plaintiff's portion of the house, he giving defendant the key. Defendant was to look after the property and take care of it, had access to it, and was allowed to use it when she wished. When plaintiff desired to take his property, and demanded it of defendant, the latter refused to surrender it or to give him the key to his room. He thereupon sued out a possessory warrant against her. It was argued that, as the property had been last in the peaceable and quiet possession of the defendant, possessory warrant would not lie against her, but that plaintiff would have to resort to an action of trover. The judge of the superior court ruled otherwise, and sustained the certiorari. In the case of *Meredith v. Knott*, 84 Ga. 222, the plaintiffs bought certain cotton of the defendant, and left it with him, at their risk, to be kept until called for. When the plaintiffs demanded the cotton, defendant refused to let them have it. They sued out a possessory warrant, and the question was raised whether this was a proper remedy. This court held that it was, saying: "After the plaintiffs had purchased the cotton and deposited it with the defendant, his possession was that of the plaintiffs. They had a right to go and take it whenever they chose, but when this was denied, and the defendant refused to let them have it, the possession was changed, and that of [defendant] was wrongful, tortious, and fraudulent; and in all such cases we hold that a possessory warrant is the proper remedy." In the case of *Hillyer v. Brogden*, 67 Ga. 24, it appeared that an agent wrongfully refused to turn over to his principal personal property which was hers, and which had been intrusted to him as her agent. He, instead, turned it over to another who was, in law, an entire stranger to the principal. Against this third person the principal sued out a possessory warrant. This court held that the possession of the agent was more than the bare constructive possession of the principal, and was sufficient to support a proceeding by possessory warrant instituted by the principal to recover the property. It was also held that the defendant, in accepting the property from the agent, took it unlawfully and wrongfully from the possession of the principal. The case of *Trotti v. Wyly*, 77 Ga. 684, was distinguished from that of *Meredith v. Knott*, supra, because in it there was a dispute as to both the title and the right of possession of the property involved. In *Mitchell v. Railway Co.*, 111 Ga. 770, 36 S. E. 971, 51 L. R. A. 622, the case of *Hillyer v. Brogden* was cited as authority for the statement that

the possession of an agent who has no special property or interest in the chattel is the actual possession of the principal. And in the case of *Wynn v. Harrison*, 111 Ga. 816, 83 S. E. 643, it was held: "When a father permits his minor son to use for a particular purpose a chattel belonging to the former, and the latter, without authority, undertakes to sell or dispose of the property, and in so doing yields possession to a third person, the father may maintain a possessory warrant for the purpose of recovering possession. This is so for the reason that, in legal contemplation, the possession of the son was that of the father, and the attempt, in the manner stated, to deprive him of that possession, was wrongful and tortious; the minor being unable to make any binding consent as to the matter." Under these decisions, and particularly that in *Meredith v. Knott*, we think it is settled that a proceeding by possessory warrant will lie in a case like the present. The possession of the defendant as agent of the plaintiff was, in law, the possession of the principal; and this possession of the principal was more than merely constructive, and was sufficient to support a proceeding by possessory warrant. When the defendant refused to deliver the property to her principal, she ceased to hold it for the principal; her possession became wrongful, tortious, and fraudulent, and the principal could recover possession by a possessory warrant.

2. The proposition announced in the second headnote is controlled by section 4807 of the Civil Code, and by the case of *Bush v. Rawlins*, 80 Ga. 533, 5 S. E. 761, in which this Code section was discussed and applied.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and LITTLE, J., dissenting.

(116 Ga. 430)

BURT v. BENNETT.

(Supreme Court of Georgia. Oct. 30, 1902.)

ACTION ON NOTE—BONA FIDE PURCHASER—EVIDENCE.

1. The controlling issue in this case being whether or not the plaintiff, who was the transferee of the note sued on, had, before paying the entire purchase price of the note, notice of the defense of failure of consideration set up in the defendant's plea, and there being no evidence to authorize a finding that he had such notice, the court erred in overruling a petition for certiorari sued out by the plaintiff for the purpose of setting aside a verdict in his favor for a less sum than the full amount of the note.

(Syllabus by the Court.)

Error from superior court, Dawson county; J. B. Estes, Judge.

Action by W. J. Burt against S. A. J. Bennett. From an order overruling a petition for certiorari to a justice, plaintiff brings error. Reversed.

B. H. Baker and O. J. Lilly, for plaintiff in error. W. F. Findley, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 426)

WHELCHER et al. v. POOR.

(Supreme Court of Georgia. Oct. 30, 1902.)

NEW TRIAL—MOTION—TIME OF HEARING.

1. Where a motion for new trial was made in term, and an order was taken setting the case for a hearing on a particular day thereafter, and on that day another order was taken, continuing the case until a named day (being the day on which court opened in another county), "to be heard the first week of court," and the motion for new trial and the brief of evidence were not presented to the judge until the week thereafter, no order having been taken to continue the case, the judge, under the decision made in *Railway Co. v. Strickland*, 41 S. E. 501, 114 Ga. 998, had no jurisdiction to hear or determine the motion. As he assumed jurisdiction and granted a new trial, his judgment must be reversed.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; J. B. Estes, Judge.

Action between F. M. Whelcher and others and J. L. Poor. From the judgment, Whelcher and others bring error. Reversed.

H. H. Dean, for plaintiffs in error. Howard Thompson and Spencer R. Atkinson, for defendant in error.

PER CURIAM. Reversed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 424)

ALMAND v. NASH et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

APPEAL—REVIEW.

1. The testimony objected to was properly admitted. The evidence, while conflicting, was sufficient to support the verdict, and there was no abuse of discretion in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; R. B. Russell, Judge.

Action between M. W. Almand and R. S. Nash & Co. From the judgment, Almand brings error. Affirmed.

W. O. Wilson, for plaintiff in error. Alonzo Field, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 423)

WALTERS v. FREEMAN.

(Supreme Court of Georgia. Oct. 30, 1902.)

APPEAL—REVIEW—QUESTIONS OF FACT.

1. A verdict turning on questions of fact will not be reversed where it was approved by the trial judge, and the motion for new trial is confined to the general grounds, though the case of plaintiff in error appeals more strongly to the court than that of defendant in error.

Error from superior court, Franklin county; R. B. Russell, Judge.

Action between Fannie Walters and J. W. Freeman. From the judgment, Walters brings error. Affirmed.

J. N. Worley and O. C. Brown, for plaintiff in error. Jas. H. Skelton, W. R. Little, and D. W. Meadow, for defendant in error.

COBB, J. While the case for plaintiff in error appeals more strongly to this court than that for the defendant in error, yet, as a jury of the vicinage has seen proper to render a verdict for the defendant in error in a case turning upon questions of fact, the judge who presided in the case has approved the verdict, and the motion for a new trial is confined to the general grounds, this court, in accordance with the rule of noninterference in such cases, feels constrained to affirm the judgment overruling the motion for a new trial.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 426)

TILLEY v. McJUNKIN et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

OBJECTIONS TO EVIDENCE—APPEAL—REVIEW—NEW TRIAL.

1. "In order to properly present for decision by the supreme court the question whether or not error was committed in admitting given evidence, it must appear that objection was made to it, and passed upon by the court, at the time it was offered, and also what the objection was." *Cooper v. Chamblee*, 39 S. E. 917, 114 Ga. 116.

2. In view of the evidence introduced on the trial, the court below did not abuse its discretion in declining to set aside the finding of the jury.

(Syllabus by the Court.)

Error from superior court, Habersham county; J. B. Estes, Judge.

Action between H. A. Tilley and John McJunkin and others. From the judgment, Tilley brings error. Affirmed.

Robt. McMillan and J. C. Edwards, for plaintiff in error. J. B. Jones, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 427)

LOVELESS v. STANDARD GOLD MIN. CO.

(Supreme Court of Georgia. Oct. 30, 1902.)

INJURY TO EMPLOYE—CONCURRENT NEGLIGENCE.

1. The negligence of a fellow servant does not relieve the master from liability to a co-servant for an injury which would not have happened had the master not been negligent himself.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; J. B. Estes, Judge.

Action by W. J. Loveless, against the Standard Gold Mining Company. Judgment for defendant, and plaintiff brings error. Reversed.

H. H. Dean, for plaintiff in error. W. A. Charters, for defendant in error.

FISH, J. Loveless sued the Standard Gold Mining Company for damages for personal injuries alleged to have been sustained by him in consequence of the negligence of the defendant. He alleged that he was employed by the defendant as a laborer; that at the time he was injured he and three others were engaged, under the direction of the defendant company, in timbering a mining shaft upon its property ("that is, were placing timbers on each side of said shaft, which was perpendicular), and, as said timbers were put in, * * * petitioner was required to put them in place, and bolt the same to other timbers" and to the walls of the shaft, so as to protect the walls thereof; that the defendant company furnished the timbers, bolts, and taps necessary for this purpose, and it was its duty to furnish suitable material; that it furnished a number of bolts and taps that were unfitted for use, the taps being too large for the bolts, so that when they were put on the bolts the threads therein would not catch to the threads on the bolts sufficiently to hold the timbers through which the bolts were placed; that another squad of laborers had put in a number of timbers before the plaintiff and the squad with which he was working went into the shaft to carry on the work; that the men employed in the work previously to the coming on of the petitioner and his squad placed some timbers in the shaft, and sought to fasten the same with the defective taps furnished by the defendant company; and that plaintiff and his assistants went into the shaft, "and stepped onto the plank placed there for safety, so that [he] could work,—the planks resting on the said timbers so upheld by the defective bolts and taps,—and after stepping out on said planks and commencing work, and while in the performance of his duty, with no knowledge of the defective taps and bolts, he was injured by the giving way of the bolts and the falling of the said timbers, which caused him to fall

¶ 1. See Master and Servant, vol. 24, Cent. Dig. §§ 515, 526.

some 15 or 25 feet and strike the solid rock on the bottom of the shaft." The defendant demurred to the petition, and pending the demurrer the plaintiff amended the petition by alleging that he had no opportunity of discovering the defects set forth, and by the exercise of ordinary care could not have known of the same, while they were well known to the defendant. The court then sustained the demurrer and dismissed the petition, to which ruling the plaintiff excepted.

The case, as it comes before us, involves the determination of a single question, and that is, did the petition, in the language of the demurrer, show "on its face that the negligence which worked the injury complained of was attributable to the coemployés and fellow servants of the petitioner, the risk of which he assumed, under the law, when he entered the employment of defendant"? It is earnestly contended by counsel for the defendant in error that the petition shows that the injury was occasioned by the negligence of the plaintiff's fellow servants, in knowingly using the defective bolts and taps in fastening together the timbers of the shaft, and that therefore the master is not responsible to the plaintiff for the injury which he sustained. Granting that these fellow servants of the plaintiff, who had preceded him in the work which he undertook to continue, were thus negligent, their negligence in knowingly using, in timbering the shaft, defective bolts and taps which were furnished them for this very purpose by the master, would not relieve the master from liability to the plaintiff for the injuries which he sustained in consequence of the use of this defective material. The master's negligence, without which the plaintiff would not have been injured, was that of the master, in furnishing improper and unsafe appliances to the plaintiff's fellow servants, to be used by them in fastening together the timbers, upon the security of which the safety of the plaintiff, while engaged in the work for which the defendant employed him, depended. Had the master not been negligent in furnishing these appliances or materials, the fellow servants of the plaintiff could not have been negligent in using them in timbering the shaft. Their negligence in the matter depended upon and grew out of the negligence of the master, and the defendant was therefore directly responsible for its own negligence, and indirectly responsible for that of its employés. If the negligence of the master had been wanting, the plaintiff would not have been injured. The master furnished improper materials or appliances to these fellow servants of plaintiff, to be used exactly as they did use them; and their negligence in using them under the implied direction of the master was but a continuance of the latter's negligence in furnishing them to be thus used.

In the case of *Cheeny v. Steamship Co.*,

92 Ga. 726, 19 S. E. 83, 44 Am. St. Rep. 113, this court held that "the negligence of a fellow servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty." This ruling is found in the opinion, on page 732, 92 Ga., and page 36, 19 S. E., 44 Am. St. Rep. 113, and is supported by a number of cited cases. "That a master is liable for an injury to his servant, caused by the concurrent negligence of himself and a fellow servant, but which could not have happened had the master performed his duty, is clear. * * * If, therefore, a servant who is himself free from negligence receives an injury caused in part by the negligence of his master, or, what amounts to the same thing, of a servant for whose negligence the master is responsible, and in part by that of a fellow servant, he can maintain an action against his master for such injury." 12 Am. & Eng. Enc. Law (2d Ed.) 905.

Counsel for defendant in error cites and relies upon *Baxley v. Manufacturing Co.*, 114 Ga. 720, 40 S. E. 730. That case came up on the grant of a nonsuit by the trial court, and this court held that the nonsuit was properly granted. There the plaintiff, who was employed in the defendant's sawmill, was injured in consequence of the breaking of an iron bolt which held in position the guide of the saw. He "claimed to have established by his evidence that the defendant was negligent in two particulars: First, in employing an incompetent machinist, or, if the incompetency was not known at the time of his employment, in retaining in its employment an incompetent machinist after knowledge of his incompetency,—one of the duties of this machinist being to put in a proper bolt at the place where the bolt which caused the plaintiff's injuries was located, to test the bolt when it was put in, and to inspect it from time to time after it had been put in position; and, second, in furnishing for the purpose of being placed in position by the machinist a defective iron bolt, when ordinary care would have required that a sound steel bolt should be used." The ground upon which the decision was based is stated by Mr. Justice Cobb, who delivered the opinion, as follows: "There being no evidence authorizing a finding that the master was negligent either in the employment of the servant who was claimed to have been negligent, or in furnishing a defective bolt to be used by such servant, the plaintiff has failed to make out his case, and was not entitled to recover, notwithstanding the evidence authorized a finding that the plaintiff himself was without fault." It was held that the evidence in the case showed that the defect in the bolt "was a latent one, and, such being the case, the mere fact that the bolt broke [was] not sufficient to remove the presumption that the master had furnished a proper appliance to be used; the defect

being of such a character that the master would not know of it, and could not by the exercise of ordinary care have discovered it." There is nothing in the facts of that case, or the grounds upon which the decision therein was placed, which conflicts with the ruling which we make in the present one. It is true that Mr. Justice Cobb, in stating the case hypothetically, uses some language which seems to support the contention of the defendant in error in the case now under review, but what the learned justice says in reference to the nonliability of the master in the case thus stated was not necessary to support the decision which the court rendered, which was based upon the grounds indicated above.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 420)

GRIFFITH v. COLLINS.

(Supreme Court of Georgia. Oct. 30, 1902.)

SUMMARY PROCEEDINGS—VENDEE IN POSSESSION—LANDLORD AND TENANT.

1. When a person holds possession of lands under a contract of purchase, he cannot be dispossessed by summary proceedings against him as a tenant.

2. Where an agreement was made for the sale of land, and it was stipulated that, if the vendee did not comply with its terms, he was to pay rent, and a tender subsequently made by the vendee was rejected by the vendor on the grounds that it did not comply with the latter's erroneous construction of the contract, and that he was in no position to make a deed, because of a security deed already made by him to a third party, the fact that the amount tendered may not have been the exact sum required under the contract did not change the relation of the parties from that of vendor and vendee to that of landlord and tenant.

3. No material error was committed with regard to the questions which are indicated above, and which are the controlling questions in the case.

(Syllabus by the Court.)

Error from superior court, Oconee county; R. B. Russell, Judge.

Action by F. P. Griffith against J. P. Collins. Judgment for defendant, and plaintiff brings error. Affirmed.

A. S. Erwin, B. E. Thrasher, and John J. Strickland, for plaintiff in error. E. T. Brown and W. M. Smith, for defendant in error.

SIMMONS, O. J. In January, 1897, Griffith instituted summary proceedings to dispossess Collins of certain described lands of which Collins was alleged to be in possession as a tenant holding over. Collins made a counter affidavit, in which he averred that he did not hold the land under any lease, or contract of rent, or otherwise as the tenant of Griffith. Griffith then amended his pleadings

by alleging that he and Collins had entered into a written agreement in regard to the lands, that by mistake of the scrivener and of the parties the writing did not speak the true intention of the parties, and that under the real contract Collins was to become the purchaser of the lands by making certain payments therein stipulated, or, in the event of a failure to make these payments, to pay rent as a tenant. He prayed a reformation of the contract. Upon the trial the evidence showed that in 1892 or 1893 Collins, as the tenant of Griffith, went into possession of most of the land here involved. He rented the land from year to year until the fall of 1895, when he made a contract of rent for the year 1896. In January, 1896, the parties entered into the following written contract, which was signed by Griffith: "This is to certify that I agree to sell Mr. J. P. Collins my home place, containing 350 acres, at \$7.00 per acre, at ten per cent. interest in ten payments, but Mr. Collins is to pay one-third and one-fourth should he fail to make payments as above. And if the said Collins pays the full amount of the ten payments in one, then I agree to give him \$250.00, a suit of clothes, and a buggy. Said land is bounded as follows," etc. On August 26, 1896, Griffith wrote Collins a letter, in which he asked Collins to bring him some cotton to be applied either to rent or "on land," as Collins might prefer. Collins does not appear to have made any payment whatever. The land was surveyed, at the request of both parties, at different times, and found by the last survey to contain about 346 acres. On October 10, 1896, Collins, through his attorney, tendered Griffith \$2,500, out of which Griffith was to take enough to pay for the land. Griffith claimed that under the contract he was at once entitled to \$7 per acre, and also to the full amount of 10 years' interest at 10 per cent. per annum. He also stated that he had already made to a third party a security deed to the land, and was, therefore, in no position to convey the land to Collins; and he refused the tender on both these grounds, and on no other. A few days later the attorney for Collins prepared a deed to the land, and again made a tender to Griffith. The second tender was of a certified check, but this Griffith expressly waived, refusing the tender for the reasons stated when the first tender was rejected. Griffith testified that he understood the contract to mean that, no matter when payment was made, he was entitled to the principal and to 10 per cent. interest for the full term of 10 years, without discount. Collins testified that at the time the contract was made both parties had understood and agreed that under it he was to pay \$7 per acre for the land, together with interest at 10 per cent. up to the time of payment; and that no part of the purchase price was to bear interest after the time of its payment. The evidence also showed without contradiction that by the words "at ten per cent. interest in ten

¶ 1. See Landlord and Tenant, vol. 22, Cent. Dig. § 1372.

payments" it was intended that the interest should be at the rate of 10 per cent. per annum, and the payments annual; and also that the stipulation as to the payment of "one-third and one-fourth" in the event of a failure to purchase, meant that Collins should, in such event, pay rent as a tenant, the rental being one-third of certain of the farm products made and one-fourth of the others. The jury found for the defendant, and the plaintiff moved for a new trial. To the judgment overruling his motion, he excepted.

1. The sole question involved in the present case is whether Collins was a tenant of Griffith at the time this proceeding against him was instituted. The law gives this remedy in no case in which the relation of landlord and tenant does not exist. If Collins, in January, 1897, was in possession of the lands as a tenant holding over, then the verdict should have been for the plaintiff; while, if Collins held the lands under a contract of sale and as a purchaser, the jury's finding for the defendant was correct. The controlling issue was, therefore, whether or not the relation between the parties was that of landlord and tenant.

2. It was argued by counsel for the plaintiff in error that the writing set out above lacked the certainty requisite to a contract, and was not binding, and that, therefore, the relation of landlord and tenant continued between the parties under their prior contract, made in the fall of 1895. This, we think, is not true. The writing did not constitute a sale of the land, but it was an agreement to sell, and was so treated by Griffith in his pleadings. Both parties had acted upon it as such an agreement, and as long as they did so the relation between them was not that of landlord and tenant. The parties intended the instrument as an optional contract or agreement under which Collins could purchase the land or hold it as tenant, and when he made a tender to Griffith, and thereby placed himself in the position of one attempting to close the option to purchase, no refusal on the part of Griffith could place Collins in the attitude of a tenant. Under the contract Collins held the land as a purchaser unless and until he should, by a failure to pay, or in some other way, elect to hold it as a tenant. In the absence of anything to show such an election, he would continue to hold as purchaser. Whether the tender made was of an exactly correct amount is of no moment, for it was refused by Griffith on grounds which show indubitably that the offer would have been declined whether correct or not. One of these grounds was that Griffith was entitled to \$7 per acre for the land, and, in addition thereto, 10 per cent. per annum interest for the full period of 10 years, although the payments were made the first year. The other was that he had already conveyed the land to a third party, and was in no position to make a deed to Collins. We are clear that Griffith was not entitled to interest at the rate of 10 per cent. per annum, and that, what-

ever the rate, he was entitled to no interest beyond the time of the tender. The rejection of the tender on the ground first stated made it apparent that a technically correct and exact tender would have been refused; while the second objection stated showed that any tender which could have been made would have been ineffectual. For these reasons we think Collins, by his tender, clearly indicated an intention to close the option to purchase, and could not be held to have relinquished his right to purchase, and to have elected to hold the land as tenant. Not holding the land as tenant, he could not be ejected by the summary process instituted against him. Whatever may be the rights of the parties in other respects, it is clear that Griffith cannot maintain against Collins proceedings which are applicable only where the relation of landlord and tenant exists.

3. The trial judge committed no material error which could have affected the decision of the above and controlling issues in the case. Whether error was committed with respect to other questions made it is unnecessary to decide, for, if the relation of landlord and tenant did not exist between the parties, a determination of this case in favor of Collins was inevitable.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 526)

GOLDING v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—APPEAL—REVIEW—LARCENY—INTENT—NEW TRIAL.

1. There was evidence sufficient to authorize a finding by the jury that the accused was guilty of the offense with which he was charged.

2. The trial judge committed no error in refusing to instruct the jury, as requested by counsel for the defendant. The question whether the accused intended to steal, as well as that whether he did in fact commit the larceny charged, was fairly submitted in the general charge, which covered the particular matter of intention referred to in the request.

3. The trial judge fairly submitted the issues made by the pleadings and evidence, and his charge was not calculated to mislead the jury in their finding.

4. The evidence alleged to be newly discovered was immaterial in character, and was not legally sufficient to change or influence the verdict.

(Syllabus by the Court.)

Error from superior court, Liberty county; Paul E. Seabrook, Judge.

R. L. Golding was convicted of larceny, and appeals. Affirmed.

A. S. Way, for plaintiff in error. Livingston Kenan, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 417)

CASON v. GRIZZLE et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

APPEAL—REVIEW.

1. The motion for a new trial was upon the general grounds only. The evidence authorized the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Hancock county; H. M. Holden, Judge.

Action between R. A. Cason and John Grizzle and others. From the judgment, Cason brings error. Affirmed.

W. H. Burwell, for plaintiff in error. L. D. McGregor and R. H. Lewis, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN P. J., absent on account of sickness

(116 Ga. 525)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

JURY—IMPANELING—CRIMINAL LAW—INSTRUCTIONS.

1. Under the acts establishing the city court of Cartersville (Acts 1884-85, p. 487, and Acts 1887, p. 716), the judge of that court may make up panels of jurors for the trial of cases, and may cause such panels to be filed by tale-men in the same manner as is provided by section 859 of the Penal Code, for the organization of panels in the superior court.

2. A charge to the jury in a criminal case that the jury shall acquit the accused if they "determine that he is not guilty beyond a reasonable doubt" is susceptible of a construction which makes it erroneous, and, in a close case, is such error as to require the grant of a new trial.

(Syllabus by the Court.)

Error from city court of Cartersville; A. M. Foute, Judge.

Will Williams was convicted of crime, and brings error. Reversed.

Jas. B. Conyers, for plaintiff in error. Sam. P. Maddox, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., absent on account of sickness. **CANDLER, J.**, not presiding.

(116 Ga. 550)

WEAVER v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—VARIANCE—EVIDENCE—EXCLUSION.

1. An indictment for an attempted arson alleged the ownership of the house to be in "Mrs. G. Bevill." On the trial the evidence showed that the deed to the property had been made to Roxie S. Bevill, that she was the wife of G. Bevill, and that Roxie S. Bevill and Mrs. G. Bevill were one and the same person. The jury having found, under proper instructions from the court, that the property belonged to the person named in the indictment, there was

no variance, and the court did not err in refusing to grant a new trial upon this ground.

2. Where police officers saw the accused throw oil upon a house for the purpose (afterwards admitted) of burning it, and at this juncture the officers came out from their hiding place, and could have been seen by the accused, who then started away from the house without attempting to ignite the oil or the house, the judge properly submitted to the jury the question as to whether the accused desisted on account of having repented, or because he had seen the officers, and was afraid of apprehension; and a finding against the accused on this issue was not without evidence to sustain it.

3. This court cannot say that there was error in refusing to allow a certain question to be propounded to a witness when it does not appear what answer was expected or would have been made.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

John J. Weaver was convicted of arson, and brings error. Affirmed.

W. F. Slater, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

SIMMONS, C. J. The accused, John J. Weaver, was indicted for the offense of "attempt to commit arson," the allegation in the indictment being that the said Weaver did attempt willfully and maliciously to burn the house of one Mrs. G. Bevill, and did do a certain act toward the commission of said crime, to wit, by putting kerosene oil on said house, but was prevented from executing the same. From the evidence it appeared that a police officer had received information which led him to believe that the house referred to in the indictment was, on the night in question, to be burned. This officer, with two others, secreted himself at a point about 50 yards from the house at about the time that it was expected the attempt would be made to burn the house. At about 2 o'clock in the morning the officers saw a man, who was identified as the accused, approach the house with something in his hand. After going to the rear end of the house, and placing upon the ground the object that he had in his hand, he walked some distance in the direction of the place where the officers were concealed, stopped, and looked around. He then walked around the house, and, after taking some time, apparently investigating the surroundings, he returned to the place where he had deposited what then for the first time was recognized by the officers to be a can or tin bucket, picked it up, and poured its contents upon the side of the house. Upon an examination made shortly after this occurrence, the fluid poured from the can or bucket upon the house was found to be kerosene oil. After throwing the oil upon the house, the accused turned around, and as he turned the officers emerged from their place of concealment. It appeared that two negro men were asleep on a bed near the window on the side of the house where the oil was thrown,

and that some of the oil went through the window and onto this bed. The officers would not testify whether the accused saw them, but it appears that he stepped back from the building after throwing the oil upon it, and stopped for about 30 seconds, after which time he turned and walked away at a rapid walk. When he had gone some distance, the officers determined to catch him. There was a dim light, and he could be seen by the officers. They supposed that he had seen them, but did not know that he had. They followed him, and when they had come within about 40 yards of him he threw the bucket or can which had contained the oil into a ditch, and walked on across a nearby bridge. He saw the officer approaching him, stopped, and was then arrested. He first gave his name as Carter, and, when asked where the bucket was that he had thrown away, he replied, "It is over there." After going some distance with the officer without speaking, he said to him: "I will tell you the truth. My name is John J. Weaver. I am a shoemaker. I know I am ruined. I was hired to do this by Mrs. Roxie Beville, my niece, wife of Granville Beville. My destitute circumstances drove me to it. I was to get twenty-five dollars for burning the house. My family is in destitute circumstances,"—and at this point he began to cry. He told the officer further that the house was insured for \$600, and asked him where he was going to take him. When told that he would be taken to the police barracks, he asked to be carried by Mrs. Beville's house, stating that she would secure a bond for him. It was shown that Mrs. G. Beville was the wife of Granville Beville, and that her given name was Roxie. The deed to the land on which the house was situated was to Roxie S. Beville. The accused, in his statement, admitted that he had thrown a half gallon of oil on the side of the house, and that he had been offered \$25 by Mrs. Beville to burn the house, but claimed that, after throwing the oil upon the house, "some unknown voice" had told him, "Don't do that!" He said further: "I turned around, and went back, giving up the idea of burning the house, and was going back to tell her that I would throw up the job. I did not know there was an officer within half a mile of me,—not nearer to me than Frogtown." He also stated that when he stopped at the time of his arrest he was in a narrow path, and that he only stepped out of the path to give the officers room to pass; that at the time he did not know that the person about to pass him was an officer, but thought he was a railroad hand, and did not learn that he was an officer until after he threw his hand upon him, and told him to consider himself under arrest.

1. As before stated, it appears that the deed conveying the land upon which was situated the house named in the indictment was made to "Roxie S. Beville," and that the

husband of Roxie S. Beville is Granville Beville. The bill of indictment describes the house in question to be "the house of one Mrs. G. Beville." The question presented for determination by this court is, did the court below err in refusing to give in charge to the jury the following written request of counsel for the accused? "If the state alleges that the defendant attempted to burn the house of one Mrs. G. Beville, then the state must so prove, and, if the facts show the property to be in the name of another, in that event the defendant should be acquitted;" and in charging instead as follows: "It is necessary for the state to show that it was the house of Mrs. G. Beville, and the state must so prove. A name is just a simple method of identifying a certain human being. If the testimony shows that the deed to the property was to Roxie S. Beville, and if the evidence shows further that Roxie S. Beville is the wife of Granville Beville, and if the initial letter of Granville is 'G,' and if the evidence showed that Mrs. G. Beville was the same person as Roxie S. Beville, a conviction under this indictment would be good, if those facts appeared." The plaintiff in error insists that, inasmuch as the deed to the land upon which the house was situated was to Roxie S. Beville, and the indictment alleged the house to be the property of Mrs. G. Beville, the request should have been given, and that the charge given was error. We think that the court did not err in refusing to charge as requested, or in the charge as given. It was held by this court in the case of *Jackson v. State*, 76 Ga. 568, where the accused was charged with embezzlement: "The question is one of the identity of the party whose property was embezzled, and not merely one of the identity of a name." As was said in the opinion in that case, "Neither the court nor the jury could have been at any loss to determine what person was referred to." In the case of *Ansley v. Green*, 82 Ga. 184, 7 S. E. 922, a declaration brought in the name of Alice McPherson Ansley was held good, although the auctioneer's memorandum of the sale of the land which was set out in the declaration was in the name of Mrs. Frank J. Ansley as seller. In that case the court said: "It is very likely that the name in the memorandum was that of her husband, and, if that is so, we think it could be explained by parol, and that she would be allowed to show that Frank J. Ansley was the name of her husband, and that the words 'Mrs. Frank J.' were applied to her in the memorandum, and that she was the real owner of the land exposed for sale." In the present case both the state and the accused proved that Mrs. G. Beville and Roxie S. Beville were one and the same person, and the court, in the charge complained of, submitted the question to the jury whether this was true. The jury found by their verdict that the house was the house of Mrs. G. Beville. See *Rogers v. State*, 90

Ga. 466, 16 S. E. 205; Carrall v. State, 53 Neb. 431, 73 N. W. 989; Peterson v. Little, 74 Iowa, 223, 37 N. W. 169; Davis v. State (Tex. App.) 11 S. W. 647.

2. From the statement of facts heretofore given, it will be seen that the accused approached the house described in the indictment at the hour of 2 in the morning, with a tin bucket or can containing at least a half gallon of kerosene oil. He sets this vessel down in a safe place, and carefully goes around the premises, taking in and examining the situation, and returns to the place where he placed the oil. He looks cautiously around, and then throws it over the wall of the house, and in so doing some of the oil goes into a window and falls upon the bedding, where two men are asleep. He steps back, and listens for 30 seconds, when into full view come three officers of the law. The accused may not have seen them. He could have done so. He then walks rapidly away, the officers following, and as he goes he throws the bucket in which he had carried the oil into a ditch. After following him for a considerable distance, the officers catch up with him, and place him under arrest, and after a time he admits all that they have seen, and more. Upon the trial, in his statement made to the jury, do we hear for the first time of his repentance, and of the "still, small voice" that bade him desist from his atrocious purpose. Under section 1040 of the Penal Code, it was a question for the jury to say under the evidence whether, after throwing the oil upon the house, he was prevented by the sight of the officers from completing his crime, or whether, after going to the extent that he did, he heard and heeded, as he claims, a voice which seemed to say, "Stop! Don't do that!" or whether he was frightened by the approach of the officers or deterred by the voice of conscience and repented of his wicked intention. The question was fairly submitted to the jury. They found against the accused, and there was ample evidence to sustain their finding.

3. Complaint is made that the court below erred in refusing to allow a certain witness to answer a question set out in the motion for a new trial. Nowhere does it appear what answer was expected to this question, and under the repeated rulings of this court this assignment of error was insufficient.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 526)

STURKEY v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—APPEAL—NEW TRIAL.

1. The evidence was sufficient to support the verdict, the alleged newly discovered evidence

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2292.

was either merely cumulative or impeaching, and, even if the sentence imposed had been excessive, it would not have been a good ground for granting a new trial. *Burgamy v. State*, 40 S. E. 991, 114 Ga. 852.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Bose Sturkey was convicted of crime, and brings error. Affirmed.

H. C. Cameron and Preer & Love, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 545)

BELLINGER v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—APPEAL—REVIEW—NEW TRIAL.

1. In the absence of exceptions pendente lite, this court cannot consider exceptions to rulings made more than five months before the bill of exceptions was sued out.

2. Rulings made upon a demurrer to an accusation and a motion to quash the warrant which was the foundation of the accusation are not proper grounds of a motion for a new trial.

3. The sentence was not excessive, and, if it were, this is not ground for a new trial. *Burgamy v. State*, 114 Ga. 852, 40 S. E. 991 (2); *Sturkey v. State*, 116 Ga. —, ubi supra.

4. The evidence authorized the verdict.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Laura Bellinger was convicted of crime, and brings error. Affirmed.

Geo. W. Owens and W. F. Slater, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 546)

WATSON v. MAYOR, ETC., OF THOMSON.

(Supreme Court of Georgia. Nov. 12, 1902.)

MUNICIPAL CORPORATIONS—ORDINANCES—GENERAL WELFARE.

1. A municipal corporation cannot, under the general welfare clause usually found in municipal charters, prohibit one from carrying on a lawful avocation on Christmas Day, when there is nothing in the character of the business carried on which is calculated to interfere with the peace, good order, and safety of the community.

(Syllabus by the Court.)

Error from superior court, McDuffie county; E. L. Brinson, Judge.

J. F. Watson was convicted of violating an ordinance of the town of Thomson, and brings error. Reversed.

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2153.

John T. West, for plaintiff in error. Ira E. Farmer, for defendant in error.

COBB, J. Watson, a merchant, was convicted in the municipal court of the town of Thomson for the violation of an ordinance providing that "it shall be illegal for any person to follow any trade, avocation, or calling within the limits of the town of Thomson on the 25th day of December of each year; said day being hereby set aside as a holiday, and is to be observed by all persons within the limits of the town." By the terms of the ordinance its provisions were not to be applicable to such "works" as are usually performed on Sunday, and it was further provided that railroad and express companies should be allowed to conduct their respective businesses for a stated period before and after the arrival of trains; that drug stores should be allowed to sell drugs upon request of the party desiring to purchase, and should immediately after the sale close; and that dealers in "green groceries" should be allowed to conduct their business until 10 o'clock a. m., on the day named. The accused did not come within any of the exceptions just referred to. His petition for certiorari complains that the judgment of the municipal court was erroneous, because the town of Thomson had no authority under its charter to pass the ordinance; and that, even if it had, the general assembly had no power to confer such authority. The superior court overruled the petition for certiorari, and the petitioner excepted.

The town of Thomson had no express authority from the general assembly to pass the ordinance in question, and, inasmuch as we have reached the conclusion that such authority cannot be fairly implied from the general grant of power contained in the general welfare clause, which is the only clause in the town's charter which could by any possible construction be held to confer the authority, it will be unnecessary to determine whether the general assembly could constitutionally enact itself or delegate to municipal corporations the power to pass such a law as is involved in the present case. Christmas Day is declared by the law of this state to be a holiday. The general assembly has not, however, seen proper to provide for an entire cessation of business on public holidays. On such days it is not lawful to note and protest bills and notes, but further than this the law does not prohibit the carrying on of business avocations. Civ. Code, § 3692. See, also, *Hamer v. Sears*, 81 Ga. 288, 6 S. E. 810. It is well settled that a municipal corporation cannot, by ordinance, provide for the punishment of an act which is made an offense under the law of the state. It does not necessarily follow, however, from this, that a municipal corporation may provide for the punishment of any act which the state has not seen fit to declare a crime. The power of municipal corporations to provide for the

punishment, under the general welfare clause in their charters, of acts otherwise lawful, is a limited power. As a general rule, a municipal corporation cannot, under this clause, exercise any powers but those which are necessarily or fairly to be implied from, or incident to, its express powers, and those which are indispensable to the declared purposes for which the corporation was created. See *Henderson v. Heyward*, 109 Ga. 377, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384. See, also, *Turner v. City of Forsyth*, 78 Ga. 683, 3 S. E. 649 (3). An ordinance prohibiting one from following his avocation upon a given day can be sustained only as an exercise of the police power of the state. Up to the present time the general assembly has seen proper to interfere with the right of the citizen to follow his ordinary avocation only to the extent of prohibiting him from pursuing such calling on Sunday, and prohibiting those engaged in the business of banking from doing the acts above referred to on public holidays. Further than this the general assembly has not seen proper to go. The power of the government to interfere with the citizen in his right to labor is one which should be cautiously exercised. "The right to follow any of the common avocations of life is an inalienable right." *Bradley, J., in Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.*, 111 U. S. 762, 4 Sup. Ct. 657, 28 L. Ed. 585. The state itself cannot interfere with the right to labor except upon reasons which demand that this right shall be restrained for the public good. Laws requiring cessation from labor at given times have been upheld for the reason that experience has demonstrated that it is for the welfare of each individual, and therefore for the society of which he is a member, that all persons should take periodic rests from their work. The policy of the law of this state is, and has been for many years, favorable to the right of a man to labor, and to follow the pursuit of his ordinary avocation. The only restraints upon this right which the general assembly has ever seen proper to exercise are those above referred to. The general assembly has never, so far as we are informed, conferred in express terms upon any municipal corporation the right to altogether prohibit a person from carrying on one of the lawful avocations of life on a public holiday, even if it could confer such power. Municipal corporations, under the general welfare clause, have been permitted to pass ordinances in aid of the policy of the law of the state by punishing acts which were not punishable under the law of the state, but which, if permitted in the municipality, might tend to bring about violations of state laws. It was held in *Karwisch v. City of Atlanta*, 44 Ga. 204, that, while the city of Atlanta could not punish a person for carrying on his ordinary avocation on Sunday, for the reason that that would be an offense against the law of the

state, it was competent for the city, under the authority of the general welfare clause, to enforce an ordinance prohibiting merchants from keeping open their doors on Sunday, the purpose of the ordinance being to prevent the violation of the state law in reference to persons carrying on the work of their ordinary calling on Sunday. See, also, *Rothschild v. City of Darien*, 69 Ga. 503. It has also been held that in municipalities where the sale of liquor is altogether prohibited, or allowed to be sold under given regulations, an ordinance prohibiting one from having liquors in his possession for the purpose of illegal sale could be passed under the power granted in the general welfare clause; the purpose of the ordinance being to aid in the enforcement of the state law prohibiting or regulating the sale of liquor. See the cases cited in *Henderson v. Heyward*, supra, on page 380, 109 Ga., and page 592, 84 S. E., 47 L. R. A. 366, 77 Am. St. Rep. 384. The general assembly never having seen proper to attempt to bring within the police power the right of the citizen to carry on his ordinary labor on public holidays, it is manifest that it is the intention of the general assembly and the policy of the state that one shall be permitted to pursue his ordinary avocation on any day other than Sunday, unless he is engaged in the business of banking, and then the restraint upon this right is limited in the manner above referred to. Such being the undoubted policy of the state, it is not to be presumed that the general assembly intended, by granting a municipal charter, that the general welfare clause therein, although it may be broad in its terms, should be construed as authority for a municipal corporation to interfere with one who is carrying on an occupation at a time when it is lawful under the law of the state for him to pursue this calling. To prohibit individuals generally from carrying on their ordinary avocations on days other than Sunday would, with the exceptions above noted, be a departure from the settled policy of the state, and any such departure must commence with the general assembly itself, either by a direct law to this effect or by granting some subordinate public corporation express authority to make such departure. See *Henderson v. Heyward*, supra, and cases cited. Of course, what is said above with reference to the power of a municipal corporation under the general welfare clause of its charter to prohibit the carrying on of lawful occupations on public holidays is applicable only to such occupations the prosecution of which is not calculated to disturb on the particular day the peace, good order, and safety of the community, in the sense in which those terms are understood by the law. A municipal corporation would doubtless have the right even to entirely prohibit on a given day the carrying on of a business, which, though lawful, was of such a character that its prohibition for the time was absolutely essential to the welfare, in a legal sense, of the community.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 526)

McARVER v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The evidence authorized the verdict, the charge complained of was not erroneous for any of the reasons assigned, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Ed. McArver was convicted of crime, and brings error. Affirmed.

W. A. Barnett, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 514)

WYNN v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

APPEAL—REVIEW.

1. There being no complaint that any error of law was committed on the trial, there being evidence to sustain the verdict, and the trial judge being satisfied therewith, the supreme court will not reverse the judgment denying a new trial.

(Syllabus by the Court.)

Error from superior court, Schley county; Z. A. Littlejohn, Judge.

S. J. Wynn was convicted of crime, and brings error. Affirmed.

J. R. Williams, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 514)

SLOCUMB v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

APPEAL—REFUSAL OF NEW TRIAL—REVIEW

1. In passing upon exceptions to the overruling of a motion for a new trial, this court will not consider grounds of the motion which were not approved by the trial judge.

2. The charges complained of, when taken in connection with the entire charge, were not erroneous, the evidence authorized the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Terrell county; H. C. Sheffield, Judge.

Tom Slocumb was convicted of crime, and brings error. Affirmed.

W. H. Gurr and R. F. Simmons, for plaintiff in error. J. A. Laing, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 534)

DEAN v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)
ASSAULT WITH INTENT TO KILL—EVIDENCE—INSTRUCTIONS.

1. The evidence authorized the verdict that the accused was guilty of the offense of an assault with intent to murder.

2. The trial judge fully and fairly instructed the jury as to the issues which arose under the pleadings and evidence in the case.

3. There was no error on the part of the trial judge in failing to instruct the jury as to the law governing voluntary manslaughter.

4. The jury would not have been authorized, under the evidence of any of the witnesses, to find a verdict that the accused was guilty of a less offense than that returned.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Ben Dean was convicted of assault with intent to kill, and brings error. Affirmed.

J. R. Williams, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 534)

MOSS v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)
CRIMINAL LAW—REVIEW.

1. No error of law was complained of, and the evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from city court of Sandersville; P. R. Talliaferro, Judge.

Lige Moss was convicted of crime, and brings error. Affirmed.

J. A. Robson, for plaintiff in error. J. E. Hyman, Sol., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 573)

JACKSON v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)
LARCENY—EVIDENCE.

1. The evidence in this case fails to show that the pistol was taken from the prosecutor with-

out his knowledge, and the circumstances of the taking do not make it satisfactorily to appear that such taking was done with intent to steal.

(Syllabus by the Court.)

Error from city court of Sandersville; P. R. Talliaferro, Judge.

James Jackson was convicted of larceny, and brings error. Reversed.

J. A. Robson, for plaintiff in error. J. E. Hyman, Sol., for the State.

LITTLE, J. The plaintiff in error was tried on an accusation in the city court of Sandersville for the offense of larceny from the person. The accusation charges that he wrongfully and fraudulently took a certain pistol from the person of the prosecutor, Copeland, privately, and without his knowledge, with intent to steal the same. He was convicted, and made a motion for a new trial, on the grounds that the verdict was contrary to law and the evidence, and without law or evidence to support it. The motion being overruled, he excepted.

The contention of counsel for the plaintiff in error is that the evidence fails to show that the accused took the pistol with intent to steal the same, and that, therefore, the verdict is contrary to law and the evidence. Larceny from the person is defined by our Penal Code (section 175) to be "wrongful and fraudulent taking of money, goods, or any article of value, from the person of another, privately, without his knowledge, in any place whatever, with intent to steal the same." It will be noted that this definition varies from that of simple larceny (Pen. Code, § 155), in that in larceny from the person the taking must be privately and without his knowledge. In the case of *Moye v. State*, 65 Ga. 754, this court ruled that the crime could not be completed if the owner of the property had knowledge that it was being taken. Again, no grade or character of larceny is complete unless, accompanying the taking, there is an intent to steal. It is true that as a general proposition the intent may be manifested by the circumstances, but these circumstances must always be sufficient to indicate that the intention to steal existed. This court, in the case of *Patterson v. State*, 85 Ga. 134, 11 S. E. 621, 21 Am. St. Rep. 152, quoted approvingly from a Michigan case (*Maier v. People*, 10 Mich. 212, 81 Am. Dec. 781) a statement that the "general rule is well settled, to which there are few, if any, exceptions, that, when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as a matter of fact, before a conviction can be had." Mr. Wharton, in the first volume of his *Criminal Law* (section 885), on authority, states the general rule to be that "taking goods, not with the intention of depriving the owner of his property in them, but with

the object of temporarily using them and then returning them, is not larceny"; and in section 886, that "the mere borrowing, without fraudulent intent, is not larceny." Mr. Bishop, in the second volume of his *New Criminal Law*, § 840 (5), after citing quite a number of cases, declares that, by all opinions, the taking, to be felonious, must be more than a mere trespass, whether careless or intended. And Mr. Clark, in his work of *Criminal Law* (page 279), while treating on the manner of taking involved in a larceny, declares that though larceny is generally regarded as a secret crime, and conveys the idea of stealth, it is not necessary that the taking should be done secretly. An open taking may constitute the crime, if there is the necessary animus furandi, or felonious intent, though the fact that there was no stealth or intended concealment may tend to show the absence of such intent. Quite a number of cases are cited by Mr. Rapalje in note 2, on page 23, in his work on *Larceny and Kindred Offenses*, which support the proposition that the articles taken must have been taken fraudulently and secretly, with the felonious intent of permanently depriving the owner of them. In section 25 of the same work the author cites authorities which support the proposition he lays down, that the taking of the property of another with the intent of depriving owner only temporarily of it is not larceny. See, also, *Causey v. State*, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447, as to the effect of a public taking.

The evidence of the prosecutor, who was the only witness for the state, is to the following effect: Between the hours of sunset and dark, at a public place (Buffalo Bridge), in Washington county, he was lying down, and saw the accused walking towards the place where he was. He had his back to him, and had a pistol in the back pocket of his pants. He felt some one taking his pistol, and, turning, saw Jackson walking away with it in his hand. When he felt the pistol leaving his pocket he endeavored to catch hold of it, but missed it. The pistol was a borrowed one, and belonged to a man by the name of Dudley. The accused returned the pistol to Dudley in about six weeks. He did not follow the accused when he took the pistol, for the reason that he was afraid he would be shot. There were a number of persons on the ground at the time. He testifies, in the same connection, that the pistol was taken privately and without his knowledge. The latter statement must be discredited, because of his evidence that he saw Jackson walking towards him, and felt some one taking the pistol from his pocket; hence he did have knowledge that it was being taken. The explanation given by the accused, which was not in any way controverted except in the foregoing evidence of the prosecutor, was that a large crowd were at the bridge; that Copeland was lying on the ground with a lot of other persons, and his pistol was sticking

out of his hip pocket; that he thought he would have a little fun out of the prosecutor, and walked up to him, and took his pistol out, and walked on off with some young ladies with the pistol in his hand; if the prosecutor said anything at the time, he did not hear it; that he had no intention of keeping the pistol, although he did not return it to Dudley, to whom it belonged, as soon as he could have done so; that the pistol was taken in broad open daytime, and that a half dozen men saw him take it and walk off with it.

The jury were not, of course, obliged to believe any part of this statement of the accused. It was, however, a very material point, considering the testimony of the prosecutor, to show the intention of the accused in taking the pistol, and the circumstances that other persons were present and saw him take it, and that it was taken in the open day tended very greatly to show the intention, and the meagerness of the evidence for the state on these points is a significant fact. Indeed, while the statement is fuller as to details, it does not seem to be contradictory of the evidence of the prosecutor, for he does not state that it was dark at the time of the taking, but that it was between sunset and dark. In another particular his evidence would tend to show that other persons saw, or might have seen, the taking; for he states that there were several other persons on the ground. Another significant circumstance which tends to show that the prosecutor did not at the time regard the taking as having been feloniously done is that he did not follow the so-called thief, nor attempt to recover the property, although there were a number of other persons present on whom he could have called for assistance. We are of the opinion that the evidence does not satisfactorily show that the pistol was taken from the person of the prosecutor without his knowledge, nor does it satisfactorily show, under the rules of law to which we have above referred, that the pistol was taken with intent to steal the same. The taking was, of course, a trespass, and wrongful, but, in the absence of the animus furandi,—the intent to steal,—the conviction cannot be upheld.

The judgment overruling the motion for a new trial must therefore be reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 573)

WHITE v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. An objection to evidence will not be considered when it does not appear that it was urged before the trial judge at the time the evidence was offered.

2. The evidence authorized the verdict.
(Syllabus by the Court.)

Error from city court of Carrollton; W. C. Hodnett, Judge.

J. R. White was convicted of crime, and brings error. Affirmed.

Jas. Beall and Oscar Reese, for plaintiff in error. S. Holderness, Sol., and Griffith & Weatherby, for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. OANDLER, J., not presiding.

(116 Ga. 562)

GRIFFIN v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. This court will not review the evidence in a case when it is apparent from the record that there has been no bona fide effort made to brief the evidence as required by law, and when the document purporting to be a brief of the evidence consists largely of questions and answers, and is interspersed with objections to testimony. *Railroad Co. v. Upshaw*, 42 S. E. 82, 115 Ga. 688, and case cited.

2. When, in such a case, no question is presented which can be determined without reference to the evidence, the judgment will be affirmed.

3. Applying the rules above stated to the record in the present case, the judgment must be affirmed.

(Syllabus by the Court.)

Error from city court of Brunswick; J. D. Sparks, Judge.

Peter Griffin was convicted of crime, and brings error. Affirmed.

Max Isaac, for plaintiff in error. J. T. Colson, Sol., Atkinson & Dunwoody, and Spencer R. Atkinson, for the State.

PER CURIAM. Affirmed.

LUMPKIN, P. J., absent on account of sickness. OANDLER, J., not presiding.

(116 Ga. 571)

LAWSON v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

ADULTERY—EVIDENCE.

1. Under an accusation charging the accused with living in a state of adultery with a named person, mere proof of a single act of adultery with such other person is not sufficient to authorize a conviction.

(Syllabus by the Court.)

Error from city court of Baxley; J. I. Carter, Judge.

Lola Lawson was convicted of crime, and brings error. Reversed.

W. W. Bennett and J. B. Moore, for plaintiff in error. N. J. Holton, Sol., for the State.

FISH, J. Lola Lawson was tried in the city court of Baxley upon an accusation charging her with living in a state of adultery with one Henry Plueasy. There were

other counts in the accusation charging her with living in a state of fornication, and living in a state of adultery and fornication, with the same person. She was found guilty, and made a motion for a new trial, which being overruled, she excepted.

In our opinion, the verdict was without evidence to support it. There was circumstantial evidence from which the jury could have inferred that the accused had been guilty of criminal sexual intercourse, upon a single occasion, with a man named Henry Pruitt. Whether Pruitt was married or single, did not appear. Waiving the question whether or not the proof showed that Pruitt was also known by the name of Plueasy, and also the question whether or not the evidence should have shown whether he was married or single, the evidence was fatally defective, in that it did not show the accused had been living in a state of adultery with Pruitt, or that she had been living with him in either of the other unlawful states or conditions charged in the accusation. At most, it showed only a single act of criminal intercourse between the parties, without any other circumstance to sustain the accusation. In *McLeland v. State*, 25 Ga. 477, where the accused was indicted and found guilty of the offense of "living in a state of adultery and fornication," the proof showed only a single act of adultery; and the trial court charged the jury that, if they believed from the testimony that the defendant had been guilty of a single act of adultery, they should find him guilty under the indictment. But this court held that, under the charges of the indictment, it was "necessary for other facts to be proven besides an act of adultery, to warrant the conviction of the defendant." It seems to us that this is clear from the very language of the statute. The statute provides: "Any man and woman who shall live together in a state of adultery or fornication, or of adultery and fornication, or who shall otherwise commit adultery or fornication, or adultery and fornication, shall be severally indicted," etc. Pen. Code, § 381. What necessity or reason was there for providing for the punishment of those who should "commit adultery" "otherwise" than by living together in a state of adultery, if by committing a single act of adultery they would be guilty of the offense of living together in a state of adultery? Or to state the proposition differently, if a man and woman by a single act of adultery, unaccompanied by any other circumstance showing an intention to establish and continue an adulterous relation, are guilty of the offense of living together in a state of adultery, how can it be possible for them to "commit adultery" "otherwise" than by living in a state of adultery? The statute clearly makes a distinction between living together in a state of adultery and merely committing an act of adultery. Bishop, in discussing the statutory offenses which he treats of under the title "Living in Adul-

tery or Fornication," after calling attention to the different expressions employed in the statutes of the various states, says: "None of these statutes are violated by a mere single act of criminal intercourse, and it will not be otherwise though the act transpires in pursuance of a prior arrangement." Bish. St. Crimes, § 697. The following cases, most of which are cited by the learned author, will be found to sustain this statement: *Smith v. State*, 39 Ala. 554; *Quartemas v. State*, 48 Ala. 269; *Hall v. State*, 53 Ala. 463; *Bodiford v. State*, 86 Ala. 67, 5 South. 559, 11 Am. St. Rep. 20; *Morrill v. State*, 5 Tex. App. 447; *Jackson v. State*, 116 Ind. 464, 19 N. E. 330; *Pruner v. Com.*, 82 Va. 115; *Luster v. State*, 23 Fla. 839, 2 South. 690; *Thomas v. State*, 39 Fla. 437, 22 South. 725; *Searls v. People*, 13 Ill. 597; *Turney v. State*, 60 Ark. 259, 29 S. W. 893; *State v. Marvin*, 12 Iowa, 499; *Com. v. Calef*, 10 Mass. 153.

A new trial should have been granted because the verdict was without evidence to support it.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 505)

ATLANTA, K. & N. RY. CO. v. ROBERTS.
(Supreme Court of Georgia. Oct. 31, 1902.)
RAILROADS—INJURY TO LICENSEE—NEW TRIAL—DAMAGES.

1. There was no error in overruling the motion for a nonsuit.

2. None of the grounds set out in the motion for a new trial present any legal reason for setting aside the verdict, which was authorized by the evidence, and which is not excessive.

(Syllabus by the Court.)

Error from superior court, Gilmer county; Geo. F. Gober, Judge.

Action by F. L. Roberts against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, J. P. Perry, and Clay & Blair, for plaintiff in error. N. A. Morris, M. J. German, and E. P. Green, for defendant in error.

LITTLE, J. Roberts brought suit against the Atlanta, Knoxville & Northern Railway Company to recover damages for personal injuries which he alleged he sustained by the running and operation of a car belonging to the defendant, by the negligence of the servants and agents of the company. The defendant denied generally all the allegations of the petition. The trial resulted in a verdict for the plaintiff. Defendant submitted a motion for a new trial, which being overruled, it sued out a bill of exceptions, in which error is assigned to the overruling of its motion for a nonsuit made at

the conclusion of the evidence for the plaintiff, and to the overruling of the motion for a new trial. The truth of certain evidence on the part of the plaintiff is practically uncontested, to wit, that plaintiff had been employed by Long to load bark in a car belonging to the defendant, which by it had been placed on a side track at Ellijay, and that while in the car a locomotive belonging to defendant was attached to it for the purpose of drilling or switching, and while the car was being moved on the track it was derailed and overturned. It was also uncontested that the plaintiff was injured. It is claimed, however, by the company, that he was injured by jumping from the car after it had stopped, and when there was no further danger; and it is urged that plaintiff saw the freight train, the locomotive of which was doing the switching, at the time it came in; that he knew it was coming in on his track, and that he ceased his business of packing the bark, and sat on it for the purpose of holding it in place; that the company had no knowledge or notice that the plaintiff was on the car; that the plaintiff knew it was going to be moved; that he was not a passenger, nor was he injured while loading or unloading the car, but that he remained in the car without making his presence known; that he could have left it at any time, and it was his duty either to have made his presence known, or to have left the car; and that under these circumstances, as the evidence shows that the plaintiff was not intentionally or willfully injured, the company was not liable.

1. We are of the opinion that the court did not err in overruling the motion for a nonsuit. It is apparent from the evidence in the case that the company placed the car on the side track for the purpose of allowing it to be loaded with bark by Mr. Long. In doing so it did not lose the right of control over the car, nor the right to change its place on its tracks as its convenience required. When it placed the car on the side track to be loaded, it did so with the knowledge that it would be occupied by Long or his employes, from time to time, until the loading was completed. This knowledge carried with it a duty to operate and move the car in such a manner, and on such notice to those engaged in loading, or being therein in connection with that business, as would not place them in danger. These propositions being sound, as we think, and the evidence certainly authorizing a verdict that this duty was not met, the trial judge would not have been warranted in withdrawing the case from the jury, and ruling that the evidence for the plaintiff did not entitle him to a recovery. There was therefore no error in overruling the motion for nonsuit.

2. A number of grounds are set out in the motion for a new trial. We have carefully considered these, and the reasons submitted why the trial judge erred in charging the

jury in different particulars, in ruling on the admissibility of evidence, and in failing to charge. None of these grounds, in our opinion, present a cause sufficient to set aside the verdict which was rendered. It is our opinion that the judge did not err in instructing the jury in the language of section 2321 of the Civil Code, nor in failing to charge that the provisions of law contained in that section were not applicable in case the jury should find that the plaintiff was not injured by the running of defendant's cars, but in the latter event the rights of the parties should be determined by other and different rules. There was no request that the latter proposition should be given in charge. If there had been, it would not, as we interpret the evidence, have been authorized. There is no question but that the car in which the plaintiff remained was derailed and overturned while being moved on the track of the defendant company, and, from the evidence in relation to the cause of such derailment, the jury would have been fully authorized to say that it was caused by the want of proper care and diligence on the part of the agents of the company. Nor does there seem to be any serious contention that the plaintiff was not injured while jumping from the car which was derailed and turned over. Although he was, it does not necessarily follow that the company was not responsible for the damage which the plaintiff so sustained. The rule governing such liability, as announced by this court in the case of Railroad Co. v. Paulk, 24 Ga. 356, is this: "If, through the default of a corporation or its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury he receives thereby, although if he had remained in the cars he would not have been injured." In the case of Smith v. Railroad Co., 83 Ga. 671, 10 S. E. 361, after the misconduct of the company in threatening the plaintiff with a collision had been established, Chief Justice Bleckley, in discussing this question, says: "The open question is whether the plaintiff, after discovering the danger, acted recklessly or rashly, and thus brought upon himself a calamity which he might have avoided by more discreet conduct. All the authorities concur in holding that the duty of a person for his own safety, in such an emergency, is not to be measured by the ordinary standard, but that allowance is to be made for the state of his emotions. The authorities to this effect which might be cited amount to scores, if not to hundreds." The contention here is that the plaintiff was not injured by the running of the cars, but because, recklessly, when there was no occasion to do so, he jumped from the car and was injured, and that therefore the court, without request, should have charged the jury (practically) that, if they found such to be the fact, then

the rule that the company was liable for damages sustained by the operation of the cars would not apply. If the evidence, as a whole, be tested by the principles of law extracted from the decisions in the cases above cited, it will be found that such a charge would not be warranted. The evidence shows that at the time the car was derailed the plaintiff, who had been packing the bark in one end of the car, had placed a plank on it, and sat upon the plank to prevent the bark from being disarranged by the movement of the car, and that he had been employed by Long to load the car. It is true that one of the witnesses, who testified that his attention was attracted by the noise of the car jumping over the ties, said that when he looked the car was off the track and going slowly; that it seemed almost to stop, and then lean, and gradually to turn over; that it fell on its side; that he saw the plaintiff, looking very much alarmed, come out of the car and jump off, and at the time the car had stopped, and was lying on its side. This same witness, however, in another portion of his evidence, further said that he looked at the car, and a considerable dust arose when it fell, and just as the dust fell he saw plaintiff come out of the top of the car and jump off. Another witness testified that when he noticed the cars he saw that some of the wheels were off the rails, running on the ties. He then saw the car turn over with the door up, and, just about the time the car turned over, the plaintiff came out of the door. Still another witness for the railroad company testified that when he first saw the plaintiff he was coming out of the door of the car, and the car was then turning over. The plaintiff himself testified that as the car went to turn over he endeavored to jump out of it. No part of this evidence, when fairly interpreted, would authorize the jury to find that the plaintiff was not injured by the running and operation of the cars, because it does not authorize the conclusion that the plaintiff, in jumping, was not in such a perilous position as to render the act of jumping a reasonable precaution for the purpose of self-preservation. He was in the car when it first left the rails and ran upon the ties, and then upset; and, if any allowance be made for the state of mind of a person placed in such a situation, it would be unreasonable to say that such a one, when he attempted to leave the car as quickly as he possibly could, and by the readiest means he could, would have been either rash or reckless. Nor do we think there was any error on the part of the trial judge, of which the defendant can complain, in admitting evidence of the plaintiff himself in relation to the accident. The specific ruling complained of was made by the judge in the following language: "He [plaintiff] can testify as to the track. * * * I don't think he can testify as to the way the engineer came back. The transaction is his

getting hurt, or as to how he struck it. I don't think this man is a competent witness as to how he came back, or as to anything that was within the immediate knowledge of the engineer. As to how he was hurt. I don't see why he should not testify as to that," etc. Counsel for plaintiff in error refer us to the case of *Mayfield v. Railroad Co.*, 87 Ga. 374, 13 S. E. 459. The ruling in that case was to the effect that a locomotive engineer, from whose negligent acts an injury is sustained, is an agent of the corporation, and, being dead, the person injured is an incompetent witness to testify in his own behalf to such negligent act; it not appearing that any surviving officer of the corporation was present. The evidence in that case which was objected to tended to show that the engineer was guilty of a negligent act, in consequence of which the plaintiff was injured; and the ruling was clearly made that a witness was incompetent to testify in his own behalf to such act, because it was a transaction between the plaintiff and an agent of the company. But in this case the court did refuse, on objection, to permit the witness to testify as to any way the engineer came back, and also ruled that the transaction was plaintiff's getting hurt, and that the witness was incompetent as to anything that was within the immediate knowledge of the engineer, but ruled that the witness could testify what he was doing prior to the time he was hurt. In our opinion, this ruling does not conflict with the principle laid down in the case cited. What the witness was doing at the time he was hurt, in the light of the evidence, certainly did not relate to any transaction between himself and the dead engineer. Nor do we think the court erred, under the principle ruled in the case cited, in allowing the witness to testify to the independent fact that the car was running at the rate of seven or eight miles an hour at the time it was turned over, and that he attempted to jump out at the time it was turning over, etc. The rate of speed of the car was not a transaction between the plaintiff and the engineer of the company, in any sense. The plaintiff was not connected with it by any act of his. The transaction ruled on in the *Mayfield Case*, supra, was the act of the injured person in attempting to get on the cowcatcher of the locomotive; and the act of the engineer at this particular time, in putting on steam, causing the locomotive to jerk violently forward, which act, it was alleged, caused the injury. The transaction discussed and passed on in that case referred to the act of two parties, one of whom was injured in his attempt to do something which he had a right to do, by a concurrent act of the party who is deceased. We further think that the court committed no error in charging the jury that the plaintiff would be entitled to recover for the pain and suffering that he sustained which was attributable to

the wrongful or negligent act of the defendant, if the defendant was liable in damages to him therefor. The objection to this charge was that it expressed an opinion that the conduct of the defendant was wrongful or negligent. We do not think the objection is a good one, especially when this extract is construed with reference to the whole charge.

Our conclusion is that for none of the reasons set out in the special grounds of the motion for new trial should the judgment be reversed, nor is the verdict contrary to the evidence in the case. Nor can we say that the sum of \$475, found as damages for the injury which the plaintiff sustained, is excessive, under the evidence relating to the character of the injury, and the necessary and accompanying pain and suffering naturally incident thereto.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 516)

GROVES v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—ATTEMPT TO COMMIT CRIME.

1. Mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, do not constitute an attempt to commit the crime.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

W. C. Groves was indicted for an attempt to commit robbery. A demurrer to the indictment was overruled, and he brings error. Reversed.

Robt. L. Colding and John B. Cooper, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

FISH, J. W. C. Groves, E. H. Mahlay, and Joe Waters were indicted for an attempt to commit robbery by force upon the person of Frank Delter. The indictment alleged that the accused "in such attempt did do an act towards the commission of said crime, to wit, by hiring a hack for the purpose of assisting them in the commission of said crime, to wit, by ascertaining that said Frank Delter had no weapon of offense, to wit, by procuring false faces for the purposes of a disguise, but were intercepted and prevented from executing said crime." Upon the trial of Groves, he demurred to the indictment, one of the grounds of demurrer being that the acts alleged did not make out the offense charged. The demurrer was overruled, and the accused excepted.

We think the demurrer should have been sustained. The indictment was based upon section 1040 of the Penal Code, which declares that "if any person shall attempt to commit a crime, and in such attempt shall do any act towards the commission of such crime, but shall fail in the perpetration there-

of, or shall be prevented or intercepted from executing the same, he shall, in cases where no provision is otherwise made in this Code, or by law, for the punishment of such attempt, be punished as follows," etc. In order to constitute the offense of attempt to commit a crime, the accused must do some act toward its commission: "Commission" means the act of committing, doing, or performing the act of perpetrating. Webst. Dict. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it. In *People v. Murray*, 14 Cal. 159, it was held that declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a magistrate to solemnize the ceremony, were mere acts of preparation, and did not constitute an attempt to commit the crime. Chief Justice Field, who delivered the opinion in that case, said: "Between the preparation for the attempt, and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made." In *U. S. v. Stephens* (C. C.) 12 Fed. 52, 8 Sawy. 116, the accused was charged with an attempt to introduce spirituous liquors into Alaska in violation of an act of congress. The evidence showed that he sent from Alaska, where he resided, to a wholesale dealer in San Francisco, an order for 100 gallons of whisky, to be shipped to him in Alaska. It was held that he was not guilty of an attempt to introduce the whisky into Alaska, as he had done no act to carry out his illegal intent of which the law could take cognizance; the offer to purchase the whisky being an act preparatory and indifferent in its character. "Procuring or loading a gun, or buying poison, or walking to a particular place, with intent to kill another, is not enough to make one guilty of an attempt to commit murder. The same is true of a purchase of coal oil and matches with intent to commit arson, or the procuring of metal and dies with intent to commit the offense of counterfeiting money. * * * These acts are mere preparations, indifferent in their character, and do not advance the conduct of the party far enough to constitute an attempt." Clark & M. Crimes, § 123, and cases cited. Mr. Clark, in his work on Criminal Law (2d Ed., p. 126), says: "An attempt to commit a crime is an act done with intent to commit that crime, and tending to, but falling short of, its commission," and that two of the essential elements of the offense are: "(1) The act must be such as would be proximately connected with the completed crime. (2) There must be an apparent possibility to commit the crime in the manner proposed." Again, on page 127, the author says: "To constitute an attempt, there must be an act done in pursuance of the intent, and more

or less directly tending to the commission of the crime. In general, the act must be inexecutable as a lawful act, and must be more than mere preparation. Yet it cannot accurately be said that no preparations can amount to an attempt. It is a question of degree, and depends upon the circumstances of each case." Citing *Com. v. Peaslee*, 177 Mass. 267, 59 N. E. 55, and *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770. Mr. Bishop defines an attempt to be "an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient both in magnitude and in proximity to the fact intended to be taken cognizance of by the law, that does not concern itself with things trivial and small. Or more briefly, an attempt is an intent to do a particular criminal thing, with an act towards it falling short of the thing intended." 1 Bish. New Cr. Law, § 728. "Mere preparation, when made at a distance from the place where the substantial offense is to be committed, is ordinarily too remote an act to satisfy the law of indictable attempt." *Id.* § 763. As defined by Bouvier, an attempt to commit a crime is, "an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate design." Burrill gives substantially the same definition. We think it manifest that the hiring of the hack, the ascertaining of the fact that the intended victim had no weapons, and the procuring of the false faces for disguise, were merely preparatory acts, and not proximately leading to the consummation of the crime of robbery, and that therefore no attempt to commit that offense was sufficiently charged in the indictment.

The solicitor general, to sustain the indictment in the present case, relied on the case of *Griffin v. State*, 26 Ga. 493. The indictment in that case charged Griffin with an attempt to burglarize a certain storehouse by unlawfully taking the impression of a key which unlocked a door to the same, and from that impression preparing a false key to fit such lock, for the purpose of unlawfully, feloniously, and fraudulently entering, and, through the agency of one Jones, to break and enter the storehouse with intent to steal. The accused demurred to the indictment upon the ground that it did not charge any offense against him which was punishable by law, and that the facts charged against him did not constitute the offense of attempt to commit larceny from the house. The demurrer was overruled, and upon the trial the accused was convicted. He excepted to the overruling of the demurrer, and to various rulings made by the court during the trial. McDonald, J., delivered the opinion; Lumpkin, J., concurred; and Benning, J., dissented. Judge McDonald, in his opinion, said: "The object of the act [now section 1040 of the Penal Code] under which the plaintiff in error is indicted is to punish intents to commit crime,

if they are demonstrated by an act. The word 'attempt' ordinarily implies an act, an effort; but the general assembly, in this statute, uses it as synonymous with 'intend,' for it declares that if a person shall attempt to commit a crime, and in such attempt shall do any act towards the commission of such offense, etc. The accused, according to the bill of indictment, conceived the purpose of perpetrating the offense, and he did an act towards the commission of it, for it was an act to take the impression of the key, and that alone is sufficient to subject him to the law; but he prepared the key, and for the object, and so the indictment alleges." The learned judge therefore held that the demurrer was properly overruled. While Judge Lumpkin concurred in the affirmance of the judgment of the trial court, he does not, in his concurring opinion, refer to the question made by the demurrer, as to whether the acts charged in the indictment constituted the offense of an attempt to commit larceny from the house. He sets forth the evidence submitted upon the trial, which went far beyond the allegations in the indictment, and says: "The proof being full and complete as to the foregoing facts, was the conviction of Griffin for an attempt to commit larceny from the house legal?" He continues: "What is an attempt to commit a crime? It is an endeavor to accomplish it, but falling short of execution of the ultimate design. [Substantially the same definition given by Bouvier and Burrill.] In many cases it is difficult to determine the difference between preparations and attempts to commit crime. One may intend to commit a crime, and do many things towards its commission, and yet repent of his purpose. The law gives to such an one a *locus penitentiae*. One of the illustrations given in the books is where a man buys poison and mixes it in the food designed for his victim, and places it on the table that he may eat. If he take back the poisoned food before it is tasted or an opportunity is given of swallowing it, awakened by a just consideration of the enormity of the crime, he will not be guilty of an attempt to poison. All that was done would amount only to preparation. Is this Mr. Griffin's case? Did he countermand his repeated instigations to his supposed confederate, urging him to the speedy execution of his diabolical scheme? Did he recall the key? On the contrary, had he not consummated his part of the preparations,—all he had to do except to share the spoils? And was he not waiting in hopeful anxiety to learn the result?" Judge Lumpkin's concurrence was based upon the theory that the evidence made out a case of attempt to commit larceny from the house. The language quoted certainly does not indicate that he subscribed to the construction placed by Judge McDonald upon the statute defining an attempt to commit a crime. Judge Benning did not concur in the affirmance of the judgment of the court below. In his opinion, the

trial judge erred in overruling the motion for a continuance, and in refusing to give a charge requested by counsel for the accused. At most, therefore, the judgment of this court in Griffin's Case was concurred in by only two judges, and consequently is not binding authority. Nor has that case been followed by subsequent adjudications of this court holding that certain specified acts do not constitute an assault. As an assault is an attempt to commit a crime,—that is, a violent injury upon the person of another,—such later adjudications are directly in point in determining the question under consideration. In *Brown v. State*, 95 Ga. 481, 20 S. E. 495, it was held: "Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not justify a conviction for an assault; and therefore where the evidence showed that, during an altercation between the person alleged to have been assaulted and two other persons acting in concert, one of the latter picked up a stone, but made no attempt to cast it at the former, who was about twenty steps distant, neither of the two persons so acting in concert could be lawfully convicted of an assault." In *Peebles v. State*, 101 Ga. 585, 28 S. E. 920, it was held: "The act of maliciously putting poison into a well, with the intent that the water thereof shall be drunk by another, and that he shall in this manner be killed, does not, without more, constitute the offense of an assault with intent to murder, when the person whose death was intended never in fact drank of the water after the poison had been introduced into the same." In *Jackson v. State*, 103 Ga. 417, 30 S. E. 251, where the accused was charged with assault with intent to murder, it was held to be erroneous for the trial judge to refuse to give in charge a written request that "mere preparation to commit a crime upon the happening of an event which may or may not occur, and which depends upon an act to be done or not done by the person acted upon, is not an attempt to commit the offense of assault with intent to murder." In *Gaskin v. State*, 105 Ga. 631, 31 S. E. 740, it was held: "Before there can be a conviction for the offense of assault with intent to commit a rape, it must appear that the accused, with the intention of having carnal knowledge of the female forcibly and against her will, did some overt act amounting to an assault upon her. It was therefore error to charge the jury that, 'If you find that this defendant formed the intent and design in his heart to have carnal knowledge of [the female alleged to have been assaulted] forcibly and against her will, and, in the accomplishment of that evil design and intent, slipped into her room, and secreted himself there, awaiting an opportune moment to carry his evil design into execution, and, being detected, fled and made his escape, the court charges you that that would make such a case as that the necessary element of assault would

be in it, and you would be authorized to find this defendant guilty of the offense as charged in the indictment,—that of an assault with intent to rape.” Again, in *Burton v. State*, 109 Ga. 134, 34 S. E. 286, it was held: “One cannot legally be convicted of the offense of assault with intent to murder, alleged to have been committed with a pistol, upon proof which merely shows that he drew the weapon from his hip pocket, and, in consequence of its being caught in the lining of his coat, did not make any actual attempt to inflict with the pistol an injury upon the person alleged to have been assaulted.” On the same line, in the late case of *Penny v. State*, 114 Ga. 77, 39 S. E. 871, it was held that the court erred in refusing to charge, as requested in writing, that: “A mere preparation to commit a violent injury upon the person of another, or a mere threat to do so, unaccompanied by physical effort to do so, will not justify a conviction for an assault. Mere words or threats, unaccompanied by some physical effort to commit a violent injury upon the person of another, will not justify a conviction for an assault.”

In view of what we have said, the judgment overruling the demurrer to the indictment must be reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 522)

MAHLAY v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—APPEAL.

1. This case is controlled by the decision this day rendered in *Groves v. State*, 42 S. E. 753. (Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

E. H. Mahlay was convicted of crime, and brings error. Reversed.

Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 535)

JOHNSON v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—NEW TRIAL—JURISDICTION.

1. A motion for a new trial made in vacation, nothing relating thereto having been done in term, is in law a mere nullity. It is therefore erroneous for the judge of a constitutional city court to take jurisdiction of such motion, and when he does so, and undertakes to decide it upon its merits, the judgment will be reversed. (Syllabus by the Court.)

Error from city court of Mt. Vernon; W. M. Lewis, Judge.

Henry Johnson was convicted of larceny, and brings error. Reversed.

A. B. Hutcheson, for plaintiff in error. W. B. Kent, Sol., for defendant in error.

COBB, J. The accused was placed upon trial in the city court of Mt. Vernon upon an accusation charging him with the offense of larceny from the house. He was tried by the judge without a jury, and a judgment of guilty was rendered on July 19, 1902, during the July term of the court. Immediately thereafter the court adjourned for the term. On July 21st, which was the Monday following the adjournment of the July term on the preceding Saturday, the accused filed a motion for a new trial, which came on to be heard on August 8th, and was on that day overruled. The accused filed a bill of exceptions assigning error upon the judgment overruling the motion for a new trial.

By reference to the act creating the city court of Mt. Vernon, it appears that that court holds both monthly and quarterly terms. A monthly term is held on the second Monday in each month for the trial and disposition of criminal business; and the quarterly terms are held on the second Mondays in January, April, July, and October for the trial and disposition of either civil or criminal business, or both. The motion for a new trial in the present case was made in vacation. The next term of the court following the filing of the motion began on the 11th day of August. It appears distinctly from the record that the July term adjourned on July 19th. It does not appear that any special term of the court was called for the disposition of either civil or criminal business on August 8th. Therefore, so far as the present record discloses, the motion for a new trial was decided in vacation. It is well settled now that a motion for a new trial cannot be properly made in vacation, and that a motion made at such a time, although based upon sufficient grounds to constitute an extraordinary motion for a new trial, is, when nothing has been done in relation to the motion in term time, a mere nullity. See *Collier v. State*, 115 Ga. 17, 41 S. E. 261; *Jinks v. State*, 115 Ga. 243, 41 S. E. 580. It was therefore erroneous for the judge to take jurisdiction of the motion for a new trial, and a reversal of the judgment necessarily results, but appropriate direction will be given for the guidance of the court below.

Judgment reversed, with direction. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 537)

GARDNER v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—NEW TRIAL.

1. A motion for new trial made and filed in vacation is, in law, a mere nullity. Such a motion should therefore be dismissed, and it is

error to entertain it and undertake to decide it upon its merits. *Collier v. State*, 41 S. E. 281, 115 Ga. 17; *Johnson v. State*, 42 S. E. 758.

(Syllabus by the Court.)

Error from city court of Mt. Vernon; W. M. Lewis, Judge.

Robert Gardner was convicted of crime, and brings error. Reversed.

A. B. Hutcheson, for plaintiff in error.
W. B. Kent, Sol., for the State.

PER CURIAM. Judgment reversed, with direction.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 563)

LEE v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—MISTRIAL—ARGUMENT OF COUNSEL—INSTRUCTIONS.

1. There is no error in refusing to grant a mistrial in a criminal case because of the use of improper language by the solicitor general during the trial, when it is certain that no injury could have resulted therefrom to the accused.

2. There is no error in the charges complained of, such of the requests to charge as embody correct statements of the law were fully covered by the general charge, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Millard Lee was convicted of murder, and brings error. Affirmed.

Arnold & Arnold, for plaintiff in error.
Boykin Wright, Atty. Gen. C. D. Hill, Sol. Gen., and Claude C. Smith, for the State.

SIMMONS, C. J. Under an indictment charging him with murder, Millard Lee was convicted. He moved for a new trial. The motion was overruled, and Lee excepted.

The evidence shows that Lee attended church, and, after the services, asked permission of Miss Lillie Suttles, a young lady, to accompany her home. She replied that she had a previous engagement, whereupon he drew his pistol from his pocket and shot her twice, inflicting a wound which produced her death. When the case against Lee was called for trial, he filed a special plea of present insanity. The jury returned a verdict against the plea. Among the witnesses, introduced on the trial of this special plea were three physicians, who testified as to Lee's mental capacity. On the trial of the present case, Lee's defense was that he was insane at the time of the homicide, and was therefore not responsible for the commission of the act. After the state had closed its testimony, Lee's counsel introduced the court stenographer for the purpose of proving that on the former trial, on the special plea, the state had introduced these three physicians as witnesses.

This evidence was excluded by the court. Counsel for the accused then offered to prove that the state had put up these witnesses at the first trial; that they had been present during the second trial, and had been present all day, and had not been put on the stand. The court ruled that this would be irrelevant. The solicitor general then stated: "I want it put in the record that, when the state put them up, they all swore that the defendant knew the difference between right and wrong." All of this occurred in the presence of the jury. Counsel for the accused then moved for a mistrial. The motion was overruled, and this ruling is complained of in the motion for a new trial. Subsequently to the overruling of the motion for a mistrial, two of the three witnesses were introduced by the state, and testified as the solicitor general stated they had testified upon the first trial. The third was not introduced. The question now presented to us is whether the trial judge erred in refusing to grant a mistrial on account of the improper remarks of the solicitor general. While this court has been strict in rebuking improper remarks by prosecuting officers, and in many cases has granted new trials because prosecuting officers have made statements of fact outside of the record which were hurtful to the accused, or calculated to prejudice his rights before the jury, we do not know of any case in which this court has granted a new trial on account of remarks or statements which, although improper, were not prejudicial or calculated to prejudice the rights of the accused. Of course, the trial of cases should be conducted with proper decorum, and no counsel should ever, in his remarks, go outside of the record, and state facts not contained therein, whether they be material or immaterial. The verdict of a jury and judgment of a court are, however, solemn things, and should generally not be set aside on account of anything which could not have prejudiced the minds of the jurors against the losing party. The decisions of this court will show that it has nearly always granted new trials where improper remarks or statements were made, and the proper motion made in the court below. On the other hand, it has frequently denied new trials in such cases where it was apparent that the remarks or statements could not have affected the rights of the parties before the jury. With these preliminary remarks, we will now look into the merits of this motion, and try to determine whether the remarks of the solicitor general were calculated to prejudice Lee or his case before the jury. The defense of the accused was that he had been for years afflicted with epilepsy, and that when he was attacked by it he lost his memory, his reason, and his self-control; that his will was overpowered by the violence of the attacks, and what he did upon such occasions he was unable to resist doing. In the argument here, his able and learned counsel insisted that the right and wrong test had noth-

ing to do with Lee's case. Some of the written requests to charge presented to the trial judge show that this was the theory of the defense in the court below. This being so, did the remarks of the solicitor general, that these physicians had testified on the former trial that Lee knew right from wrong, prejudice the case of the accused? It seems, from reading the testimony of the witnesses for the accused, as set forth in the brief of evidence, that the accused's knowledge of right and wrong was not really in issue before the jury. Therefore the solicitor's remarks could not have prejudiced the rights of the accused. The real theory of the defense seems to have been that the attack of epilepsy destroyed the will power of the accused, and that under its influence, although he knew the difference between right and wrong, he could not control his actions, but was impelled to do what he did. The solicitor's remarks could not have affected the case one way or the other. As to Lee's knowledge of right and wrong, there was no real controversy. The statement of the solicitor could not, then, have prejudiced the accused as to this matter, and it related to no other. For these reasons, we think the case falls within the principle ruled in *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944, that "the use of unfair or improper language by an attorney in arguing a case will not be held cause for a new trial when it is certain that no injury could possibly have resulted therefrom to the losing party." For similar reasons, we think there was no error in refusing to grant a new trial on the ground that the court had refused to declare a mistrial because the solicitor, when counsel for the accused called attention to the fact that but two of the three physicians referred to above had been introduced by the state, made a statement to the effect that the third was the witness of the accused, and had been sent to examine the accused by his counsel. This statement, while improper, could not have prejudiced the rights of the accused.

2. The motion for new trial complains of the refusal to give in charge to the jury certain requests, and of certain instructions which were given. We have carefully examined these grounds, and have come to the conclusion that there was no error committed in either of these respects, when considered in connection with the entire charge of the court. This able and admirable charge covers the whole law of insanity as a defense, in accordance with the decisions of this court. It is true that there is a decided difference upon this subject between the opinion of the courts of this and other states, and that of able and distinguished alienists. This court has uniformly held since its organization that the knowledge of right and wrong is the test, generally, where insanity is relied upon as a defense. The alienists contend that this is an improper test; that nine-tenths of the insane in asylums and sanitariums know the differ-

ence between right and wrong almost as well as sane persons. While this may be true, the courts, for the preservation of society and public order, have not generally agreed with these experts. The time may come, when we shall have a better understanding of the intricacies of the human mind, the workings of the human brain, and the diseases incident thereto, when the courts may yield to the arguments of the alienists, as they did in *Hadsfield's Case* upon the argument of Lord Erskine in regard to delusions produced by mental diseases which overmastered the will. So far as this court is concerned, we are bound, under the Code, by our former rulings upon this subject, unless application is made to us in proper time to review and overrule them. In the case of *Forgarty v. State*, 80 Ga. 450, 5 S. E. 782, learned counsel made contentions similar to those made in the present case, under almost the same state of facts, to wit, the defense of epilepsy overpowering the will of the accused. In that case the proof of the existence of epilepsy, and of its influence on the mind of the accused, was very much stronger than in this. Counsel in that case asked this court to overrule its former rulings upon this subject. After a review of the cases, this court expressed itself as satisfied with their soundness and wisdom. The charge of the court in the present case followed these former decisions as to the general rule, and as to the exception in regard to delusional insanity. The requests to charge, in so far as they were correct and pertinent, were fully covered by this general charge, and the portions of the charge complained of were not erroneous for any of the reasons assigned. When a man who attends to his ordinary business with some degree of success; who has been slighted by a young lady with whom he is in love, and has threatened to be revenged; who on the morning of the homicide shaves and dresses himself, hitches his horse to his buggy, attends church, and sits quietly through the services, making no demonstrations of anger or hallucination or delusion; who, after the conclusion of the services, approaches the young lady and asks permission to accompany her home, and, upon her refusal, shoots her to death; and who thereupon walks out of the house, keeping back with his pistol those who attempt to arrest him, goes to his father's home, and gets from him, in addition to the money he already has, other money which his father owes him, makes his flight, and, upon his capture the next day, seems to remember all that has happened,—it is difficult for a layman or nonexpert to conceive that at the time of the shooting the slayer had no knowledge of what he was doing, as one of the experts testified was possible, although he might have a recollection of it the next day. It seems to us that to uphold such a theory would be to put the public at the mercy of any person who fails to suppress his anger or jealousy; who is sane at one moment, in-

sane at the next, and then immediately afterward sane again; and all this without any outward sign of the change in his mental condition. It is, however, useless to elaborate any further, as this court is bound by its former decisions upon this subject, which will be found cited in *Carr v. State*, 96 Ga. 284, 22 S. E. 570; *Taylor v. State*, 105 Ga. 746, 31 S. E. 764; *Minder v. State*, 113 Ga. 772, 39 S. E. 284. We therefore conclude that those requests to charge which sought to substitute another test of sanity for the knowledge of right and wrong should not have been given. With regard to the exception to the general rule in case of delusional insanity, the charge was correct, and followed the cases of *Roberts v. State*, 3 Ga. 310; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Flanagan v. State*, 103 Ga. 619, 30 S. E. 550. Under the rules laid down in the above-cited cases, the finding of the jury was right, for the accused knew the difference between right and wrong, and acted upon real circumstances and the ordinary perceptions of the mind, and not upon any morbid delusions. There was no error in refusing a new trial.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLEE, J., not presiding.

(116 Ga. 413)

ATLANTIC & B. R. CO. v. SEABOARD AIR LINE RY.

(Supreme Court of Georgia. Oct. 29, 1902.)

EMINENT DOMAIN—RAILROADS—CROSSINGS—INJUNCTION.

1. Where a railroad company was chartered by the legislature, but the charter gave it no power to condemn a right of way over the track of another railroad company, and where, subsequently, it made application to the proper authority to amend its charter in certain specified particulars, and also to adopt the provisions of the general railroad law of this state "as far as applicable," and such application was granted, section 2167 of the Civil Code, giving the right to acquire a right of way over the track of another railroad company by condemnation, became incorporated into its charter, although under the original charter such right of way could be acquired only by contract, lease, or purchase.

2. Such company has, however, no right or power to cross the track of another railroad company without first acquiring such right or power and paying such just compensation therefor as may be fixed by contract or by condemnation proceedings instituted under the law enacted for that purpose.

3. Where such railroad company is about to cross the track of another railroad company without having acquired the right to do so, it is proper to grant an injunction at the instance of the latter company; but it is error for the court to provide in its order that the defendant company may cross the track of the plaintiff upon condition that it put in a certain described system of switches. The defendant should have been enjoined from making the crossing until it had acquired a legal right to cross.

(Syllabus by the Court.)

§ 2. See *Eminent Domain*, vol. 12, Cent. Dig. §§ 224, 318.

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

Suit by the Seaboard Air Line Railway against the Atlantic & Birmingham Railroad Company. Judgment for plaintiff, and defendant brings error. Modified.

J. L. Sweat, for plaintiff in error. J. Randolph Anderson, for defendant in error.

SIMMONS, C. J. An equitable petition was filed by the Seaboard Air Line Railway to enjoin the Atlantic & Birmingham Railroad Company from crossing its tracks in the city of Cordele at a point which was, the plaintiff alleged, "within so short a distance from the passenger station" it had established in that city "as to make it impossible for petitioner's trains to stop at said station without lying across and obstructing the proposed track of said Atlantic & Birmingham Railroad Company." It was further alleged in the petition (1) that, "should said crossing be permitted, petitioner could not handle its trains at said passenger station without constant danger to the same and to the traveling public thereon from trains of said Atlantic & Birmingham Railroad Company, and that the safety, value, and use of petitioner's said station would be destroyed"; (2) that said company had not secured from petitioner "any right by contract to make the said crossing," or "by condemnation or other legal means obtained the right to make such crossing"; and (3) that it was "not necessary that the tracks of said Atlantic & Birmingham Railroad Company should be allowed to cross the tracks of petitioner at the point selected by them, but that other and more suitable points of crossing could have been selected and can be selected, and which would work less damage to petitioner, and which would not involve such great and constant danger to trains and to the traveling public." The defendant company filed an answer in which it admitted that it had not, by contract or by condemnation proceedings, acquired any right to cross the track of the plaintiff, but denied that the proposed crossing at the point in question would result in the injury apprehended by the latter, and alleged "that the point of the proposed grade crossing aforesaid is the only feasible, practical one to be made. A hearing was had in the court below, resulting in the grant of an injunction, and the defendant company excepted.

1. In view of the pleadings and the evidence upon which the case was submitted to the trial judge, and of the comprehensive scope of the order passed by him, the main question presented for our determination is whether or not the Atlantic & Birmingham Railroad Company has corporate authority to exercise the power of eminent domain, and thereby acquire a right to construct the proposed crossing. It is the legal successor to the Waycross Air Line Railroad Com-

pany, which obtained a special charter from the general assembly in 1887, wherein provision was made that it might, "by contract, lease, or purchase," secure the privilege of using a portion of the right of way of any other railway company, when necessary and proper. See Acts 1887, p. 230. No power to condemn the right of way of another company was, however, conferred upon the Waycross Air Line Railroad Company by the terms of that act. Subsequently that company presented to the secretary of state a petition to have its corporate name changed to that of the Atlantic & Birmingham Railroad Company, and in its petition also specifically asked that it be granted leave to extend its road from Cordele to Birmingham, and that it be allowed "to adopt the provisions of the general law of said state of Georgia, as far as applicable, contained in the article relative to corporate powers of railroads embodied in the Code of 1895 and amendments thereto." This application was granted by the secretary of state; so the sole inquiry is, did the Atlantic & Birmingham Railroad Company thus have conferred upon it the right to acquire by condemnation proceedings an easement over the right of way of another company, if necessary in order to extend its line from Cordele to Birmingham? We think it did. Under section 2167 of the Civil Code, the provisions of which constitute a part of what is known as the "general railroad law" of this state, a railroad company duly incorporated thereunder has the right (subject, of course, to the duty of "first making compensation for the damages which will result,"—Georgia Midland & G. R. Co. v. Columbus South. Ry. Co., 89 Ga. 205, 15 S. E. 305) to "cross, intersect, or join or unite its railroad with any railroad heretofore or hereafter to be constructed, at any point in its route"; and section 2178 expressly provides that any railroad company heretofore incorporated by act of the general assembly may, by filing a petition with the secretary of state, ask for and obtain leave to adopt the provisions of the general law for the incorporation of railway companies. When, then, the Waycross Air Line Company was granted leave to change its name to the Atlantic & Birmingham Railroad Company, and adopt the provisions of the "general railroad law," in so far as such provisions were applicable it was no longer limited by the terms of its original charter with respect to acquiring an easement over the right of way of another railroad company, but became vested with the power to acquire by condemnation the right to cross the lines of other companies.

2, 3. Since it affirmatively appeared from the answer filed by the defendant company that it had not, either by contract or by condemnation proceedings, acquired any right to cross the track of the plaintiff, we uphold the judgment of the court below granting an

injunction. We cannot, however, altogether approve the order passed by the trial judge; for he therein provided that if "the Atlantic & Birmingham Railroad Company will, at its own expense, put in, maintain, and operate at said crossing an interlocking and derailing system or plant of some standard and approved pattern, such as is used to prevent danger of accidents and collisions on railroad crossings, to properly guard and protect the said crossing or crossings, and to render the same safe, as far as may be, then this injunction be modified, and said defendant company be permitted to proceed to cross with its tracks the tracks of the plaintiff company, the Seaboard Air Line Railway, at the point proposed, upon the said defendant company giving bond to the said plaintiff company, its successors and assigns, in the sum of twenty thousand dollars (\$20,000.00), obligating itself to maintain and operate the said interlocking and derailing plant, when put in, so long as it shall use said crossing or crossings at said point." There is no provision of law of which we are aware which authorized the court to impose any such terms upon the defendant company, or to permit it, were it willing to comply therewith, to cross the line of the plaintiff without first acquiring a right to do so either by contract with it or by virtue of legally instituted condemnation proceedings and the payment of just compensation, as provided for by section 4657 et seq. of the Civil Code. Accordingly, we have given direction that the order passed by his honor below be so amended as to leave the defendant company free to proceed in a legal way to acquire the right, which it now does not have, to cross the tracks of the plaintiff, the injunction granted to remain effective until such right has been in a proper way secured, and the privilege of crossing without the consent of the latter upon establishing an "interlocking and derailing system" being at once withdrawn.

Judgment affirmed, with direction. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 583)

DOZIER v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—APPEAL—INSTRUCTION.

1. The verdict was supported by the evidence, and there was no error in refusing to give the charge requested, as it contained an expression of opinion as to what had been proven.

(Syllabus by the Court.)

Error from superior court, McDuffie county; E. L. Brinson, Judge.

Ben Dozier was convicted of crime, and brings error. Affirmed.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1731.

Matt W. Gross, for plaintiff in error. J. S. Reynolds, Sol. Gen., by John M. Graham, for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 563)

KING v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The motion for a new trial was upon the general grounds only. The evidence, though circumstantial, was sufficient to warrant the verdict, and the discretion of the trial judge exercised in overruling the motion for a new trial will not be controlled.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

Henry King was convicted of crime, and brings error. Affirmed.

Jas. E. Warren and Claude O. Smith, for plaintiff in error. C. D. Hill, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 475)

GAINES v. GAINES et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

EQUITABLE PETITION—PARTIES.

1. Where a petition for equitable relief is filed by plaintiffs, as heirs at law of a decedent, in behalf of themselves and other heirs at law, and it appears from the copy of the will attached to the petition that the property involved would, if the averments contained in the petition concerning a deed made by the decedent on the same day that he made the will be true, pass, under a residuary clause of the will, to certain legatees, and all of these legatees are not made parties, and where it appears from the petition that some of the parties plaintiff are not legatees, a demurrer to the petition containing this ground is good, and should be sustained.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by M. P. Gaines and others against L. P. Gaines. Judgment for plaintiffs, and defendant brings error. Reversed.

R. J. McCamy and J. M. Neel, for plaintiff in error. John W. Akin, for defendants in error.

ADAMS, J. The defendants in error filed their petition for equitable relief against the plaintiff in error, and expressly stated that they did so for themselves and all other heirs at law of the decedent whose estate was represented by the plaintiff in error as

executor. The purpose of the proceeding was to have set aside a deed to property of the decedent which it was claimed the plaintiff in error had secured by fraud and undue influence, and the prayer was that the property covered by this deed be adjudged to be the property of the decedent's estate. To this petition was attached the will of the decedent, in which, after disposing of other property, he directed that his executor convert all the rest and residue of his estate into money, and after paying debts and the expenses of administration, and setting apart a sufficiency to pay a specific legacy provided for in another item of the will, he then divide the balance of the funds of the estate into what the residuary clause calls "eight equal shares," which are designated. All of these legatees named are not made parties in any way, and several of the parties plaintiff are not such legatees. There is no suggestion of a claim in the petition in behalf of any of the parties plaintiff as legatees, and they expressly and in terms make their claim as heirs at law. If the theory of the plaintiffs be true, then it follows that the deed of the defendant is void, and the property thereby sought to be conveyed is still a part of the estate of the testator, and belongs, under the terms of his will, to the residuary legatees. The two general methods of acquiring title to things real are those by descent and by purchase; the latter, in its technical sense, covering every mode of acquisition, save only where the title is vested by operation of law. The differences between claims based upon these titles are essential and fundamental. A case made by heirs at law is a different case from that made by legatees. The decision of this court in the case of Phillips v. Rentz, 106 Ga. 249, 32 S. E. 107, covers, we think, this case; certainly in principle, even although the facts be not identical.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 476)

GAINES et al. v. GAINES.

(Supreme Court of Georgia. Oct. 30, 1902.)

EXECUTORS—BILL FOR CONSTRUCTION—INDIVIDUAL TRANSACTIONS.

1. A petition filed by an executor against all the heirs at law of his testator and all parties interested, which is based upon the principles embodied in section 4000 of the Civil Code, is sustainable, even although individual transactions of the plaintiff may be involved; it appearing that the estate is interested in all of the property covered by the suit, and that the defendants are or may be interested in such property; all of the allegations of the petition being connected with the distribution of the estate.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Suit by H. W. Gaines and others against

L. P. Gaines, as executor. Judgment for defendant, and plaintiffs bring error. Affirmed.

John W. Akin, for plaintiffs in error. J. M. Neel, for defendant in error.

ADAMS, J. The petition in this case was filed after that dealt with in the case of *Gaines v. Gaines*, 42 S. E. 763, this day decided; the present defendant in error being the defendant in the court below. It was filed under the provisions of section 4000 of the Civil Code. All the questions involved are connected with the distribution of the estate. All the parties concerned under the will or as heirs at law are made parties defendant. The petition contains abundant equity, and complete justice can be done in the case made without the violation of any rule of law or practice known to us. We have read the petition, which the learned judge of the court below sustained against a demurrer filed on various grounds, not only with attention, but with pleasure. It is a model of lawyer-like clearness, precision, and skill. We are satisfied that the court below was right in sustaining it and in overruling the demurrer. No useful purpose will be subserved by quotations therefrom, or a detailed discussion of its allegations.

Let the judgment of the court below be affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 491)

DAVIS et al. v. DOUGHERTY COUNTY
et al.

(Supreme Court of Georgia. Oct. 30, 1902.)
COUNTIES—BOND ISSUE—ELECTIONS—NOTICE—
STATUTES—IMPLIED REPEAL.

1. A general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body.

2. The act of 1891 (Acts 1890-91, vol. 1, p. 241; Civ. Code, § 5458) relating to the publication of notices of sales and orders by certain public officers and others did not repeal or modify that portion of the act of 1879 (Pol. Code, § 377) which requires that notice of an election called for the purpose of determining whether bonds shall be issued by a county shall be published for a space of 30 days next preceding the day of the election.

3. When, at the hearing of an application under the provisions of the act of 1897 (Acts 1897, p. 82; Van Epps' Code Supp. §§ 6074-6081) to validate an issue of bonds, it appears that the notice of the election was published for a period of time less than 30 days next preceding the day of the election, a judgment should be entered declaring the election invalid, and refusing to validate the bonds.

(Syllabus by the Court.)

Error from superior court, Dougherty county.

Petition by Dougherty county and others for an order validating a certain bond issue. From a judgment granting the petition, J. S. Davis and others bring error. Reversed.

D. H. Pope & Son, for plaintiffs in error. D. F. Crosland and W. E. Wooten, Sol. Gen., for defendants in error.

COBB, J. An election was held in the county of Dougherty to determine whether bonds to the amount of \$40,000 should be issued for the purpose of erecting a new courthouse. The registration list for the election showed 611 qualified voters. Persons to the number of 427 voted, "For bonds," and 81 voted, "Against bonds." When the application to validate the issue of bonds came on to be heard, certain citizens of the county appeared, and were made parties to the proceedings, and interposed numerous objections to the passage of an order validating the bonds. One of the objections urged was that the notice of the election had not been published the requisite number of days before the election. Upon the hearing it appeared that the order of the county commissioners calling the election was passed on May 5, 1902; that the first notice of the election was published in the newspaper in which the sheriff's advertisements were published in an issue of the paper dated May 10th; and that subsequent insertions of the notice appeared in issues of the paper dated the 17th, 24th, and 31st days of May. It was admitted that the papers were really issued one day before they bore date. The election was held June 5th. It thus appears from the uncontradicted evidence and the admission above referred to that, between the date of the paper in which the first insertion of the notice of the election was given and the date of the election, there were only 26 days, and between the date of the actual issue of the paper and the date of the election there were only 27 days. Having reached the conclusion that a failure to begin the publication of the notice at a time which would be 30 days from the date of the election invalidated the election, it is unnecessary to refer to the other objections which were raised at the hearing of the application to validate the bonds.

The statute provides that the authorities calling such an election "shall give notice for the space of thirty days next preceding the day of election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named an election will be held to determine the question whether bonds shall be issued by the county, municipality or division." Pol. Code, § 377. It is contended that, in determining what would be a compliance with the section of the Code just quoted, reference must be had to the provisions of the act of 1891, now contained in Civ. Code, § 5458. That act provides that "in all cases where the law of force on October 21st, 1891, required citations, notices, or advertisements, by ordinaries, clerks, sheriffs, county bailiffs, administrators, executors, guardians, trustees or others, to be pub-

lished in a newspaper for thirty days * * * It shall be sufficient and legal to publish the same once a week for four weeks (that is, one insertion each week for each of the four weeks) immediately preceding the term or day when the order is to be granted, or the sale is to take place; and the number of days between the date of the first publication, and the term or day when the order is to be granted or the sale to take place, whether more or less than thirty days, shall not in any manner invalidate or render irregular the said notice, citation, advertisement, or order or sale." Section 877 of the Political Code is a codification of the act of 1879, and therefore is a law which was of force at the date named in the act of 1891. While the act of 1879 is a general law in the sense that it is not confined in its operations to a given locality, it is a special law in the sense that it applies only to a particular proceeding. In *Montford v. Allen*, 111 Ga. 18, 36 S. E. 305, it was held that the provisions of section 5458 of the Civil Code did not repeal the provisions of an existing municipal charter; it being there said that "a general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body." It is true that in that case the particular or special law was also a local law, but we do not think this difference makes the principle of that decision any the less applicable in the present case. Even if the act of 1891 was, in general terms, sufficiently broad to embrace notices of elections to determine whether bonds should be issued by the authorities of municipalities and counties, it would not be construed so as to repeal the provisions of the act of 1879, unless there was something in the act of 1891 which made it plainly manifest that the general assembly intended that it should have this effect. But we do not think the act of 1891 is, even in general terms, sufficiently broad to cover cases provided for in the act of 1879. The act of 1891 relates to citations, notices, and advertisements by certain public officers and certain representatives of estates; the enumeration of such officers and representatives being followed by the words "or others." Applying the doctrine of *ejusdem generis* in the construction of the words just quoted, the officers charged with levying taxes, contracting debts, etc., for counties and municipalities, are not of the same class as any of the officers enumerated in the act, and consequently would not be embraced within the general descriptive word, "others." It is true that among the officers enumerated is the ordinary, and that in some counties the ordinary is the officer who has jurisdiction in county matters. But applying the rule of construction, *noscitur a sociis*, the ordinary referred to in this act is the officer who is the judge of the probate court, and not the

ordinary who has charge of county affairs. In addition to this, the act of 1891 does not apply in any case except where a notice is to be given of a sale or of an order, which, from the class of officers enumerated, and the use of the word "term," necessarily means an order passed by some court or judicial officer.

It is said, though, that, even if the act of 1891 did not repeal or modify the provisions of the act of 1879, the notice given in the present case was a substantial compliance with the act of 1879. In the case of *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 732, 32 S. E. 907, it was said: "The policy of the constitution is against the incurring of municipal debts, and therefore the constitutional provision prescribing the manner in which debts must be incurred is to be strictly construed. It has been the uniform ruling of this court that not only the constitutional provision must be strictly construed, but that the act of the general assembly prescribing the manner in which an election shall be held on the question of bonded indebtedness shall be also strictly construed." See, also, the cases cited in the case just referred to. The act requires that notice of an election shall be published for the space of 30 days next preceding the day of the election, and the publication of a notice for a period of time less than 30 days is neither a literal nor a substantial compliance with this provision. It is said, though, that this construction of the law would altogether prevent at the present time an election from being held in the county of Dougherty, for the reason that the paper in which the sheriff's sales are advertised is issued on Friday, and that 30 days after any Friday would fall on Sunday. All that is necessary to be said in answer to this suggestion is that the rule that Sunday is *dies non* applies in such a case, and an election would be valid if held on the following Monday. While the act provides, in terms, that the notice shall be given for the space of 30 days next preceding the day of the election, construing that in connection with the provision that notice shall be given in the paper in which the sheriff's advertisements are published, the first insertion of the notice in a newspaper issued at least 30 days before the election, and as nearly as may be immediately preceding the beginning of that period, would be a compliance with the law. See, in this connection, *Montford v. Allen*, *supra*. In some cases it has been held that a failure to strictly comply with the law as to notice of an election may be treated as a mere irregularity, when there has been an acquiescence in the result of the election, and a delay in raising the objection, and purchasers of bonds or others have been misled by the acquiescence and delay. See *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120; *Brand v. Town of Lawrenceville*, 104 Ga. 486, 30 S. E. 954. But in no case has it ever been

held that an election of the character now under consideration will be upheld when there has been a failure to comply with the law in regard to the notice, and objection is raised not only before the bonds have been issued, but before they could have been legally issued. The law requiring notice of the election to be given in a certain way is mandatory, and a failure to comply with the law vitiates the election, if objection is raised at the proper time and in the proper way. The constitution does not authorize the creation of a debt merely because two-thirds of the qualified voters give their assent to the incurring of such debt. In order for a debt to be created under authority of this provision of the constitution, it is necessary that consent shall be given in the manner prescribed by law; that is, at an election held after notice has been published in a given way. See Civ. Code, § 5893.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 587)

SMITH v. STATE.

(Supreme Court of Georgia. Nov. 14, 1902.)
OBTAINING MONEY UNDER FALSE PRETENSES
—REPRESENTATION OF INTENTION—
EVIDENCE—SUFFICIENCY.

1. A statement that the accused intended thereafter to do a particular thing, made at the time of and in connection with certain other statements as to a past fact shown to have been false, does not remove from the accused the consequences which the law attaches to false representations made with intent to deceive, and by which one is defrauded and cheated. (a) This is true notwithstanding the representation as to what the accused intended to do was a part of the inducement under which the defrauded person parted with his money.

2. The jury were authorized to find, as they did, that the representations proven in this case meant that the son of the defrauded person had sent word to the latter to let the accused have a sum of money for and on account of the son.

3. The evidence was sufficient to make out a case of cheating and swindling under the statute. The trial judge committed no error in charging the jury as complained of, nor in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Sandersville; P. R. Tallafiero, Judge.

J. T. Smith was convicted of crime, and brings error. Affirmed.

J. A. Robson, for plaintiff in error. J. E. Hyman, for the State.

LITTLE, J. Smith was indicted for cheating and swindling. The evidence in behalf of the state sustained the details of the charge as laid in the accusation, and was to the following effect: On a day named the accused came to the house of the prosecutor, and told him that L. E. Sheppard, a son of the prosecutor, said for him (the accused) to tell the prosecutor, or the person from whom he got a wagon, to let him have \$1.75; that

he (the accused) wanted to pay rent to the man he was moving from; that the prosecutor, relying upon that statement, and believing that the accused was then on his way to his son's place, let the accused have \$2, and looked to his son to pay it. The prosecutor testified that he would not have let the accused have the money if the latter had not told him that he was going to move on his son's place, and that "he, my son, told him to tell me to let him have the money; I did not lend him the money; he never asked me to lend it to him," etc. The defendant, in substance, stated that the prosecutor loaned him the money on his application; that he was prevented by sickness of his wife from moving, etc.

1, 2. It did not require any forced construction for the jury to find, as they undoubtedly did, that the representation meant that L. E. Sheppard had sent the accused to his father, the prosecutor, with a request to let the accused have a wagon for the purpose of moving, and at the same time let him have the sum named on his son's credit; for if Sheppard (the son) really did these things he would undoubtedly have been liable both for the wagon and the money. The request amounted in law to nothing more than an order so to do, which, if accepted and performed, would fix liability on the maker of the order. The validity of such an order would not be affected by the fact that it was not in writing. A writing would only render the terms of the request or order more definite, and more easily proven in case they were contested. If we assume that the language used by the prosecutor in his evidence amounted to an understanding on his part that the accused at the time he got the money promised to move on his son's place, and if we accept the evidence as showing that the prosecutor would not have advanced the money but for the fact that he believed the promise would be kept, the representation that the son requested him to let the accused have the money remains unaffected. The result of the evidence is that the prosecutor let the accused have the money on the faith of the request of his son, but, notwithstanding that request, he would not have let him have it had he not believed that he was going to move on his son's place. Undoubtedly the fact that the accused was so going to move operated as a part of the inducement to furnish the money, and, although this was so, the representation that the son requested that the money should be so advanced was as much, if not a greater, inducement. The representation was shown to have been falsely made. A conviction under such circumstances is not contrary to law. *Thomas v. State*, 90 Ga. 437, 16 S. E. 94. See, also, the authorities cited on page 441, 90 Ga., and page 95, 16 S. E.

3. The trial judge did not err in his instructions to the jury, as set out in the motion. The evidence was sufficient to support

the verdict, and the judgment overruling the motion for a new trial is affirmed.

All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 359)

WILKINS et al. v. CITY OF WAYNESBORO
et al.

(Supreme Court of Georgia. Aug. 9, 1902.)

CITIES—BOND ISSUE—ELECTION—NOTICE—PROVISION FOR PAYMENT.

1. The maturity of the principal and interest of bonds issued by a municipal corporation may, under our constitutional provision relating thereto, be fixed at any time or times, within the period of 30 years from the date of issue; but, without regard to the time fixed, an annual tax sufficient to pay both principal and interest when due must be provided for before or at the time of issue. No plan or scheme for raising the necessary revenue can lawfully be substituted for the assessment and collection of such tax.

2. By statutory enactment to carry into effect constitutional provisions in relation to the issue of bonds by municipal corporations, the notice calling the election must specify certain named particulars in reference to the bonds. If it fails to specify all of such particulars, or varies from the plan contemplated by the constitution for paying the bonds, the notice does not have the effect of calling a valid election. If it be given under an ordinance prescribing the same terms, both the ordinance and notice are void and of no effect.

3. The method of determining whether two-thirds of the qualified voters have voted for the issuance of bonds is by reference to the list of registered voters, if a system of registration has by legislative enactment been provided for the municipality desiring to make the issue; if not, then by reference to the tally sheets of the last general election held for such municipality.

4. A special act of the general assembly which directs that the proceeds arising from the sale of certain bonds, which it authorizes a municipal corporation to issue after the requisite number of qualified voters have assented thereto, shall be applied to the equipment of waterworks and electric light plants, and "to other purposes," is not in harmony with the general law, which requires that the purposes for which such proceeds are to be applied must be specified. And so much of said act as, after prescribing that an annual tax sufficient to pay the interest on the bonds, further provides for a sinking fund to pay the principal of the bonds, and does not contemplate the collection by annual tax of an amount sufficient to pay such principal when due, is in conflict with the provisions of the constitution, and is void.

5. Applying what is laid down above to the facts appearing in the record, the court erred in passing the order validating and confirming the bonds.

(Syllabus by the Court.)

Error from superior court, Burke county; E. L. Brinson, Judge.

Petition by the city of Waynesboro for an order validating a certain bond issue, in which W. A. Wilkins and others, as taxpayers, intervened. From an order granting the petition, interveners bring error. Reversed.

F. L. Scales and J. R. Lamar, for plaintiffs in error. J. S. Reynolds, Sol. Gen., Phil P. Johnston, and E. H. Callaway, for defendant in error.

LITTLE, J. A petition was filed in the superior court of Burke county, in which it was prayed that certain bonds sought to be issued by the city of Waynesboro should be validated, and the legality of the issue established. Certain citizens residing in that municipality intervened, were made parties to the proceeding, and filed objections to the grant of the order which was sought. The hearing resulted in a judgment confirming and validating the bonds. The interveners excepted, and, as plaintiffs in error here, contend that for many reasons the grant of the order was erroneous. It appears that in 1901 the general assembly passed a special act which by its terms authorized the municipal authorities of Waynesboro to issue bonds, and an ordinance was adopted by the mayor and council, calling an election to ascertain whether the qualified voters of the city would assent to the issue. This ordinance prescribed the number and amount of the bonds sought to be issued, the time of maturity, and the manner in which funds necessary for the payment of the principal and interest should be raised. A notice calling an election, which set out in substance the terms of the ordinance, was duly published. An election was held, which, it is claimed, resulted in favor of the issue. The published notice calling the election followed the ordinance, and set out the number of bonds to be 60, each of the denomination of \$500, specified the rate of interest as 5 per cent. per annum, payable semi-annually, and fixed the date of the maturity of the principal on January 1, 1932. In relation to the disposition of the proceeds arising from the sale of such bonds, it was therein declared that not less than \$7,000, nor more than \$10,000, shall be applied to the construction of an electric light plant, and not less than \$20,000, nor more than \$23,000, to a waterworks plant, with the following proviso: "That should the maximum amount appropriated to either project be not issued, the overplus may, in the discretion of the mayor and council, be appropriated to the other object named and to other purposes incident thereto; but if not so used, the said overplus shall become a part of the sinking fund provided for the redemption of said bonds." The notice also specified the sum of \$1,500 as the annual interest to be paid on the bonds for the years 1903 to 1931, inclusive, and recited, "The amount of principal to be paid (that is, collected as a part of the sinking fund provided for the redemption of said bonds) annually, for the years 1903 to 1932, inclusive, to be \$517.25"; and, as a plan devised for the redemption of the bonds at maturity, the notice also declared that "the sinking fund provided by ordinance for the redemption of the bonds should, with its accumulation, be amply sufficient for that purpose, but in the event of unfavorable casualty, or failure to make the fund pay interest equal to the estimate, to wit, 5 per cent., compounded annually, the mayor and council

will, on proper authority, from time to time, as the exigencies of the case may require, supplement said fund by an additional ad valorem tax, or with such fund as may be in the treasury at the time, not otherwise appropriated, so as to insure a sufficient amount to pay the bonds in full at maturity." The objections presented by the interveners at the hearing to a judgment of validation, and urged here as reasons for setting aside that judgment, are, substantially, that the ordinance and notice under which the election was held are invalid, because they are contrary to the constitution and laws of the state; that no provision is made for an annual payment of the principal of the bonds, nor for the annual tax required by law to be levied to meet the sum when due. It is claimed, on the contrary, that the ordinance, notice, and election were each regular, valid, authorized by the constitution and laws of the state, and by the terms of a special act approved November 15, 1901, and that no error was committed in rendering the judgment of validation. A determination of all the issues raised can be reached by a consideration—First, of the nature and scope of the constitutional provisions relating to the issue of bonds by a municipal corporation; second, of the requirements of the statute as to notice of the election, and the method by which it shall be determined whether a sufficient number of voters have sanctioned the issue; and, third, of the legal effect to be given the special act which is relied on in part as authorizing the plan of payments set out in the ordinance and notice.

1. Before proceeding to a consideration of the constitutional provisions which relate to the issuance of bonds by a municipal corporation, it may not be amiss to remark that at the time of the adoption of the constitution, and for some years prior thereto, there were but few solvent municipal corporations in the state; that is to say, that payment of the principal and interest of the bonded debt of such corporations could not be met by the imposition of a reasonable tax on property situated and contained within the corporate limits; that municipal taxes had, as a rule, grown to be not only onerous, but burdensome; that this condition of affairs was the result of the improvident exercise by municipal authorities of the power conferred to create debts. The mischief which was believed to exist was the indiscriminate use of that easily to be acquired power, so that a high rate of taxation was found to be insufficient to meet current expenses and pay outstanding obligations. The stringent provisions found in our constitution are the remedies which the people sought to apply to the existing evil, and indicate a settled public policy, applicable alike to all municipal corporations in this state. The framers of the constitution made, and intended to make, the creation of a new debt by a municipality a matter not altogether easy of accomplish-

ment, by placing upon the citizens residing within the limits of such municipality the responsibility for the creation of a debt. The condition annexed to the right to issue, as to the levy of an annual tax to pay off the debt, was seemingly considered to be a guaranty of prompt payment at maturity, and protection against municipal extravagance would be found in the provision that only when two-thirds of the qualified voters had expressed a desire that the municipality should create a debt, such might be done. The provisions limiting the power to create a debt and issue bonds are found in paragraphs 1 and 2 of section 7 of article 7 of the constitution of 1877. In the former of these paragraphs it is declared that an election to ascertain whether two-thirds of the citizens of the municipality would assent to the creation of a new debt should be held as might thereafter be prescribed by law. By the second it is expressly declared that any municipal corporation which might incur any bonded debt should, before or at the time of doing so, provide for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said debt within 30 years from the date of incurring the same. The manner of raising funds to meet the obligation about to be assumed is not left in doubt, but, in plain terms, it is declared that it shall be by the assessment and collection of an annual tax. There is, however, no requirement that payments of either interest or any part of the principal shall be made annually. The question of the maturity of the debt is, within stated limits, left to the people concerned, who, it was to be presumed, would look to their interests in determining it. But without regard to the date of the maturity of the principal, or to the time fixed for the payment of interest, the corporation is absolutely required in each year after issue, and until maturity, to raise by an annual tax an amount sufficient to pay the principal and interest when by the contract these become due. Under these provisions, no municipal corporation can have any authority of law to issue bonds, although the assent of the voters has been obtained, unless it does, before or at the time of the issue, provide not only for the assessment, but for the collection, of such a tax. These are conditions precedent to the issue, and no plan for otherwise raising funds for the purpose can be lawfully substituted.

2. Legislative enactments in respect to the election required by the constitutional provision to ascertain whether two-thirds of the qualified voters of the corporations have assented to the issuance of bonds are codified. Pol. Code, §§ 377-381. In the first of these it is provided that the officers charged with levying taxes, contracting debts, etc., for the municipality, shall give notice for the space of 30 days next preceding the day of election, specifying what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and

interest to be paid annually, and when to be fully paid off. The object of this notice must be to fully inform the voters, so that they may intelligently judge whether the contemplated public work will be of sufficient importance to justify the imposition of an additional annual tax on their property to promptly meet the debt and its increase when the time of payment shall come. If the notice fails in any one of these particulars, it is an illegal notice, in the sense that it is entirely ineffective to cause a legal election. If it indicates a different method of raising funds to pay the debt than that prescribed, the bonds cannot lawfully be issued, even if at the election the requisite number of voters authorize the issue. If such notice be the result of an ordinance regularly passed, the ordinance is of no force, and does not authorize the notice.

3. Another important subject-matter of the enactments of the legislature on the subject is in relation to the method by which, after an election, it may be ascertained whether two-thirds of the qualified voters of a municipality have assented to the issuance of bonds. By section 380 it is provided that in determining this question the tally sheets of the last general election held in said municipality shall be taken as the correct enumeration of the qualified voters of said corporation. While this general rule is prescribed by the statute, attention is called to the fact that it was enacted at a time when there was no law for the registration of voters in force in this state, and consequently reference to the tally sheets, besides an actual enumeration, was the only method by which the result could be ascertained; but, subsequently to the passage of the act from which these sections are codified, a general registration law was provided for the state, which is made applicable to all county elections, and special registration has been provided by appropriate legislation for many municipal corporations which in terms is applicable to elections held therein. In consequence of the passage of these acts, it has been ruled by this court that, in the case of an election to determine whether bonds shall be issued, reference must be had to the registration list, to ascertain whether two-thirds of the qualified voters have assented to the issue; and, since their passage, reference to the tally sheets of the last general election is not necessarily the legal method of determining the number of qualified voters. *Floyd Co. v. State*, 112 Ga. 794, 38 S. E. 37. There the rule which governs is thus stated: "If within the county or municipality a system of registration has been provided by which the number of qualified voters of the county or municipality can be determined, the question whether two-thirds of the qualified voters of the county or municipality voted for bonds must be determined from an inspection of the registration list. If the municipality has been invested by the legis-

lature with authority to put a system of registration in force, and an election is held without having provided such a system, no means of determining whether two-thirds of the qualified voters did in fact cast their votes for bonds exists. If no registration law is applicable, and no authority to establish one has been conferred on the municipality, and the election for bonds is held, then the question as to whether two-thirds of the qualified voters voted in favor of the issuance of bonds is to be decided by reference to the tally sheets of the last general election."

4. The general assembly passed a special act, approved November 15, 1901, which purported to authorize the mayor and council of Waynesboro to issue bonds, not to exceed \$30,000, to establish electric lights and waterworks in Waynesboro, etc. Inasmuch as the authorities of the city rely to some extent, at least, on the authority which it is claimed this act confers, to sustain their contention that the ordinance, the notice, the election, and the plan indicated for the payment of the principal and interest of the bonds are all authorized by law, it becomes necessary, in determining whether such contention is sound, to consider and pass upon certain provisions of that act. It is enacted by its fourth section that the proceeds arising from the sale of bonds shall be appropriated and applied to the construction of a waterworks plant and an electric light plant, "and to other purposes." Presumably it was under the language just quoted that the municipal authorities provided, in the ordinance and notice of the election, that, if any part of the sums designated for the establishment of such plants should not be used, it should go into the sinking fund provided for the redemption of the bonds. It was ruled in the case of *Smith v. City of Dublin*, 113 Ga. 833, 39 S. E. 327, that a notice which provided that a given amount should be used for the purpose of building and erecting a school-house, and another amount (being the proceeds of the bonds) should be used for enlarging and improving the light and water plant of the city, and the surplus, if any, to be used by the mayor and council in such a manner as they might see fit, did not meet the legal requirements of a notice which shall specify "what amount of bonds are to be issued, [and] for what purpose." An election called to ascertain whether an issuance of bonds shall be made is illegal unless the purpose for which the bonds are to be issued shall be stated in the notice, and an issue of bonds is not legal when the purpose expressed is to construct an electric light plant and waterworks, and "for other purposes." Hence it would seem that so much of the act as declares that the proceeds of the bonds may be devoted to other purposes than the construction of the electric light plant and the waterworks system is contrary to the general law of the state, in that the purpose

for which the bonds are to be issued must be specifically stated in the notice. This act cannot, therefore, be taken as any foundation for that part of the notice which provides that, in the contingency that a sum shall remain after equipping the light and water plant, it shall go into a sinking fund. Again, the provision found in the sixth section of the act, that the number of voters shall be ascertained from the tally sheets of the last general election, can have no effect, provided a system of registration has by legislative enactment been provided for the city of Waynesboro. However, these grounds will be more elaborately considered hereafter. The second section of the act under consideration provides that the city council of Waynesboro shall assess, levy, and collect a sufficient tax to pay the interest of the bonds issued, as the same shall become due, and provide a sinking fund for the redemption of the bonds as the principal shall become due. The constitutional requirement to which we have heretofore referred is not met by providing for taxation for the purpose of creating a sinking fund for the redemption of the principal of the bonds,—certainly not unless the amount required to be raised by taxation is sufficient to pay the principal of the bonds at the expiration of the time in which they are made to run. It is one thing to raise a sufficient amount by taxation to pay the bonds at maturity, and another to raise a fund by taxation to provide a sinking fund for the redemption of the bonds. We are not now called upon to pass on the question whether, when the payment of the principal of the bonds is deferred for a number of years, the amount provided annually by taxation for the payment of the principal may not be designated a "sinking fund." What we do rule is that the bonds cannot lawfully be issued until provision has been made to pay off the principal of the bonds by annual taxation. The city of Waynesboro could, under the general law, through the municipal authorities, have given the notice and held the election to ascertain whether bonds should be issued without any special act. It might also, under the terms of the special act, in so far as they do not conflict with the constitution and laws of this state, have held such an election and determined the result; but a special act cannot give any municipal corporation authority to issue bonds in any other manner or on any other terms than those provided by the constitution and general laws of the state, and so much of the act of 1901 as is in conflict with either the constitutional provisions or the general law to which we have directed attention is of no force and effect.

6. We are now to determine whether, under the construction which we have given to the constitution and general laws on the subject of the issue of bonds by municipal corporations, and the special act which authorizes the city of Waynesboro to issue the

bonds in question, the court erred in passing an order confirming and validating such bonds. It is true, as we have before said, that the notice of the election states the amount of the bonds to be issued, the rate of interest to be paid, and when, and that the principal is to mature and be paid in 30 years. These statements meet the requirements of the statute in such matters. The notice goes further, however, and states that, of the proceeds of the bonds, not less than \$7,000 nor more than \$10,000 shall be applied to the construction and equipment of an electric light plant, and not less than \$20,000, nor more than \$23,000 shall be applied to the erection and equipment of a waterworks plant. We do not think that it was ever contemplated that a notice of such an indefinite character, as to what amount shall be applied to a named purpose, would meet the requirements that the notice shall state the amount of bonds to be issued, and for what purpose. The voter is entitled to know how much money will be used to separately construct these public improvements. He might be willing that \$7,000 should be applied to the construction of an electric light plant, but not that \$10,000 should go in that direction; and the will of the voters must, after all, govern. But passing these indefinite statements, we find in the notice a recital that, should the maximum amount appropriated to either project be not so used, the overplus may, in the discretion of the mayor and council, be appropriated to the other project named, and to other purposes incident thereto; but, if not so named, the said overplus shall become a part of the sinking fund provided for the redemption of said bonds. Clearly, this is no compliance with the law. The notice must state the purpose for which the bonds are to be issued. Why should there be an overplus? If there is to be an overplus, why issue the bonds represented thereby? The effect of applying it to the sinking fund, under the scheme inaugurated, is to issue bonds to raise money to pay into a sinking fund to redeem the bonds issued. Further, and of more vital importance, is the provision in the notice relating to the payment of the principal of the bonds. After providing for the interest, the notice says, "The amount of the principal to be paid (that is, collected as a part of the sinking fund provided for the redemption of said bonds) annually, for the years 1908 to 1932, inclusive, to be \$517.25," which, when collected, is to go into the sinking fund for the redemption of the bonds. If collected annually, the aggregate sum would be \$15,000; the principal of the bonds being \$30,000. The law requires an annual tax sufficient in amount to pay off the bonds within 30 years. The notice under consideration is not a compliance with the requirements of the law, nor will these be satisfied by raising any sum for a sinking fund. An amount sufficient to pay off the bonds at maturity must be raised

by an annual tax. A sinking fund may, and frequently does, take unto itself the wings of the morning and fly away. The same may be said of the amount raised annually by taxation; but to this it may be replied that it is not so liable to be diverted as a sinking fund, for the reason that the contemplation of having a sinking fund is that the latter must be invested in order to make it, by annual accretions, raise a larger sum of money. In doing this, risk, of course, is encountered, —not only one risk, but many. It is questionable whether, with the best management, such a sinking fund would, in the given time, raise the requisite amount. Indeed, the experience of mankind is that it will not. But however this may be, to comply with the law the amount necessary to pay off the principal of the bonds at maturity must be raised each year by direct tax. Whether it should be called a "sinking fund," after having been raised, and be subject to be used for investment, is a matter which existing laws must govern. We are inclined to think, under the law as it now exists, that the annual tax so raised could not be appropriated for any purpose whatever, except that for which it was raised. But it is said that this notice contains another provision, that is, if by investment the fund is not sufficient to pay off the principal, the mayor and council will, on proper authority, from time to time, supplement that fund by an additional ad valorem tax, or by such funds as may be in the treasury not otherwise appropriated, so as to afford a sufficient amount to pay off the bonds at maturity. The reply to this is that, however feasible such a scheme may appear, it is not in accord with the law. That contemplates that there should be no uncertainty. Not only so, but, before the bonds are issued, provision shall be made to raise such an amount as will, beyond all contingency, be sufficient to meet the bonds at maturity. The scheme originated in the special act, followed in the enactment of the ordinance, and promulgated to the voters, by which the principal of the bonds was to be paid off through the medium of a sinking fund, as provided, however plausible, is not a legal one. The plan proposed makes no such provision for the ultimate payment of the bonds as is required. Provision for the levy of a sufficient annual tax for this purpose is a condition precedent to the issue; and it is our conclusion that the city of Waynesboro cannot legally issue bonds until it shall have provided for an annual tax sufficient for the payment both of principal and interest at maturity, whenever that may be, and that the plan adopted by the city, as set out in the record before us, is not such a one as is authorized by the constitution. And we therefore rule that the trial judge erred in passing the order validating and confirming the bonds.

Judgment reversed. All the justices concurring, except LEWIS, J., absent.

(118 Ga. 424)

GEORGIA, C. & N. RY. CO. et al. v.
MATHEWS.

(Supreme Court of Georgia. Oct. 30, 1902.
RAILROADS—DEATH BY WRONGFUL ACT—EVIDENCE—NEW TRIAL—DISCRETION.

1. Where a traveler is killed upon a public crossing by a railroad train, and the defendant company admits that at the time of the homicide it was disobeying the provisions of section 2222 of the Civil Code, designed to protect life and property upon such crossings, its only contention being that the verdict in favor of the widow (which is the second verdict in her favor, and is for a good deal less than a full verdict could have been under the mortuary tables) is contrary to the evidence, in that the deceased failed to exercise ordinary care and diligence to avoid the consequences of the railroad company's negligence, and the evidence does not require a finding that there was such failure after it became apparent that the provisions of the Code section above mentioned were being disobeyed, this court will not control the discretion of the trial judge, and must therefore affirm his judgment denying a new trial.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; R. B. Russell, Judge.

Action by E. Mathews against the Georgia, Carolina & Northern Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Erwin & Brown, T. M. Peebles, and N. L. Hutchins, Jr., for plaintiffs in error. Julian & McDonald, for defendant in error.

ADAMS, J. The plaintiff in the court below obtained a verdict against the railroad company for the sum of \$2,850 for the homicide of her husband, which occurred at a public crossing while he was in the act of driving across the railroad track. This is the second verdict in her favor. The deceased was a very young man, about 20 years of age, and the verdict rendered was a good deal less than a full recovery would have justified. The railroad company complains that the presiding judge ought to have set aside this verdict on the ground that the deceased was guilty of such a lack of care and diligence as precluded a recovery, notwithstanding the fact that at the time of the homicide the company was violating in several respects the provisions of section 2222 of the Civil Code, which section is designed to protect life and property on public crossings against injuries from railroad companies. In the light of the principle recognized by this court in the case of Comer v. Barfield, 102 Ga. 485, 31 S. E. 89, and subsequently followed, we are not prepared to say that the judge of the court below so abused the discretion reposed in him by the law in refusing to set aside this—the second—verdict as will justify this court in overruling this discretion and sending the case back for another hearing, or, in other words, that the evidence in the case required a finding that, after the failure of the railroad company to observe the provisions of this section became apparent, the decedent then failed to exer-

cise ordinary care in endeavoring to escape the consequences of the company's negligence. If, in our opinion, the evidence required a finding that the decedent knew of the approach of the train, or heard the witness who gave him warning, then a reversal of the court would necessarily follow. But we are not prepared to say this with the confidence that we think we ought to entertain before requiring a third trial of this case. The witness who claims to have given warning to the decedent of the approach of the train admits that, because of the noise made by the rattling of the wagon driven by the decedent, he was not prepared to say that the decedent heard him. No sound was made or language used which demonstrates that the warning was heard. The testimony is that the decedent shook his head, and this is consistent with the theory that the warning was not heard. There was evidence before the jury of obstructions to the view, which might have led them to believe that the decedent did not see or hear the approaching train, which was out of schedule time, and approached the crossing very rapidly, in time to avoid the catastrophe. As we understand the law, a discretion to grant or refuse a new trial, when the motion is based upon the general grounds, is vested in the presiding judge; and when this court overrules that discretion, and grants a new trial notwithstanding his approval of the verdict, it is upon the view that he has not properly exercised his discretion, because the verdict rendered is an illegal verdict, in that it is not warranted by the evidence.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 515)

DUNN v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)
CRIMINAL LAW—NEW TRIAL—MOTION—VERIFICATION—HOMICIDE—ACCIDENT
—INSTRUCTIONS.

1. An amendment to a motion for new trial which has upon it an entry to the effect that it was "allowed" by the judge, with nothing else to indicate an approval of its grounds, is not sufficiently verified to authorize this court to deal with the assignments of error therein. *Long v. Scanlan*, 31 S. E. 436, 105 Ga. 424; *Merritt v. Merritt*, 38 S. E. 973, 113 Ga. 569; *Taylor v. Brown*, 40 S. E. 281, 114 Ga. 299.

2. Where the main theory of the defense of the accused, based upon the evidence and upon his statement, was that he shot and killed the deceased in self-defense as the deceased was approaching him with a deadly weapon, and the court charged fully as to this theory, and in his statement the accused further stated that the shooting was an accident, there was no error in failing to charge on the theory of accident. *Robinson v. State*, 39 S. E. 862, 114 Ga. 56 (4). The charges complained of were not erroneous for any of the reasons assigned, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Sol Dunn was convicted of murder, and he brings error. Affirmed.

B. B. McCowen and A. L. Franklin, for plaintiff in error. J. S. Reynolds, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 418)

DEERING HARVESTER CO. v. THOMPSON.

(Supreme Court of Georgia. Oct. 30, 1902.)

DEFAULT—OPENING—FAILURE TO FILE ANSWER—REASONABLE EXCUSE.

1. A default will not be opened at the instance of a defendant unless he shows a "reasonable excuse" for failing to file an answer at the first term; that is, such an excuse as will justify the exercise in his favor of a sound legal discretion.

2. An order passed by the superior court in which a petition is filed, allowing the defendant until a date after the adjournment of the appearance term within which to file an answer, will not, when the plaintiff did not consent to the passage of such order, afford him such an excuse as is referred to in the preceding note. The court had no power to pass such an order, and the defendant was chargeable with knowledge of its want of authority.

(Syllabus by the Court.)

Error from superior court, Madison county; H. M. Holden, Judge.

Action by the Deering Harvester Company against W. H. Thompson. From an order opening a default judgment against defendant, plaintiff brings error. Reversed.

Z. B. Rogers and J. F. L. Bond, for plaintiff in error. John E. Gordon and D. W. Meadow, for defendant in error.

COBB, J. The Deering Harvester Company brought suit against Thompson in the superior court. The defendant did not file any plea or answer at the appearance term, but at that term an order was passed allowing him 60 days within which to file a plea. This order was taken without the consent of the plaintiff or its attorneys. The defendant filed a plea within 60 days after the passage of the order, but after the adjournment of the appearance term. At the trial term the court, upon motion of the plaintiff, struck the defendant's plea upon the ground that it was not filed in time. The defendant thereupon moved to open the default, giving as his reason for so doing that he acted under an order of the court, which was held to be illegal for want of authority in the court to pass it. The presiding judge, Hon. Paul E. Seabrook, passed an order opening the default, and allowing the defendant to file his plea. To this ruling the plaintiff ex-

cepted pendente lite. At a subsequent term of the court the case came on to be tried before Judge Holden, and upon motion of the defendant a nonsuit was awarded. The case is here upon a bill of exceptions assigning error upon the ruling of Judge Seabrook opening the default, and upon the granting of a nonsuit by Judge Holden.

A defendant who has been served with a petition and process is required to appear at the term to which the process is returnable and make his defense in writing. Civ. Code, § 5052. When the defendant fails to appear at the first term, the case is in default. Civ. Code, § 5077. The court has no authority to extend the time for filing a plea in any case. Where the defendant has filed a plea in due time, and objection is made to such plea by the plaintiff on the call of the appearance docket, the court may, on good cause shown, allow a reasonable time, in his discretion, for the making and filing of an amendment to the plea. Civ. Code, § 5045. But we are aware of no law which authorizes the court to extend the time for filing an answer beyond the appearance term. The failure of the defendant in the present case to file his answer at the appearance term was due to his reliance upon an order of the court which was illegal for want of authority in the court to pass it. The defendant's reliance upon this order was the result, not of a mistake of the law, but of ignorance of the law; and, although he may have acted in good faith, the passage of the order cannot afford him any reasonable excuse for his failure to file a plea. In *Brucker v. O'Connor*, 115 Ga. 95, 41 S. E. 245, Mr. Chief Justice Simmons, in referring to that section of the Civil Code which authorizes the judge to open defaults in certain cases at the trial term, says: "While this section [section 5072] gives to a judge a broad discretion, it does not mean that he can act arbitrarily, but that he may exercise a sound and legal discretion. It does not give him authority to open a default capriciously, or for fanciful or insufficient reasons. 'Excusable neglect' does not mean gross negligence. It does not mean a willful disregard of the process of the court, but refers to cases where there is a reasonable excuse for failing to answer. * * * The Code gives a judge no authority to open a default after the term has passed, for reasons which fall short of a reasonable excuse for the negligent failure to answer." See, also, in this connection, *Kellam v. Todd*, 114 Ga. 981, 41 S. E. 39; *Ingalls v. Lamar*, 115 Ga. 296, 41 S. E. 573. Reliance upon an order of court which is void for want of authority in the court to pass it is certainly not a reasonable excuse for a failure to comply with the law. The court erred in opening the default.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 522)

WELBORN v. STATE.

GILES v. SAME.

(Supreme Court of Georgia. Nov. 12, 1902.)

RAPE—EVIDENCE—INSTRUCTIONS—ASSAULT WITH INTENT TO RAPE.

1. Other than as dealt with in the headnote below, none of the grounds of the motion for a new trial disclose that the trial judge committed any error sufficient to set aside the verdict.

2. Under an indictment charging a person with rape, a verdict finding him guilty of assault with intent to commit a rape is unwarranted and contrary to the evidence, when it appears that some of the witnesses testified to the full accomplishment of the crime charged, and none of them to an assault not included in the perpetration of the offense.

3. An instruction that the jury might so find in this case was, under the evidence, erroneous. (Syllabus by the Court.)

Error from superior court, Rabun county; J. B. Estes, Judge.

Sam Welborn and William Giles were convicted of rape, and separately bring error. Reversed.

W. S. Paris and H. H. Dean, for plaintiffs in error. W. A. Charters, Sol. Gen., for the State.

LITTLE, J. Welborn and Giles, with two others, were jointly indicted in the superior court of Rabun county, charged with the offense of rape on the person of one Mary Queen. The two plaintiffs in error were jointly placed on trial, and the jury returned a verdict finding them guilty of an assault with intent to commit a rape. They separately moved for a new trial, which being overruled, each of them, by separate bills of exceptions, seek to have the verdict rendered set aside, and a new trial granted. The motions for a new trial being identical, and the assignments of error and briefs of evidence the same in all respects, the cases were allowed to be presented together in this court, and are together here considered.

1. A number of grounds are set out in the motion for a new trial, and for causes assigned in two of these a new trial must be ordered. As to those grounds not hereafter more specifically dealt with, we find on examination that they do not authorize the verdict to be set aside. In this number it is complained that the court erred in refusing to allow defendants' counsel to prove, on cross-examination by the prosecutrix, who was the woman alleged to have been assaulted, that her father was opposed to this prosecution. Certainly such evidence was inadmissible, and could not legally affect the question in issue,—whether the defendants were guilty as charged. It is complained, also, that the court erred in charging the jury in relation to positive and negative evidence. The charge of the court was founded on section 985 of the Penal Code, which was codified from the decision in the case of

Cobb v. State, 27 Ga. 648. There was evidence which could fairly be denominated negative evidence, and therefore a charge as to the effect and weight of positive and negative evidence was authorized. While the charge, as given, is supported both by the language of the Code and the decision referred to, and the principles enunciated cannot be characterized as unsound in law, there are yet many cases in which such principles would not be applicable; and, when they are, it should always be understood that, in considering the weight of positive and negative testimony, much depends on the credibility of the witnesses testifying. The object to be accomplished is to ascertain the truth of the issues being tried, and, notwithstanding the evidence of a witness who swears positively to a fact is rather to be believed than that of one who testifies that he was present on the occasion and did not see or hear the particular thing which was the subject-matter of the evidence, yet it is clearly within the province of the jury, in judging of the credibility of the witnesses, to say that the matter or thing testified about did not happen; and this, too, on the evidence of the witnesses whose evidence might be characterized as negative. A jury are not bound to believe the evidence of any particular witness, when it is contradicted either positively or by circumstances. While they are not authorized arbitrarily to disregard the evidence of any witness, yet it is their duty to determine and declare the truth of the matter in issue according to the weight and value which they place on the whole evidence. As to the application of the rules in relation to positive and negative evidence, see **Innis v. State**, 42 Ga. 473. That portion of the charge which refers to the impeachment of witnesses was not, perhaps, couched in language particularly happy, nor was it positively erroneous. It would have been well to have omitted so much of it as appears in the eighth ground of the motion, but it cannot be said either to have been illegal in itself, or prejudicial to the defendants, under the facts of the case presented. There was no request on the part of either of the defendants that the trial judge should instruct the jury as to the circumstances under which they might make a separate finding as to either one of the defendants. They were indicted as joint perpetrators of the offense charged. They did not choose to sever. They were tried together under evidence which was practically the same as to each. Had either of the defendants desired an addition to the charge which was given, he should have requested it. Having failed to do so, we cannot rule, under the facts, that the judge's failure so to charge was error. None of the grounds above referred to disclose an error sufficient to set aside the verdict.

2, 3. The remaining grounds set out are that the verdict was contrary to the evidence, and that the trial judge erred in instructing

the jury that, under the evidence in the case, they could find the defendants guilty of an assault with intent to commit rape. The evidence submitted for the state, if true, discloses the commission of a most horrible and outrageous crime, the details of which reflect very severely, not only upon the morals, but also upon the civilization, of those who participated in it. If the jury believed this evidence, they were bound to find that the defendants criminally assaulted the prosecutrix, and each had forced sexual connection with her in a most revolting manner, and therefore were guilty of the offense of rape. The evidence for the defendants tended to show that neither a rape, nor an assault with intent to commit a rape, was committed by either of the accused. What is the truth of the matter, we, of course, do not know, nor is it our province to determine; but, if the jury believed the evidence of the witnesses for the defendants, the verdict under this indictment should have been, "Not guilty." No evidence was had as to any criminal assault, save that which was included in the commission of the rape, of which certain witnesses testified. Therefore a charge that the jury could, under the evidence, find the defendants guilty of an assault with intent to commit a rape, was error, for it is declared in section 19 of the Penal Code that "no person shall be convicted of an assault with intent to commit a crime, or of any attempt to commit any offense, when it shall appear that the crime intended, or the offense attempted, was actually perpetrated by such person at the time of such assault, or in pursuance of such attempt." The plaintiffs in error are entitled to have this rule of law enforced in their favor. And as, under the evidence, the jury could not have legally found them guilty of an assault with intent to commit rape, an instruction that they had this power was error, and the finding made thereunder was contrary to law and the evidence.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 555)

PULLEN v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

GAMING—INDICTMENT—PROOF—ERROR—FAILURE TO BRING UP EVIDENCE—MOTION TO DISMISS.

1. Moving to dismiss a writ of error on the ground that the evidence sent up in the record has not been briefed as required by law is not the proper manner of bringing to the attention of this court an apparent failure on the part of the plaintiff in error to make a bona fide effort to meet the requirements of section 5528 of the Civil Code, which prescribes how the evidence adduced on the trial of a case in the court below shall be presented for consideration by this court.

2. An accusation in which three named persons are jointly charged with the offense of

gaming, but in which there is no allegation that they participated with others in the doing of the acts therein specified, is not sustained by evidence showing merely that one of the persons accused engaged, with other parties whose names were undisclosed, in playing for money a game in which cards were used.

(Syllabus by the Court.)

Error from city court of Wrightsville; V. B. Robinson, Judge.

Rube Pullen was convicted of gambling, and brings error. Reversed.

E. I. Stephens, and K. J. Hawkins, for plaintiff in error. B. B. Blount, Sol., for the State.

LITTLE, J. The plaintiff in error was brought to trial in the city court of Wrightsville upon an accusation in which he, James H. Wright, and Jim Wright were jointly charged with the offense of gambling. The trial resulted in the conviction of Pullen, who brought the case here for review by a bill of exceptions in which complaint is made (1) that the court below overruled a demurrer to the accusation; and (2) that his motion for a new trial was also overruled. The first of these assignments of error was not insisted upon before this court. As to the second, we have reached the conclusion that a new trial should have been granted on the ground that the evidence did not support the verdict of guilty. Before undertaking to deal with the case upon its merits, it is necessary, however, for us to dispose of a motion made by counsel for the state to dismiss the writ of error.

1. This motion was based upon the ground that "what purports to be a brief of evidence in said case is not compiled as the law directs, and not briefed as required." As was pointed out in the case of *Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73, "It is not the proper practice to move to dismiss a writ of error on the ground that the evidence has not been briefed as required by law." We have, however, examined the brief of evidence sent up in the record before us, with a view to determining whether or not a bona fide effort was made to comply with the requirements of section 5528 of the Civil Code, and have reached the conclusion that there has been a substantial compliance therewith, as regards the manner in which the testimony delivered at the trial was briefed. This being so, we will pass to a consideration of the question whether or not the state made out the charge against the plaintiff in error which was set forth in the accusation.

2. Only one witness was introduced by the state. He testified that he knew Rube Pullen, and "saw him gambling some time in May, 1902, * * * at Smith & Rowland's mill." The witness fully described the manner in which the game he saw played was conducted by Pullen and the parties with whom he was gaming, but did not give the

names of any of the persons who participated with Pullen in his forbidden pastime. It seems that the witness was unable to state who any of these persons were, for upon cross-examination he said: "There was several others in the game. Don't remember who all." Certain it is that he did not mention either James H. Wright or Jim Wright as being participants in the game, or even state that either of them was present. Was this, then, the occasion referred to in the accusation, when "the said Rube Pullen, James H. Wright, and Jim Wright, * * * on the 15th day of June, 1902, did then and there unlawfully and with force and arms play and bet for money, or other thing of value, at a game played with cards"? We cannot ourselves undertake to say, nor do we think the jury were authorized to indulge in any speculation on the subject. It was not, of course, incumbent on the state to show that the unlicensed performance in which Pullen was alleged to have taken part occurred on the precise date named in the accusation. *Chapman v. State*, 18 Ga. 736. But it was indispensably necessary that the charge against him should have been supported by at least some proof of the dramatic personæ. To have established the fact that Pullen played with other gamblers, of whom either James H. Wright or Jim Wright was one, would have been all-sufficient. *Grant v. State*, 89 Ga. 394, 15 S. E. 488. As this was not done, however, the present case is controlled by the decision pronounced by this court in *Woody v. State*, 113 Ga. 927, 928, 39 S. E. 297, wherein one of the reasons assigned for holding that the "evidence did not warrant a verdict of guilty" was that "there was no proof whatever that the accused ever played any game of any description with any one or more of the persons named as codefendants in the accusation." It is to be noted that the accusation now under consideration did not charge that Pullen ever played with persons other than James H. Wright and Jim Wright, so it is not to be inferred that the state sought to bring him to trial for engaging in an illegal enterprise of greater scope or moment than a three-handed game. Accordingly, the conviction cannot be upheld upon the idea that the case at bar falls within that class of cases cited approvingly in the recent case of *Martin v. State*, 115 Ga. 255, 41 S. E. 576, in which this court held that "where, under an indictment charging two named persons, 'together with others,' with the offense of riot, one of the persons named was convicted, and the other acquitted, the conviction will be upheld when the evidence shows that any other person capable of committing the crime participated with the person convicted in the criminal acts charged in the indictment." Our conclusion, therefore, is that Pullen was not shown to be guilty of the specified charge made against him. Indeed, if credit is to be given to his statement made at the trial,

that he "don't gamble" at all, and "was not at the mill at the time" referred to by the witness for the state, an innocent man has been found guilty of doing an unlawful act, with the commission of which he has never been by the state even accused.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 491)

WHELCHER v. GAINESVILLE & D. ELECTRIC RY. CO.

(Supreme Court of Georgia. Oct. 30, 1902.)

TRIAL—INSTRUCTIONS—FAILURE TO PRESENT PHASE OF DEFENSE—PRESCRIPTION—RIGHT TO MAINTAIN DAM—EVIDENCE.

1. A ground in a motion for a new trial to the effect that the court erred in admitting in evidence, over the objection of counsel, a plat referred to in the testimony of a witness, cannot be considered, when a copy of the plat is not attached to the motion, or set out or explained in any way, save only by reference to the brief of evidence, and when it does not appear what objections were made to the trial judge, and overruled by him.

2. Sayings of a person in possession of real estate, or some interest therein, ought not to be admitted against another, unless it appears that this other claims through or under him, or stands in privity with him; these declarations not being offered, apparently, to prove adverse possession on the part of the person making them. When such declarations are offered, it is material to show accurately or approximately when they were made.

3. While a party cannot complain of the failure of the court to give in charge to the jury a request not in writing, he can complain, without any request having been made at all, of the fact that the court has not presented with reasonable fullness and clearness (if this be true) a material and substantial contention made by him. (a) When a defendant claims that he had a prescriptive right to maintain a mill-dam attached to land claimed by the plaintiff (that is, that he enjoyed an easement of this kind as to the plaintiff's land), and the charge, in its entirety, while dealing with prescription, does not present this specific defense, certainly not with reasonable fullness and clearness, the error is material, in the light of the pleadings and the evidence in this case.

4. It is error for the court to charge that permissive possession cannot ripen into a prescriptive title until the defendant asserting this possession first surrenders possession, and turns it over to the other party, and claims it adversely. This is putting a burden upon the defendant which the law does not impose in a case like that now before the court.

5. It is error for the court to charge that in order for the defendant to acquire prescriptive title to an easement, such as the right to maintain a dam, he must have kept the dam at a certain place, and "just so high, and no higher," for over 20 years. This error becomes more material when the court subsequently charges the jury that, where the defendant claimed a prescriptive right to a dam, they must be satisfied from the evidence "that he claimed a dam at a certain place, of a certain height, and with certain privileges, for the full term of twenty years."

(Syllabus by the Court.)

¶ 4. See *Adverse Possession*, vol. 1, Cent. Dig. § 291.

Error from superior court, Hall county; J. B. Estes, Judge.

Action by the Gainesville & Dahlonega Electric Railway Company against A. S. Whelchel. Judgment for plaintiff; and defendant brings error. Reversed.

Geo. K. Looper, for plaintiff in error. O. J. Lilly, for defendant in error.

ADAMS, J. The defendant in the court below, who is the plaintiff in error here, claimed a prescriptive right to maintain a mill-dam attached to the land claimed by the plaintiff. The plaintiff obtained a verdict and judgment perpetually enjoining the defendant from maintaining his dam at that place, and this bill of exceptions is filed to the judgment of the court below overruling the defendant's motion for a new trial.

Several objections to the admission of evidence made in the motion for a new trial cannot be considered by this court, because the rule of practice indicated in the first headnote has not been observed. It is important that the motion for new trial itself show in substance the document objected to, and that it do not refer the court to a brief of evidence for the purpose of ascertaining the contents or effect of the document. It is particularly necessary that a motion state what the objections to the admissibility of evidence were, and that these objections were presented to the trial judge.

We need not deal more specifically than we have done in the headnotes with what we conceive to be material errors in the charge of the court. As said by this court in the case of *Baker v. McGuire*, 53 Ga. 247: "The rule seems equally well settled that the capacity of the dam from its height is the measure of the easement. * * * He [referring to the mill owner] has a right to repair his dam and build a better, though not a higher, one." See, also, *Washb. Easem.* top page 152. Under the charge of the court, in order to sustain the defendant's defense, it would have been necessary for the jury to have found that the height of the dam had never at any time varied,—become even less than that claimed by the defendant. We do not think, after a careful reading of the record, that the general charge cured the defects pointed out in the headnotes, and complained of in the motion for a new trial.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(126 Ga. 546)

MACK v. STATE

(Supreme Court of Georgia. Nov. 12, 1902.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

1. On the trial of one charged with having violated the law by illegally selling intoxicating liquor, proof that the accused received money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivered whisky to such per-

son, puts the onus on the defendant of explaining where, how, and from whom he got the liquor (*Grant v. State*, 13 S. E. 554, 87 Ga. 265); and, if the explanation offered by him is supported only by his own statement, the jury, if they believe it to be a mere subterfuge to cover up an illegal sale by himself, are authorized to find him guilty (*White v. State*, 19 S. E. 49, 93 Ga. 47).

2. There was no evidence whatever in the record to support the grounds of the motion for a new trial based upon alleged newly discovered evidence.

(Syllabus by the Court.)

Error from city court of Sandersville; P. R. Tallafiero, Judge.

Madison Mack was convicted of violating the liquor law, and brings error. Affirmed.

A. W. Evans, for plaintiff in error. Gus H. Howard, Sol. pro tem., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 473)

AKERMAN v. FORD.

(Supreme Court of Georgia. Oct. 30, 1902.)

QUO WARRANTO—TRIAL—REVIEW—CITIES—MAYOR.

1. Where, in a quo warranto case, the trial judge renders a judgment against the petitioner, containing a recital touching an agreement between counsel, afterwards sets aside this judgment on the ground that a dispute had arisen as to the terms of the agreement, and then proceeds to hear the case, and rendered another judgment against the petitioner (all of this occurring on the same day), it does not appear that the setting aside of the first judgment could have done petitioner any harm.

2. Even if the setting aside of the first judgment was, as claimed by the plaintiff, beyond the power of the judge, and harmful to the plaintiff, his remedy to review this decision was to apply for a mandamus to compel the judge to sign a bill of exceptions to the first judgment in the event of his refusal to do so.

3. Assuming that a school commissioner of the city of Cartersville is a municipal officer, within the meaning of the law embodied in section 739 of the Political Code, as amended by the act approved December 21, 1899 (Acts 1899, p. 26; Van Epps' Supp. § 6132), the judgment of the court below in favor of the respondent was right, if only because the mayor of the city of Cartersville is not embraced within the words "councilmen and aldermen."

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Quo warranto by F. M. Ford against Walter Akerman. Judgment for respondent, and complainant brings error. Affirmed.

Akerman & Akerman, for plaintiff in error. John W. & Paul F. Akin, for defendant in error.

ADAMS, J. Without elaborating the points decided in the first two headnotes, we affirm the judgment of the court below for the reason stated in the third headnote. It is not necessary for us to decide in this case

whether or not a school commissioner of the city of Cartersville is a municipal officer, within the meaning of the legislation invoked by the plaintiff in error. It appears that the plaintiff in error complains because, while the defendant in error was mayor of the city of Cartersville, he was elected to the office of school commissioner, although, it is contended, he was ineligible, under this law, to hold that office. In our opinion, the words "councilmen and aldermen" do not embrace the mayor of a city. It was not claimed in the argument, and is not in the brief for plaintiff in error, that there is any incompatibility between the two offices. The case is based upon the law embodied in section 739 of the Political Code, as amended by the act of December 21, 1899 (Acts 1899, p. 26; Van Epps' Supp. § 6132), which law was originally passed in 1889 (Acts 1889, p. 181), under a title which reads as follows: "An act to declare councilmen and aldermen of towns and cities ineligible, during their term of office, to any other municipal office in said towns and cities." Commonly and colloquially, when we speak of a councilman or alderman, we do not refer to a mayor. The charter of the city of Cartersville to be found in Acts 1872, p. 179 et seq., seems to preserve this distinction. For example, in section 15 of the Incorporating act it is provided that the city shall be laid off "into four wards, and each ward shall be entitled to two aldermen—all of whom, and as well the mayor of said city, to be elected by general tickets—all voters voting for such candidates, not exceeding eight aldermen and a mayor, as they desire." The mayor and councilmen may together form the governing power, and therefore no legislation can be had without the presence and concurrence of the mayor; but it does not follow from this that the mayor is a councilman, or that the councilman is a mayor. In the first volume of his work on Municipal Corporations (section 273), Mr. Dillon says: "Where the power to legislate for the corporation is vested in 'the mayor and councilmen,' the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: 'If a simple resolution [instead of an ordinance] would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor, as a part of the lawmaking power. The co-ordinate action of both is required.'" The phraseology and spirit of the law, instead of embracing the mayor, suggests the contrary view. Under its terms, it does not apply to any municipal office filled by appointment of the mayor. As the mayor could not appoint himself, the result of the view which would embrace the mayor within the inhibition would be that, in a certain character of municipal offices (those filled by appointment), the law would not apply to a councilman or alderman, but would apply to the mayor in all cases. The fact that the appointees or

the mayor are expressly excepted is, we think, inconsistent with the construction of the act urged by the plaintiff in error.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 445)

McCORMICK HARVESTING MACH. CO. v. ALLISON et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

SALES-AGENT'S WARRANTIES-RETURN OF GOODS.

1. Where a written contract for the sale of a machine specified the warranties undertaken by the seller, and stipulated that no warranties other than those expressly stated in the contract should be binding on him, he was not responsible for an additional warranty subsequently made by his agent; and, upon the trial of an action brought by the seller against the purchaser for the price of the machine, evidence of such warranty made by the agent was inadmissible.

2. Where such a contract stipulated that: "If upon one day's trial the machine should not work well, the purchaser shall give immediate notice to [the seller and his agent], and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded. * * * Failure to * * * return the machine as agreed shall be deemed an acceptance of the machine by the purchaser,"—*held*, that upon the failure of the machine to work well, and failure of the seller, upon proper notice, to have it put in order, a notice by the purchaser to the agent of the seller that the machine was held subject to the seller's order was not a compliance with the terms of the contract, and did not relieve the purchaser from liability for the price of the machine, when it did not appear that the seller or his agent ever took possession or control of the machine in pursuance of such notice.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by the McCormick Harvesting Machine Company against Nathan Allison and another. Judgment for defendants, and plaintiff brings error. Reversed.

Starr & Erwin, for plaintiff in error. Harkins & Dodd, for defendants in error.

FISH, J. Suit was brought in a justice's court by the McCormick Harvesting Machine Company against Nathan Allison and Frank Walraven on one of a series of notes given by the defendants to the plaintiff for the purchase price of a corn binder. Upon a trial by jury, a verdict was rendered for the defendants. Plaintiff sued out a certiorari, and to a judgment of the superior court overruling the same it excepted. It was in evidence before the jury that the defendants signed a printed order for the machine, directed to the plaintiff. This order contained the following agreement: "Machine is to be warranted, as per warranty on the back of this order, without condition or erasure, a copy of which * * * we have this day received and accepted." On the back of the order was the following: "Machine Warranty. This machine is warranted to be well made, of good material, and durable with proper care. If upon one day's trial the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Co. and their agent, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded. Continuous use of the machine, or use through harvest season, or failure to notify the McCormick Harvesting Machine Co. or their agent, or to return the machine as agreed, shall be deemed an acceptance of the machine by the purchaser. No agreement or warranty other than that printed in this order is binding on the McCormick Harvesting Machine Company."

1. One of the complaints made by the certiorari was that the magistrate erred in allowing Nathan Allison, one of the defendants, to testify, over plaintiff's objection, that Black and Yancey, agents for the plaintiff, guaranteed that the machine would cut and bind a designated "piece" of "high tangled corn." The objections urged were that the contract between the plaintiff and the defendants specified the only express warranty for which the plaintiff should be bound, and that the agents could not bind their principal by a warranty made after the sale of the machine. We think the objections were well taken, and that the testimony should have been excluded. The defendants had expressly agreed in the contract signed by them that no agreement or warranty other than that specified in the contract should be binding upon the plaintiff, and therefore it was not permissible for them to prove that plaintiff's agents made any other warranty. Moreover, this guaranty or warranty that Allison testified was made by the agents of the plaintiff appeared to have been made after the sale of the machine, and could not, therefore, have been a part of the contract of sale.

2. One of the contentions of the defendants insisted upon before the jury was that the machine, after repeated trials, failed to do good work; that plaintiff, after being notified in accordance with the contract, failed to put the machine in order; and that thereupon the defendants returned the same to the plaintiff's agent, and were therefore not liable for its price. The only evidence bearing upon the question of the return of the machine was the testimony of Nathan Allison, one of the defendants, and A. T. Black, the agent of the plaintiff through whom the machine was sold. Allison testified that, after plaintiff failed to make the machine work well, "he then, next week, notified Mr. Black that the machine was subject to his orders, and that after a few days Mr. A. T.

Black was out at his father's house, and told him to run the machine under the shelter there at his father's barn." Black testified "that defendants never at any time returned or tendered to me the machine sold to them"; that late in the fall he was at J. T. Allison's and told defendants that they ought to put the machine under shelter, whether they gained the suit or not. Assuming, as we must in passing upon the question under consideration, that Allison's testimony was true, it was wholly insufficient to authorize the jury to find that the machine was returned to the plaintiff or its agents. It will be noted that Allison did not testify that the machine was ever placed under the shelter, as he claimed Black directed; and, in view of this fact, Black's testimony that the defendants never returned the machine to him was not in conflict with what Allison swore. There was no evidence, then, before the jury, that Black or any agent of the plaintiff ever had any kind of possession or control over the machine after it was sold to the defendants. Indeed, so far as the evidence disclosed to the contrary, the defendants had possession of the machine when the case was tried. If the machine failed to work well, and the plaintiff, after being notified of this fact in accordance with the contract, failed to make it do good work, then the defendants were bound, under the terms of the contract, to return the machine at once to the agent of whom they received it; and, as they failed to show that they did this, then they should have been held, in accordance with their contract, to have accepted the machine, and been made liable for the note given for part of its purchase price.

The certiorari should have been sustained, because the magistrate erred in admitting the testimony referred to in the first division of this opinion, and because the verdict was without evidence to support it.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 535)

SOMERS et al. v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

HOMICIDE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—OBJECTIONS—ADMISSIONS.

1. There was no merit in the ground of the motion for a new trial based on alleged newly discovered evidence, as such evidence was merely cumulative, and the accused made no effort whatever to have it upon the trial, though knowing of its existence prior thereto.

2. That a juror's name is not on the jury list or in the jury box is not cause for a new trial; being an objection proper defectum, it should be discovered and urged before verdict. *Brown v. State*, 81 S. E. 557, 105 Ga. 640, and cases cited.

3. An assignment of error upon the refusal of the court to rule out certain evidence should specify the ground upon which the motion to rule out was based. Merely assigning reasons

in a motion for a new trial why the evidence should have been ruled out will not suffice, it not appearing that such reasons were presented to the court when the motion to rule out was made.

4. Upon the trial of two persons charged with murder, it was competent to show that shortly after the homicide one of the accused said "he had killed a fellow," and that the other said "he had killed a negro"; it appearing that the person alleged to have been killed was a negro.

5. There was evidence authorizing the charge to the effect that if the accused acted together, having for their common purpose the intent to take the life of the person killed, then each would be responsible for the act of the other in carrying out such common purpose.

6. The court fairly stated the contentions of the state and the accused, the evidence warranted the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Screven county; B. D. Evans, Judge.

Henry Somers and another were convicted of crime, and bring error. Affirmed.

White & Boykin and A. S. Anderson, for plaintiffs in error. B. T. Rawlings, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 533)

SIMMONS v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

HOMICIDE—TRIAL—POSTPONEMENT—ABSENT WITNESSES—CONFESSIONS—INSTRUCTIONS.

1. Postponements of trials rest in the sound discretion of the trial judge. It does not appear that this discretion was abused in the present case.

2. Where, upon the call of a criminal case to be set for trial, the accused being unable to employ counsel, the court appointed a "junior and inexperienced member of the bar" to represent him, and upon the trial, and before the same was entered into, the court, ex mero motu, appointed an "attorney of experience and ability" to aid in the defense, and both of the attorneys represented the accused throughout the trial, he had "the privilege and benefit of counsel," as guaranteed him by the constitution of this state.

3. Even if a failure to charge upon the law of confessions, in the absence of a request to so charge, be cause for a new trial, the evidence in the present case did not authorize a charge on the subject.

4. The verdict is amply supported by the evidence, and is not contrary to law.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Robert Simmons was convicted of murder, and brings error. Affirmed.

Simon N. Gazan, John E. Myrick, and Edwin Leffler, for plaintiff in error. W. W. Osborne, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

FISH, J. It appears from the record in this case that the homicide for which the

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2222.

accused, Robert Simmons, was tried, occurred on Thursday, July 24, 1902. The bill of indictment charging him with murder was returned on July 25th. On Saturday, July 26th, the accused was brought into court, and, as he had no counsel, the presiding judge appointed counsel to represent him, and at the same time, and in the presence of, and without objection by, such counsel, set the case for trial on the following Thursday, the 31st day of July. On the date last mentioned the case was called for trial, and counsel for the accused asked that the same be postponed, on the ground that he had not had time to prepare the case for trial; stating that the accused had some witnesses "living two or three miles out on the Louisville road," whose testimony he desired to use, but whose names counsel did not know. The judge asked the accused if he could give him the names of the witnesses desired, at the same time offering to have them brought into court. The accused replied that he did not know their names. The court then asked the accused if he had any witnesses who were not present whose testimony he desired, to which the accused replied that he did not know. Complaint was made in the motion for a new trial that the counsel first appointed to represent the accused was "young and inexperienced," but in connection with this ground of the motion the trial judge certifies that, before the trial was entered upon, the court appointed additional counsel to assist in the defense of the accused, and that after such appointment, and further consultation between the accused and his counsel, the trial was begun without further motion for a continuance or postponement. The trial resulted in a verdict of guilty, and to the overruling of his motion for a new trial the accused excepted.

1. The time to be allowed counsel to prepare for trial is in the sound discretion of the trial judge, which discretion will not be interfered with by this court unless abused. *Charlon v. State*, 106 Ga. 400, 32 S. E. 347; *Baker v. State*, 111 Ga. 141, 36 S. E. 607. In view of the facts of this case as above stated, there was no abuse of discretion in refusing to postpone the trial. If the accused had any witnesses who were absent, it was not shown that he knew their names or where they resided, or what they would testify to if present, or that their presence could be secured if the case should be postponed. It did not appear that there were any unusual or intricate matters of law or fact involved in the case. The trial judge knew the facts as to the business in which counsel had been engaged in his court, and could better determine the propriety of a postponement of the trial than this court. It follows that the court did not abuse its discretion in refusing the postponement.

2. It appears from the recitals in the motion for a new trial that the counsel who was first appointed to represent the accused was

"a junior member of the bar, inexperienced and unskilled in the trial of cases; that he had never tried but one case before a jury"; and that he was admitted to the bar only a little more than a month previous to the trial of this case; and it is complained that, taking into consideration the gravity of the case, representation by such counsel up to the time of the trial was not a compliance with the requirement of the constitution of this state to the effect that every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel. The law presumes that every man who has been admitted to the bar of this state is competent to practice law. It requires that every applicant for admission shall be carefully and thoroughly examined. This examination, under the statute, must be strict, and it is made the duty of the persons charged with the examination "to reject any applicant who does not undergo a full and satisfactory examination"; and no person who, upon examination, is not found to possess the requisite learning and ability to enable him to properly discharge the duties imposed by law upon attorneys at law, can legally be admitted to the bar of this state. Moreover, after the request for a postponement was made and denied, the court, according to the certificate of the trial judge, appointed "an attorney of experience and ability" to assist in the defense of the accused, and both the attorneys so appointed represented the accused throughout the trial. We are therefore of the opinion that the accused had "the privilege and benefit of counsel," as guaranteed him by the constitution.

3. Complaint was further made in the motion for a new trial that the court erred in not giving in charge to the jury the law relating to confessions, as it was claimed that an alleged confession was introduced in evidence by the state. Even if the failure of the court to give in charge to the jury the law relating to confessions be, in the absence of a court so to charge, cause for granting a new trial (*Malone v. State*, 77 Ga. 767), there was no evidence in the present case to authorize a charge upon that subject. It appears from the record that after the accused had made his statement, in which he admitted the killing, and claimed that he committed the act because of an assault made upon him by the deceased at the time of the killing, in pursuance of threats previously made against him, he closed his case. The state then introduced the evidence of the officer who arrested the accused, to the effect that at the time of the arrest the accused stated to him that he and the deceased had, a few days previous to the killing, had a quarrel, in which the deceased told the accused that he had heard that he was a bully, and that if he (the accused) said anything to a certain woman, or struck her, he would "put in ninety-nine for him"; meaning that he would kill him, and serve a life sentence

in the penitentiary for so doing. The witness stated further that the accused told him that on the night of the killing he went to the house of the woman in question, where the homicide was committed, and knocked upon the door, which was opened by the woman, who told him to come in; that he went in, and just as he got inside the door the deceased started to shut the door; that he, not knowing what the deceased was going to do, shot him; that the deceased then went into another room, while he (the accused) went outside and shot through the window, in order to prevent the deceased from coming out to hunt him. The accused, in his statement, gave substantially the same account of the quarrel previous to the killing as that given by the officer, and, in his account of the occurrences that took place on the occasion of the homicide, he narrated other circumstances not related in the statement testified to by the officer; but in both the statement given to the officer and that made on the trial he attempted to excuse the killing. The apparent purpose of the state in offering the testimony of the officer was to show that the account given by the accused in his statement to the jury as to the conduct of the deceased on the occasion of the homicide was different in its detail from that given to the officer. The accused did not deny that he killed the deceased, and there was ample evidence outside of the statement to the officer and that made on the trial to show that such was the case. While an appropriate charge upon the subject of the statement made to the officer might not have been amiss, to have treated this statement as a confession of guilt would, under the facts of this case, have been improper, and would have been cause for a new trial. See *Covington v. State*, 79 Ga. 687, 7 S. E. 153; *Fletcher v. State*, 90 Ga. 468, 17 S. E. 100; *Powell v. State*, 101 Ga. 19, 29 S. E. 309, 65 Am. St. Rep. 277; *Lee v. State*, 102 Ga. 225, 29 S. E. 264.

4. As before indicated, the verdict finding the accused guilty is fully sustained by the evidence, and the judgment of the court below overruling the motion for a new trial is accordingly affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 573)

COHEN v. STATE.

(Supreme Court of Georgia. Nov. 13, 1902.)

MURDER—TRIAL—INSTRUCTIONS—PUNISHMENT—POWER OF JURY.

1. The jury, in the trial of one who is charged with murder, if they find the accused guilty, are invested by the law with the power of fixing the punishment, by recommendation, to life imprisonment. Whether they will so recommend, or not, is a matter solely in their discretion, which is not limited or confined in any case. Accordingly, where the jury were instructed that they had such right, full and untrammel-

ed, but in the same connection they were also instructed that the law allows such recommendation in cases where they think there are circumstances of mitigation, and in cases where the circumstances soften the crime, and where, in their judgment, they do not think the death penalty ought to be inflicted, a verdict of guilty, without a recommendation, must be set aside, because it is possible that the jury may not have fully understood the extent of their power as defined by the law.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Abe Cohen was convicted of murder, and brings error. Reversed.

W. F. Slater, for plaintiff in error. W. W. Osborne, Sol. Gen., and Boykin Wright, Atty. Gen., for the State.

LITTLE, J. Cohen was indicted for murder, was tried, and found guilty. He submitted a motion for a new trial on the grounds that the verdict was contrary to the law and against the principles of justice and equity, and because the court erred in certain instructions to the jury, which are specified. The motion was overruled, and he excepted.

In relation to the general grounds of the motion, it is sufficient to say that the evidence showed the homicide to have been murder, without any excuse, and unaccompanied with any circumstances of mitigation. The special grounds of the motion are that the court erred in charging the jury as follows: "The punishment for murder is death, but there are cases in which the law allows the jury, where they think that there are circumstances of mitigation,—if it is a case in which the extreme penalty ought not to be inflicted,—to recommend that the defendant be imprisoned in the penitentiary for life;" and again, after charging and explaining the meaning and scope of section 63 of the Penal Code, that he erred in charging as follows: "That, you see, gentlemen, was intended to confer upon jurors the power, in cases where the circumstances soften the crime,—where, in their judgment, they don't think the full penalty ought to be inflicted,—to recommend that the defendant be punished by imprisonment in the penitentiary for life. It is for the jury to say whether they will make that recommendation, or not, in this case." The judge, in his order overruling the motion for a new trial, said: "It is true, as stated in the motion, that the court charged the jury that, where they think there are circumstances of mitigation, they can recommend that the punishment be reduced from death to imprisonment for life; but it is also true that this is not all that was said in that immediate connection with regard to the power of the jury to make this recommendation, and their reasons for it. The jury had their attention called three separate and distinct times in the charge to the fact that they had the right

to reduce the punishment from death to imprisonment for life, and in each case they were told that they had that power, without circumscribing them to mitigating circumstances or any other circumstances." This language of the order is not, as we understand it, to be taken as varying the approval of the grounds of the motion, which is entered in the following language: "The recitals of fact in the above motion are approved as true and correct." But we understand from the order overruling the motion that, while the grounds therein stated are approved as correct, the judge directs attention to the fact that the charge, in addition to the extracts taken from it, called the attention of the jury more than one time to the fact that they had the right to reduce the punishment from death to imprisonment for life, and that the power which they so possessed was not circumscribed. So that, in construing the grounds set out in the motion in the light of the order overruling the same, it appears that the judge did instruct the jury as set out in the motion, and also that they had the power to recommend that the accused be imprisoned for life, "without circumscribing them to mitigating circumstances or any other circumstances"; and, so understanding the charge, we proceed to the consideration of the points made.

The charge against the defendant, if made out by the evidence, subjects him either to the loss of life or to perpetual imprisonment. Whether the punishment to be inflicted on him be the one or the other depends, not on the evidence, but on the action of the jury. Of course, the jury must determine the guilt of the accused under the evidence; but, after guilt has been determined, the punishment in the manner named, under the law, rests alone with them. Hence the power and right of the jury to inflict the one or the other punishment should not only not be misunderstood, but their power in this regard should be so clearly explained that an opportunity for a misunderstanding could not be presented. The very able judge who presided on the trial of the case, as appears from his order, instructed the jury that they had this power to recommend, even when there were no mitigating circumstances which appealed to their discretion; but, while he did so, he also instructed them that there were cases in which the law allowed them, "where they think there are circumstances of mitigation,—if it is a case in which the extreme penalty ought not to be inflicted,—to recommend that the defendant be imprisoned" for life. Not only so, but that the law intended "to confer upon jurors the power, in cases where the circumstances soften the crime,—where, in their judgment, they don't think the full penalty ought to be inflicted,—to recommend that the defendant be punished" by imprisonment for life. Possibly the idea of the judge was that while the jury had the power, and that power was not

circumscribed, the contemplation of the law was that the power would be exercised only when there were mitigating circumstances, or circumstances which soften the crime to such an extent that the jury believed that the death penalty ought not to be inflicted. While the jury were not impressed with that idea in language similar to that which we have used, yet the fact that the judge charged both propositions may have induced the jury to believe that the power to recommend ought not to be exercised except in a case where there were mitigating circumstances, or circumstances which influenced them to believe that the death penalty ought not to be inflicted. If this be the idea which the jury received, it was a mistaken one, and we are obliged to rule that they were not properly instructed as to their right to recommend, under the law as it is written. Whether it be wise or not, whether the jury ought or ought not to recommend in a clear and palpable case of murder, is not the question. The law in this respect does not at all deal with the duty of the jury in the return of their verdict. It only prescribes the right of the jury, and, in effect, gives to the jurors trying capital cases, when the evidence shows the guilt of the accused, to fix the punishment at imprisonment for life, in their discretion, without regard to the circumstances of the case. Section 63 of the Penal Code declares that the punishment of persons convicted of murder shall be death, but may be confinement in the penitentiary for life, "if the jury trying the case shall so recommend." Whether the jury will recommend, or not, is for them alone to determine. They have a right, under this statute, to recommend that the offender shall be punished by confinement, without regard to the circumstances of the homicide. Whether they ought to recommend is another and distinct question, which appeals alone to them as jurors, and which they must decide without any suggestion from any other source than their own judgment. The power to recommend resting alone in the jury, and that power being confined by law to their discretion alone, any instruction, charge, or suggestion as to the causes for which they could or ought to recommend is error sufficient to set aside a verdict where no recommendation is made. In the case of *Hill v. State*, 72 Ga. 131, it was ruled that: "The Code leaves it to the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder. They are not limited or circumscribed in any respect whatever, nor does the law prescribe any rule by which the jury may or ought to exercise this discretion." "Such recommendation [is] in all cases matter of discretion with the jury." *Thomas v. State*, 89 Ga. 479, 15 S. E. 537. "This right [to recommend to mercy] is not restricted in the Code to cases of mitigating circumstances, or other particular facts of

any given case, but is at the free disposal of the jury in any case," etc. Johnson v. State (a cattle-stealing case) 58 Ga. 491. The solicitor general insists that, in giving the instructions complained of, the trial judge unquestionably followed the reasoning of this court in the case of Perry v. State, 102 Ga. 365, 30 S. E. 903. This is true. The reasoning to which allusion is made was confined to a discussion, not of the power and right of a jury in such a case, but as to what ought to influence them in making a recommendation. Indeed, in that case it was said on page 379, 102 Ga., and page 909, 30 S. E., by Lumpkin, P. J., that "this court has frequently decided that the judge cannot properly undertake to give to the jury any rules to aid them in reaching a conclusion as to what they should do upon the question of punishment," and the reasoning to which reference has been made was predicated on the proposition which followed the above statement,—that "it by no means follows that the jury should capriciously exercise their power in this respect."

The attorney general refers us to the case of Taylor v. State, 105 Ga. 747, 31 S. E. 764, as authority upon which, perhaps, the charges complained of may be sustained. An examination of that case, however, will show that the ruling there made will not sustain the charge complained of here. The investigation of the charges there was directed to instructions of the court, in particular language, to the effect that if the jury were satisfied beyond a reasonable doubt of the guilt of the defendant, and did not desire "that he should suffer the death penalty, the form of their verdict would be," etc.; and, "If the jury find that the evidence establishes beyond a reasonable doubt that the defendant is guilty of the offense of murder, and do not desire to reduce his punishment to imprisonment in the penitentiary for life, but do desire that he should suffer the death penalty, the form of your verdict would be," etc. In our ruling on this charge, we said: "It is possible that there may be better words to use in this connection than to say that the reduction of the punishment is to be governed by the wishes of the jury in that regard."

* * * Yet, after all, as the whole matter—the recommendation as well as the refusal to recommend—is in the power and discretion of the jury, and, when exercised, no tribunal can review or call in question the exercise of that discretion, it is a matter which the wishes of the jury must determine." It has not come to our attention that, under the provisions of our Code giving to a jury the power to recommend, this court has ever sustained a charge which either limited this power, or which, when fairly construed, might convey to the jury the idea that the power should not be exercised except in a particular class of cases. On the contrary, this court has frequently ruled that the jury must be left free in all cases

to exercise that power, uninfluenced by any suggestion or direction of the judge. Understanding, as we do, that, while the jury in the present case was instructed that the matter of recommendation rested alone with them, they were also told that the law allowed that recommendation in cases of a certain character, and in cases where, in the judgment of the jury, the death penalty should not be inflicted, we are constrained to rule, notwithstanding the evidence in this case clearly warranted the verdict of guilty, that, from the charge taken as a whole, the jury could have understood that the exercise of their power to recommend should be had only in a given class of cases. In reference to whether this ought or ought not to be the law, we have nothing to say. But as the statute, according to our interpretation, leaves the matter of recommendation entirely with the jury, and their discretion alone, any instruction which tends to qualify this right, or to point out the manner of its exercise, is cause for setting aside a verdict where no recommendation has been made.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(118 Ga. 511)

NATIONAL COMPUTING SCALE CO. v.
EAVES et al.

EAVES et al. v. NATIONAL COMPUTING
SCALE CO.

(Supreme Court of Georgia. Oct. 31, 1902.)

SALES—WARRANTIES—PAYMENTS—RECOVERY—EVIDENCE.

1. A contract of sale contained a guaranty to keep the articles sold in repair during a given time following the sale, provided the buyer returned them to the seller for this purpose. There was no express warranty, nor did the nature of the transaction or anything in the contract exclude the implied warranty of the law. Held, that though in such a contract the seller impliedly warranted that the articles sold were reasonably suited to the uses intended, the purchaser could not defeat an action brought to recover the purchase money upon the ground that the articles were not so suited, unless it appeared that the articles, when sold, were so defective as not to be reasonably suited to the uses intended, or unless they became defective after the sale, and the seller, upon the articles being returned to him, had failed or refused to repair them within a reasonable time, or unless the defect thus arising was of such a character that it could not have been remedied even if the articles had been returned.

2. While, as a general rule, a purchaser of personal property, who pays a portion of the purchase money with a full knowledge that the article sold is defective, cannot recover the amount so paid, still, if at the time the payment is made it is expressly agreed that the defects shall be removed, and the seller fails or refuses to do this, the fact that the payment was made with knowledge of the defect will not alone defeat a recovery.

3. Other than as above indicated, there was no error in any of the rulings complained of.

(Syllabus by the Court.)

Error from superior court, Bartow county:
A. W. Fite, Judge.

Action by the National Computing Scale Company against W. H. Eaves and another, on which defendants presented a plea in recoupment. Judgment for defendants, and both parties bring error. Reversed.

Joe M. Moon, for plaintiff in error. Jas. B. Conyers, for defendants in error.

COBB, J. The National Computing Scale Company brought suit in the justice's court against Eaves and another upon four promissory notes. The case was appealed to the superior court, and the trial there resulted in a verdict in favor of the defendants. The case is here upon a bill of exceptions sued out by the plaintiff, complaining that the court erred in overruling its motion for a new trial, and a cross-bill of exceptions sued out by the defendants, assigning error upon various rulings adverse to them.

The notes sued on referred to a contract which had been entered into between the parties, and made the same a part of each note. It appears from this contract that the plaintiff had sold to the defendants a set of computing scales for the sum of \$80. In this contract appeared the following words: "Guaranty. Should said National computing scales get out of order at any time within two years from date of shipment, with ordinary use (not dropped or broken), the National Computing Scale Co. to quickly repair the same free of charge; the purchaser paying transportation charges to and from the factory." Other than this clause, there was no reference in the contract to the subject of a warranty. The defendants had paid one-half of the purchase money, and the notes sued on were for the balance claimed to be due by them. The defendants' plea set up that the consideration of the notes had entirely failed, and that the scales were not reasonably suited to the uses intended, and that by reason of these facts they had been damaged to the extent of the sums paid by them on the purchase money, and other damages set forth in the plea, resulting from an attempt to use the scales. While there is no express warranty in the contract, other than the warranty that the plaintiff will repair any defects when not brought about in a given way, still there is nothing in the contract which excludes the implied warranty of the law; nor is the transaction one of such a nature as that such warranty would be excluded. The plaintiff therefore at the time of the sale warranted that the scales were reasonably suited to the uses intended, and if this was not true, by reason of any defect then existing, the plaintiff would not be entitled to recover, without regard as to whether the defendants had given it any opportunity to make the scales so suited. But the defendants could not defeat a recovery on account of a defect which arose after the sale, unless it appeared that the scales were returned to the plaintiff, and it had failed

or refused to repair the same within a reasonable time, or unless it appeared that the defect was of such a character that it could not have been remedied by the plaintiff if the scales had been returned to it. If the scales, when sold, were not reasonably suited to the uses intended, or if the plaintiff, after they had been returned to it, had failed or refused within a reasonable time to repair a defect arising after the sale, or if such defect was of such a character that it could not have been remedied, the defendants would be entitled not only to a finding on their plea of failure of consideration, so far as the notes sued on were concerned, but also on their plea of recoupment, at least to the extent of the amount which they had paid on the purchase money. See, in this connection, *Cochran v. Jones*, 85 Ga. 684, 11 S. E. 811. The charge of the judge was not in exact accord with what is above laid down, and, as the motion for a new trial contained a ground which assigned error upon specified portions of the charge,—that the same were not adjusted to the facts of the case,—the court erred in refusing to grant a new trial.

The foregoing disposes of all questions made by the main bill of exceptions that require extended notice. The court overruled a motion to strike a certain portion of the defendants' plea which set forth certain representations which had been made by the agent of the plaintiff to the defendants in regard to the character and quality of the scales. There being a written contract between the parties, which in terms set forth that it contained all of the stipulations entered into by them, the defendants cannot be allowed by parol to add to or vary the terms of this contract. If the representations of the agent had this effect, the portion of plea containing them should have been stricken. If the representations of the agent did not have the effect of adding to or varying the contract, that portion of the plea containing them should have been stricken as surplusage.

2. Complaint is made in the cross-bill of exceptions that the judge erred in charging the jury, in substance, that as the contract was made by the defendants after the latent defects were discovered, and with a full knowledge of these defects, they could not recover any payments made, whether the machine was worth anything or not. As an abstract proposition of law, what is said by the court is probably correct, but the complaint is that the charge was error because it was not adapted to the facts of the case. The defendant Bentley testified distinctly that he made the payments upon the express promise of the attorney of the plaintiff that he would have the defects in the scales removed. If the jury believed that this was true, and also believed that the defects in the scales were of such a character that they could not be remedied, the defendants would be entitled to recover on their plea of re-

coupment. See, in this connection, Means v. Subers, 115 Ga. 371, 41 S. E. 633.

3. Attached to the summons in the justice's court were copies of the four notes sued on, and of the contract which was referred to in the notes, and made a part of the same. A motion was made to strike the contract as an exhibit. There was no error in overruling this motion. The contract was a part of each note, and was properly exhibited to the summons. There was no error in refusing to allow the defendants to amend their answer by filing what was characterized by them as a plea of non est factum. This plea was defective for the reason that it did not deny the execution of the contract, but, on the other hand, really admitted that the same had been executed by them. Nor was there any error in admitting in evidence the contract, without requiring the plaintiff to produce the subscribing witness.

Judgment on both main and cross bill of exceptions reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 448)

WESTERN & A. R. CO. v. HUNT.

(Supreme Court of Georgia. Oct. 30, 1902.)

NEW TRIAL—VERDICT—INSUFFICIENCY OF EVIDENCE.

1. Where the record constrains the conclusion by this court that the plaintiff's own evidence does not sustain the theory set up in her declaration (that for the defendant being against this theory), this court must hold that a verdict rendered in her favor is an illegal one, and reverse the judgment of the court below denying the defendant's motion for a new trial, containing the general grounds.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by Etta Hunt against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye and Starr & Erwin, for plaintiff in error. W. R. Rankin and Cantrell & Ramsaur, for defendant in error.

ADAMS, J. Mrs. Hunt obtained against the railroad company a verdict in a case in which personal injuries were claimed. The motion for a new trial contained, among others, the general grounds that the verdict was contrary to law and the evidence, and a bill of exceptions was taken to the judgment of the court overruling this motion.

We are constrained to reverse the judgment of the court below upon the ground that the plaintiff's evidence did not sustain her case, particularly in the light of the great weight of testimony introduced in behalf of the railroad company. We fully recognize that questions of fact are for the jury, and that their discretion as to the facts is a wide one. We believe, also, that they are better

judges of the facts than are courts, and we have great respect for their verdicts. They are often affirmed in cases where it seems clear to the members of the appellate court that, if they had been in the jury box, they would have rendered a different verdict. We recognize, also, that the discretion to set aside a verdict on the ground that it is strongly and decidedly against the weight of the evidence is reposed by law in the presiding judge, whose opportunities for determining this question are necessarily very much better than those of this court. At the same time, this discretion is a legal, and not an arbitrary, one. If, under any reasonable view of the evidence, the verdict cannot be sustained, it is an illegal verdict,—as completely so as if it were rendered in the teeth of a positive statute. In this event a judgment of reversal does not mean that this court substitutes its opinion for that of the jury, or that it invades the province of either the jury or the presiding judge. It means only that in the opinion of the court the presiding judge has not made a legal use of the discretion placed in him by law. In section 5477 of the Civil Code it is provided that, "in any case when the verdict of the jury is found contrary to the evidence and the principles of justice and equity, the presiding judge may grant a new trial before another jury." Section 5482 provides that "the presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding." It will be seen that this discretion is placed in the presiding judge, who, because he has seen the witnesses and their manner of testifying, and has become possessed of the facts in the case as no appellate court reading a record can be, has a much better opportunity of determining whether or not a verdict ought to be sustained than that enjoyed by this court. But this court has held more than once that this discretion is not arbitrary, but is one to be exercised according to legal principles. A case must be an exceptional one to justify the interference, and this court will not interfere unless the record requires a conclusion like that announced in the headnote.

The declaration of the plaintiff proceeds upon the idea that the company's agents, against her will, forcibly and violently removed her from a moving train, in reckless, if not in wanton, disregard of her rights and her safety. The third paragraph of the petition, after setting forth that, just before the train reached the station of the plaintiff's destination, she arose rapidly, with her babe in her arms, and went upon the platform in order to alight, then alleges: "When petitioner reached the platform, the train had begun to move, and while petitioner stood on the steps, not feeling safe in stepping off with her babe in her arms while the tr

was in motion, the conductor and another employé of the said railroad company caught petitioner and pulled her off the steps to the ground with great force." The fourth paragraph alleges that her injuries were "caused by being pulled violently to the ground as aforesaid by the conductor and other employé," and concludes as follows: "All of which petitioner charges was caused by the violent manner in which the employés of defendant took her from the said company's train." The sixth and most important paragraph of the petition is the only one that charges negligence upon the defendant company, or mentions negligence in any way. This paragraph reads as follows: "Petitioner further charges that it was through the willful negligence of defendant's employés that the train was started before she was able to reach the door of the car and alight therefrom, and that her injuries resulted from the forcible manner with which they took her from the car while in motion. Petitioner charges that the conduct of defendant's employés in putting her off the train was aggravating, both in act and intention, and that she is thereby injured in the sum of ten thousand dollars." We have quoted all of the declaration, as it appears in the record, which illustrates the theory upon which the plaintiff's case was based. No effort was made to show that it was through the willful negligence of any employé that the train was started. At most, so far as this feature of the case is concerned, the railroad company might be said to have started its train too quickly before giving this passenger a reasonable opportunity to alight. The case, however, by the evidence and by the argument of counsel for the defendant in error, is predicated upon her forcible removal. Certainly this is the theory of the declaration, by which the plaintiff must stand or fall. An examination of the evidence of the plaintiff herself shows that she failed to sustain this theory. It must be borne in mind that this court has more than once ruled that, where a party to a suit makes statements upon the stand concerning his or her case which are not harmonious, that one must be taken as true which bears most strongly against his or her right to recover. Concerning this point there are several statements. The plaintiff below says: "Train had started. Conductor took one arm, and flagman the other, and pulled me off. Train gave a lurch when I got to the door." Again: "I was undecided what to do, when conductor took one arm, and flagman the other, and jumped me to the ground with my baby." In another place she states: "They pulled me to the ground with a great deal of force. Having my baby, I couldn't well prevent the shock. I came down with a great deal of force." Immediately afterwards she says: "I had to steady myself. I just jumped; just gave way little; fell around." The truth of the matter is, accord-

ing to her testimony, that she stood upon the steps of the platform, uncertain whether to alight or not while the train was in motion, and the conductor and another employé took hold of her and "jumped" her to the ground. It is not a case of her forcible removal, or one in which, against her will and her resistance, she was pulled violently to the ground. Her mother and two other lady passengers were helped to the ground by this same conductor and train hand just before this plaintiff. The mother testified concerning her daughter: "I got off before my daughter. She had the baby. She did not reach the ground before the cars began to move, and she stood on the steps, uncertain what to do. She was assisted by the conductor and flagman. The conductor took her by one arm, the flagman by the other, and they jumped her from the steps of the car. She had her baby in her arms when she got off the car." This is all the testimony from the plaintiff's mother on the subject. According to the conductor, whose testimony showed that he had been acting in this capacity for more than 32 years, and had never before had any trouble, or even been a witness in a case against the railroad, the train hand who assisted the conductor, and the other two lady passengers, who alighted at the same time, the plaintiff was assisted to the ground politely and gently, and nothing happened which could possibly have caused her any damage. This defense of the railroad company was supported by a great deal of corroborative evidence. If it served any useful purpose, it could be shown that the testimony adduced by the plaintiff in rebuttal merely corroborated her as to the fact that the train had started to move when she was on the steps. It is not consistent with the theory that any sort of violence, rudeness, or improper conduct was observed towards her. Recognizing, however, that the wide discretion of the jury could permit them to predicate the verdict upon the testimony of the plaintiff herself, no matter how great the preponderance on the other side, we have been careful to show what the theory of the plaintiff's declaration is, and her own evidence, which, in our opinion, does not sustain that theory. Reluctant as we are to interfere, or seem to interfere, with the discretion of the jury and of the presiding judge, we nevertheless feel bound to reverse the judgment of the court below denying the motion for a new trial. This renders it unnecessary to consider the exceptions to the charge of the court with reference to the damages recoverable. It appearing from the evidence that the plaintiff was living apart from her husband, it is, perhaps, not amiss to say that we do not discover any error in this charge that could have been prejudicial to the defendant company.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 557)

LOCKHART v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

INDECENT EXPOSURE—PUBLIC PLACE—INDICTMENT.

1. To constitute a notorious act of public indecency, within the meaning of Pen. Code, § 390, it is essential that the act should have been committed at a time when and in a place where it could have been seen by more than one person.

2. An indictment charging one with "publicly and indecently exposing his secret or private parts of his person" in the presence of one named individual, but which fails to charge that the act was committed at a place where it could have been seen by more than one person, should have been quashed on a demurrer raising this objection.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Barney Lockhart was convicted of crime, and brings error. Reversed.

A. W. Cozart, S. T. Pinkston, and E. J. Wynn, for plaintiff in error. Peter Preer, Sol., for the State.

COBB, J. Barney Lockhart was arraigned in the city court of Columbus upon an indictment charging that he "on the 9th day of July, in the year nineteen hundred and two, in the county aforesaid, did then and there, unlawfully and with force and arms, publicly and indecently expose his secret or private parts of his person in the presence of one Mrs. E. M. Brumage, contrary to the laws of said state," etc. The accused demurred to the indictment upon various grounds,—among them being that the facts alleged did not constitute an offense against the laws of the state, that the indictment failed to allege that the act of indecency was in a place where it might have been seen by more than one person, and that it did not allege that the act was committed in a public place. The Penal Code provides that "any person who shall be guilty of * * * any notorious act of public indecency, tending to debase the morals, * * * shall be guilty of a misdemeanor." Pen. Code, § 390. A person is not guilty of a notorious act of public indecency, within the meaning of this statute, unless the act is committed at a place where and at a time when more than one person was in a position to see it. See *Morris v. State*, 109 Ga. 351, 34 S. E. 577. It is not absolutely essential that this place should be a public road or street, but it is at least necessary that it should be at a place that is for the time being open to a portion of the public, as distinguished from a private room or dwelling, which at the time is occupied by the inmates only. But no matter where the place, it is absolutely essential, not that more than one person should have actually seen the exposure, but that more than one person was in a position where it would have been possible for them to have seen it. While the indictment charges that the ac-

cused publicly exposed his private parts in the presence of one named person, it does not allege that this exposure was in a public place, or in any other place where it could have been seen by more than one person. The allegation of the indictment is that it was done in the presence of one person, and this was not a sufficient allegation to make out the offense. The accused was entitled to an indictment perfect both in form and substance, if he called for it at the proper time and in the proper way. He called for it before arraignment and by a special demurrer. The demurrer so filed was well taken, and the court erred in overruling it. See *Adkins v. State*, 103 Ga. 6, 29 S. E. 432, and cases cited.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J.; absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 537)

WALKER v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

HOMICIDE—TRIAL—STATEMENT OF ACCUSED—CROSS-EXAMINATION—INSTRUCTIONS—POSTPONEMENT.

1. In making a statement the accused is not under examination as a witness, and his counsel has no right to ask him questions. If, in continuing his statement, the prisoner refers to the subject-matter of a suggestion or question which his counsel has made, and prior to such reference the accused has been notified by the judge that if he answered the suggestion or question he would subject himself to cross-examination, he is not even then lawfully subject to such examination. The right to make such a statement as he may deem appropriate is by law given to a prisoner on trial, and, unless he consents thereto, he cannot be compelled to answer questions on cross-examination.

2. The manner of conducting a trial of one charged with a criminal offense is largely within the discretion of the judge presiding, and when, after the evidence of both sides has been closed, the trial judge suspends the progress of the trial for a limited time, for the purpose of procuring the attendance of an important witness, such discretion is not abused.

3. No evidence appears in the record which authorized a charge in relation to threats.

4. The evidence was sufficient to authorize the judge to instruct the jury as to the law of conspiracy.

5. When it appeared on a trial for murder that the deceased was shot and wounded by the defendant, using a shotgun, and another person, using a pistol; that one of the wounds inflicted by the pistol was certainly mortal, and probably one or more of the wounds inflicted by the shotgun were so,—a charge to the effect that, if the jury should believe that no conspiracy existed between the parties doing the shooting, yet, if they should believe that the defendant inflicted on the deceased a wound that would have produced death, they were authorized to convict the defendant, provided the other elements of murder existed when he shot, was error. (a) To sustain a conviction of murder in such a case, the evidence must be such as to authorize the jury to find that death ensued as the result of the act of the defendant on trial.

(Syllabus by the Court.)

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1552.

Error from superior court, Sumter county; **E. A. Littlejohn**, Judge.

Pomp Walker was convicted of murder, and brings error. Reversed.

Bialock & Cobb, for plaintiff in error. **J. A. Ansley, Jr., F. A. Hooper**, Sol. Gen., and **Boykin Wright**, Atty. Gen., for the State.

LITTLE, J. Walker, together with one Jones, was jointly indicted for the murder of Holton. Walker was separately placed on trial, and convicted. He submitted a motion for a new trial, which being overruled, he excepted. We reverse the judgment of the court below overruling the motion for a new trial on the ground that the evidence, as it appears in the record, does not show beyond a reasonable doubt that the accused was guilty of the offense as charged, and because of certain rulings made by the trial judge, which will be hereafter considered. It is not, we think, necessary to set out the evidence upon which the state relies to support the conviction. It may not be amiss, however, to remark that the brief sets out the evidence in such a confused and disconnected manner as to make it a work of great difficulty to determine what has or has not been proven. If any attempt was made to put the evidence in narrative form, we must say that it was not very successful. It will be sufficient, however, in reference to the evidence, to say that enough may be gathered from the brief to show that the jury were authorized to find that the plaintiff in error shot the deceased, without excuse, with a gun. It does not at all show that he shot him with a pistol, nor does it satisfactorily appear that the deceased died from the effects of the wounds inflicted by the accused.

1. The first and second grounds of the amended motion will be considered together. It appears that during the trial, and while the accused was making his statement to the jury, his counsel, addressing the court, said that he would like to direct the mind of the accused to a particular fact, and let him explain it. In response to this request, the court informed counsel that the latter could ask questions of the accused under the rule, if he desired. Counsel then replied that he did not desire to do so, but wished to direct the attention of the accused to a certain matter, and let him explain that. The trial judge then directed the prisoner not to answer that question (suggested by counsel), and stated that if he did he would subject himself to cross-examination. Counsel then, addressing the prisoner, remarked, if there was anything else that he desired to state, to do so; if not, to come down. The prisoner then referred to the subject previously suggested by counsel to the court, and explained the matter to which his attention had been thus directed. The solicitor general then insisted that reference to that subject subjected the prisoner to cross-examination, and the

court so ruled. His counsel objected to a cross-examination, which objection was overruled, because the prisoner had answered the question suggested by his counsel. The court then permitted the prisoner to be cross-examined by the solicitor general. The bill of exceptions assigns as error the refusal of the court to allow defendant's counsel to direct the mind of the prisoner to the subject about which he had neglected to make a statement, and also to the ruling of the court which allowed the prisoner to be cross-examined. It was said by Judge Bleckley, in delivering the opinion in *Brown v. State*, 58 Ga. 212: "In making his own statement to the court and jury, the prisoner is not under examination, and his counsel has no right to ask him questions. Doubtless the court might, at the prisoner's request, permit questions to be put to him, as matter of discretion." See, also, to the same effect, *Echols v. State*, 109 Ga. 508, 34 S. E. 1038. The ruling in the *Brown Case*, supra, was made because of the fact that while Brown was making his statement his counsel proposed to examine him; and the judge not only refused to allow this to be done, but also declined to hear from counsel as to the question which it was desired to ask the prisoner; and we entirely agree in the view expressed by Judge Bleckley, that counsel had no right to ask the accused questions in relation either to matters stated or any not stated. The privilege which the law gives a prisoner to make a statement is a much-abused one. This right was granted in the interest of truth and justice, but it extends no further than to permit the prisoner himself to make to the court and jury just such a statement as he deems proper in his defense. The statement which the law recognizes is not evidence, and should consist only of just such things in relation to his case as the prisoner himself wishes to say. The statement to be made, and as made, must be that of the prisoner. In the case of *Robinson v. State*, 82 Ga. 535, 9 S. E. 528, it appeared that on the trial, after the conclusion of the statement made by the accused, the trial judge asked of the prisoner whether he meant to deny the testimony of the witnesses. This court ruled that such interrogation was improper, and, referring to the matter in the opinion which he delivered in that case, Chief Justice Bleckley said: "It certainly was irregular to interrogate Henry Goldsmith, after he had concluded his statement, by asking him whether he meant to deny the testimony of the witnesses; but the court explains that this was done for the purpose of calling attention to an omission in the statement, and with a purpose altogether friendly. The motive was a kind one. Nevertheless the act was not well-advised, and we cannot approve it." We have, then, two propositions expressly ruled by this court: First, that his counsel has no right to ask questions of the prisoner while

he is making his statement, in relation to the same; second, that the trial judge himself cannot do so. While counsel, as thus shown, has no right to ask the accused questions, nor to make suggestions to him, in relation to the matter of his statement, this court, in a later case (*Echols v. State*, supra), ruled that it was in the discretion of the judge to allow either to be done. In the present case the judge, in the exercise of his discretion, refused to allow the desired suggestion to be made. In doing so he did not abuse his discretion. In overruling the motion for a new trial, his honor who presided in the court below places his ruling by which he allowed cross-examination on the idea that the prisoner had been instructed by the court that, if he answered the question or suggestion made by counsel, it would subject him to cross-examination, and that, as the prisoner did answer the question or suggestion, he was thus lawfully subjected to a cross-examination. We cannot agree in this view. We know of no rule of law or practice which sanctions it. The statute expressly declares that the prisoner shall not be compelled to answer questions on cross-examination should he think proper to decline to answer them. Furthermore, so long as the prisoner confines his statement to matters connected with his defense, he has the right to refer to any particular phase of it, and this he may do without let or hindrance. While counsel has no right to make suggestions to him, or to put any question to him, if he do so, even while out of order, the prisoner may lawfully incorporate in his statement any matter which involves the subject of the suggestion or question, without placing himself at any disadvantage, because his right to make such a statement as he may deem proper is unqualified. It does not appear in this case that the prisoner consented to be cross-examined. His counsel objected to it, and when the court ruled that by answering the suggestion of question of his counsel the prisoner has subjected himself to cross-examination, under which ruling the prisoner was cross-examined, he committed an error which required the grant of a new trial.

2. It is insisted that the trial judge erred, after both the state and the defendant had closed, in allowing the case to be suspended, on the application of the solicitor general, for the purpose of sending for a witness; the defendant at the time objecting to such suspension. To this ground of the motion the presiding judge attaches an explanatory note to the effect that on satisfactory proof submitted to the court of the existence of the witness, the importance of his testimony, and that the solicitor general had just heard of the same, he suspended the trial from 11:45 a. m. to 3:10 p. m. in order to secure the presence of the witness. We find no error in this. The manner of conducting a trial is largely in the discretion of the judge presiding, and that discretion was not abused

by a suspension of the trial for the limited time named for the purpose of procuring the evidence of an important witness. On the contrary, such a suspension seems to have been in the furtherance of justice.

3. An examination of the evidence fails to disclose that any witness testified as to threats made on the part of the accused against the deceased, and for that reason it was error on the part of the trial judge to charge the jury in relation to threats.

4. Complaint is made that the court erred in charging the jury in relation to the law of conspiracy. The accused, with one Jones, was jointly indicted, and the charge objected to appears to be a full and accurate presentation of the law in relation to the liability of one of two conspirators for the acts of the other. There can be no objection to the matter of the charge, and, on a review of the evidence, we find there was evidence which tended to some extent, at least, to show that the accused and Jones had entered into a conspiracy to kill deceased.

5. It is claimed that the court erred in instructing the jury as follows: "After going through the evidence, if you should have a reasonable doubt on your mind that any conspiracy existed between these parties, Pomp Walker and Eli Jones, to take the life of this deceased, Tom Holton, yet if you should believe from the evidence that wounds were inflicted upon the deceased by Eli Jones, and that the defendant in this case inflicted a mortal wound on Tom Holton,—a wound that would have produced death,—then you would be authorized to return a verdict finding the defendant guilty of murder, provided you believe that all the other elements of murder existed about which I have charged you." When fairly construed, we think this portion of the charge might be understood to have this meaning: That if both Jones and the accused inflicted wounds on the person of the deceased, and the wounds inflicted by the accused would have resulted in death, then the accused could be lawfully convicted, although, as a matter of fact, the wound inflicted by Jones may have been the immediate cause of the death. So construed, this charge was error. The state charged that Walker was guilty of murder in killing Holton. It was therefore incumbent upon the state, before a conviction for any grade of homicide could have been had, to prove not only that the deceased was killed, but that he died from the effects of a wound inflicted by the accused. Mr. Kerr, in his treatise on the Law of Homicide (section 31), on authority, lays down the following propositions: "Where the defendant inflicts a fatal blow, he cannot escape liability for his wrongful act from the fact that other blows were subsequently inflicted by other persons which hastened the death. But if one inflicts a mortal wound, and, before death ensues, another kills the same person by an independent act, without concert or procurement of the

one who caused his first wound, the first person cannot be convicted of murder," etc. Mr. Wharton, in volume 1 of his Criminal Law (section 153), says: "When, after a wound, a new and independent causation intervenes, producing death, this relieves parties to whom such new causation is not imputable." And again, in the same volume (section 309a): "The death must be traced to the blow charged to the defendant." "It has been ruled that if a person receives a wound willfully inflicted by another, which might cause death, and death actually follows, the burden is on him who inflicted it to show that it did not cause the death." Hughes, Cr. Law & Proc. § 87. The converse of this proposition must be true; that is, if the person inflicting such wound in fact shows that it did not cause the death,—as, for instance, by showing that death actually occurred in consequence of a wound inflicted by another,—he meets this burden, and cannot be convicted. It is, however, unnecessary to cite authorities to support this proposition. Of course, in the case of a proven conspiracy, one may be found guilty, while another inflicted the wound which caused death. But in an individual case, one cannot be lawfully convicted of murder when it is shown that the deceased really died from another and a distinct wound, inflicted by a different person. We, of course, are not to be understood as saying that the evidence in this case shows that the deceased did not die from the wound inflicted by the accused. That is a question for legitimate determination by a jury. We are intending only to meet the proposition involved in the instruction to the jury under consideration. That instruction contains the proposition that, if the accused inflicted on the person of the deceased a wound that would have produced death, the jury would be authorized to return a verdict of guilty, if the other elements of murder existed. The charge was error. The jury could not have lawfully convicted the accused of murder, if he was acting independently when he inflicted the wound, unless they could find from the evidence that the wound inflicted was the cause of death.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 515)

PAULK v. STATE

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—REVIEW—MANSLAUGHTER.

1. It does not appear that the trial judge committed any error for the causes assigned in the special grounds of the motion for a new trial.

2. The finding by the jury that the accused was guilty of the offense of voluntary manslaughter was fully authorized by the evidence. Therefore the trial judge committed no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Coffee county; Jos. W. Bennett, Judge.

Dennis Paulk was convicted of voluntary manslaughter, and brings error. Affirmed.

E. D. Graham and Leon A. Wilson, for plaintiff in error. John W. Bennett, Sol. Gen., and Quincey & McDonald, for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 527)

GULLY v. STATE

(Supreme Court of Georgia. Nov. 12, 1902.)

BIGAMY—INDICTMENT—FORMER ACQUITTAL—EVIDENCE—GENERAL OBJECTION.

1. An acquittal under an indictment charging that the accused committed bigamy by contracting an unlawful marriage with "Gussie Shingler" will not be a bar to a prosecution subsequently instituted under an indictment charging that, on the same date as that named in the first indictment, the accused committed bigamy by contracting an unlawful marriage with "Bessie Shingler," especially when it appears that, at the time upon which the marriages were alleged to have taken place, there were in life persons answering to the names both of Gussie and Bessie Shingler. The above is true notwithstanding it appears that the witness who testified before the grand jury by mistake gave the name of Gussie Shingler when he intended to give that of Bessie, and that the name of Gussie was inserted in the indictment under a misapprehension growing out of this mistake of the witness; there having been but one marriage, and it having been in fact contracted with Bessie, and not Gussie.

2. Where objection is made to specified evidence as a whole, part of which is admissible and part inadmissible, and the objection does not point out the objectionable portion, there is no error in admitting the entire evidence.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

R. C. Gully, alias C. R. Bridges, was convicted of bigamy, and brings error. Affirmed.

W. D. Sheffield, by J. D. Harrison, for plaintiff in error. W. E. Wooten, Sol. Gen., by R. R. Arnold and Donelson & Fleming, for the State.

COBB, J. R. C. Gully, sometimes known as C. R. Bridges, was placed upon trial, charged with the offense of bigamy; the indictment charging that on November 7, 1901, the accused married one Bessie Shingler; his lawful wife, Annie Bridges, being then in life, which fact was known to him. The accused filed a special plea setting up that at a previous term an indictment had been preferred against him, charging him with the offense of bigamy, in that on November 7, 1901, he had married one Gussie Shingler, —his lawful wife, Annie Bridges, being then

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1897.

in life, which fact was known to him; that he was arraigned on this indictment, and pleaded "Not guilty"; and that the trial resulted in a verdict of acquittal; a copy of the proceedings being attached to the plea. It was alleged that the offense charged in the indictment in the present case is the same as that charged in the indictment upon which the accused was previously indicted; that the present indictment charges identically the same and only the offense charged in the former indictment; that, in order to convict upon the present charge, it would be necessary to introduce the same evidence, without any additional facts, as was produced upon the trial under the former indictment; that the finding of the jury at the former trial was upon the same evidence and issue that would be had and made in the present case, and none other; that while the former indictment charged that the accused committed the offense of bigamy by marrying Gussie Shingler, and the present indictment alleges that he committed the offense by marrying Bessie Shingler, still both indictments relate to the same unlawful marriage, and both allege the same date upon which the marriage took place; the only difference in the allegations in the two indictments being in the name of the person with whom the marriage was alleged to have been contracted. It appeared from the evidence that there were two Shingler sisters, one named Gussie and the other Bessie; that no marriage had taken place between Gussie and the accused, she herself being married to another on the date she was alleged in the indictment to have been married to the accused; and that the only unlawful marriage contracted by him was the one with Bessie Shingler. The name of Gussie appeared in the first indictment as the result of a mistake made by a witness who testified before the grand jury, the witness intending to give the name of Bessie instead of that of Gussie. The accused entered a plea of not guilty upon the indictment, and the issue raised by this plea and that raised by the special plea were submitted to the same jury, by whom a verdict was returned finding the accused guilty; thus, in effect, finding against the special plea. The accused filed a motion for a new trial upon various grounds. The motion was overruled, and he excepted. The only grounds of the motion which were insisted on in this court were those which alleged, in substance, that the verdict, so far as it amounted to a finding against the special plea, was contrary to evidence, and one ground which assigned error upon the admission of certain testimony.

1. It is contended that under the evidence the jury should have found in favor of the special plea setting up former acquittal, for the reason that the offense involved in the present case was the same as that for which the accused had been placed on trial and acquitted. To entitle the accused to plead suc-

cessfully former acquittal, the offenses charged in the two prosecutions must have been the same in law and in fact; and, while there is no infallible test that can be applied in all cases for determining the identity of the offenses charged in the different indictments, it has been said that it is a rule of almost universal application that if the facts required to support the second indictment would have been sufficient, if proved, to procure a conviction under the first indictment, the offenses are identical. See 17 Am. & Eng. Enc. Law (2d Ed.) 596, 597. See, also, 1 Archb. Cr. Proc. & Pl. (8th Ed.) top page 341. The rule above referred to is that which is sometimes called the "same evidence test." There is also another rule which declares that if the prosecution under the second indictment involves the same transaction which was referred to in the former indictment, and it was or might have properly been the subject of investigation under that indictment, an acquittal or conviction under the former indictment would be a bar to a prosecution under the last indictment. This rule is sometimes called the "same transaction test." The latter rule has been the one adopted and generally followed in this state. In *Roberts v. State*, 14 Ga. 8, Judge Starnes, after stating that there seemed to be some difficulty about applying in all cases the rule known as the "same evidence test," says: "To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz., that the plea of *autrefois acquit* or *convict* is sufficient whenever the proof shows the second case to be the same transaction with the first." The rule thus laid down was applied in the following cases: *Holt v. State*, 38 Ga. 187; *Jones v. State*, 55 Ga. 625; *Buhler v. State*, 64 Ga. 504; *Goode v. State*, 70 Ga. 752; *Knight v. State*, 73 Ga. 804; *Knox v. State*, 89 Ga. 259, 15 S. E. 308. See, also, in this connection, *Crocker v. State*, 47 Ga. 568; *Johnson v. State*, 65 Ga. 94 (2); *Craig v. State*, 108 Ga. 776, 33 S. E. 653; *McWilliams v. State*, 110 Ga. 290, 34 S. E. 1016.

If the two prosecutions really involve the same transaction, the fact that the offense charged in the second indictment is by name a different offense from that which is set forth in the first does not prevent a judgment under the first from being a bar to the second prosecution. *Holt v. State*, supra. On the other hand, if the two offenses are nominally the same, but are substantially different, a judgment in one will not be a bar to a prosecution in the other. *Brown v. State*, 85 Ga. 713, 11 S. E. 831 (3). It has also been held that where a person has been put in jeopardy of a conviction of an offense which is a necessary element in, and constitutes an essential part of, another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same act. *Bell v. State*, 103 Ga. 397, 30 S.

E. 294, 68 Am. St. Rep. 102. See, also, *Copenhagen v. State*, 13 Ga. 264; *Pat v. State*, 116 Ga. 92, 42 S. E. 389. In *Blair v. State*, 81 Ga. 629, 7 S. E. 855, it was held that the true rule is, if the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of additional facts would be necessary to complete the offense charged in the second indictment, the former conviction or acquittal could not be pleaded in bar of the second. In that case a conviction for selling liquor without a license was upheld, notwithstanding the accused had been convicted on another indictment of selling liquor to a minor; the two cases involving the same sale. This case apparently applies the "same evidence test," and disregards the "same transaction test." The ruling in the *Blair Case* was followed in *Smith v. State*, 105 Ga. 724, 32 S. E. 127. See, also, *Copenhagen v. State*, supra. What was said in *Bryant's Case*, 97 Ga. 105, 25 S. E. 450, in reference to the "same evidence test" being the true test as to whether a plea of former acquittal or conviction should prevail, was obiter; the ruling in that case being entirely consistent with the rule known as the "same transaction test." Without reference to which is the sounder rule, the "same evidence test," or the "same transaction test," the latter has been, since the decision in 14 Ga., generally accepted as the rule in this state. Under this rule, it becomes necessary in each case to determine whether both indictments, and the investigations that may be had thereunder, relate to the same offense; that is, in order to successfully defeat a prosecution under the last indictment, it is incumbent upon the accused to identify the offense charged in the second indictment with that which was, or could have been, made the subject of investigation under the first indictment. In *Sweeney v. State*, 16 Ga. 468, Judge Benning said: "But in all pleas of former acquittal or former conviction, the proof of the plea has to consist partly of matter of record and partly of matter not of record. And the identity of the two cases is the part of the plea which it is the peculiar business of the evidence which is not of record to make out." In determining whether the two offenses are identical, we must not look to the indictment alone or to the proof alone, but to both the proof and the indictment. If the evidence offered under the issue formed upon the special plea shows that no other transaction than that sought to be investigated under the second indictment could have properly been the subject of investigation under the first, then an acquittal under the first indictment would be a bar to a prosecution under the second, notwithstanding the fact that there could not have been a conviction under the first indictment, for the reason that the proof offered in support of it failed to establish allegations descriptive of the offense ordinarily immaterial, but which

the pleader had made material by averment. Thus it was held in *Buhler's Case*, supra, that where the accused had been indicted for stealing a cow which was the property of H., and had been acquitted, and he was again indicted for stealing a cow which was the property of H., the description being different from that alleged in the first indictment, and it appeared on the trial that H. had only one cow, and this cow was the one referred to in both indictments, and the testimony in each case related to this cow, a verdict finding against the plea was contrary to law. And in *Goode's Case*, supra, it appeared that the accused was tried and acquitted under an indictment charging him with larceny from the house, and alleging ownership of the house and the goods stolen in the prosecutor, and was subsequently arraigned upon another indictment for larceny from the house; the indictment alleging a different ownership of the house and the goods stolen. It was held that a plea of former acquittal which set out fully the first indictment and the proceedings had thereon, and averred that the transactions embraced in both indictments were one and the same, was improperly stricken on demurrer. To the same effect was the ruling in *Knight's Case*, supra. In all of these cases it appeared that the indictment referred to the same property and the same theft, and that the theft referred to in the first indictment in each case could have been properly investigated thereunder, although, on account of a variance in regard to description in identity of the property or ownership, a conviction could not be had. If it had appeared from the second indictment in the *Buhler Case* that the animal alleged to have been stolen was and could not have been the same animal referred to in the first indictment, then, of course, no proceedings under the first indictment would have affected a prosecution under the second; that is, to take an extreme case, if it had appeared in the first indictment that *Buhler* was charged with having stolen a cow, and in the second indictment for stealing a bull, then no proceedings had under the first indictment would affect the right of the state to prosecute under the second; and this would be true notwithstanding it appeared from the evidence upon the issue formed upon the special plea setting up former acquittal that the draftsman of the indictment by mistake described the animal as a bull, when it should have been described as a cow. *Goode's* and *Knight's Cases* are subject to a similar explanation. The ruling in the *Knox Case*, supra, was based upon the ruling in the three cases just referred to; and, even if it is not subject to the same explanation as the other cases, it was a decision by two justices only, and is not controlling as authority. In the present case the first indictment charged an unlawful marriage with *Gussie Shingler*. The proof showed that there was such a per-

son as Gussie Shingler. But whether this was so or not, under the first indictment there could not have been a legal investigation in reference to an unlawful marriage by the accused to any other person than the one named in the indictment. Evidence of a marriage by the accused with Bessie Shingler would not have been admissible under the first indictment. While the offense charged in each indictment is the same, in general terms,—that is, bigamy,—an unlawful marriage to a particular person is an essential element in this offense, and the allegation and the proof in reference to this person must correspond. The offenses charged in the two indictments are not, therefore, identical. In the absence of any evidence at all, the indictments, on their face, show that they could not involve the same transaction. In the light of the evidence that Gussie Shingler and Bessie Shingler were separate and distinct persons, the view is strengthened that it was impossible under the first indictment to investigate the subject of a marriage by the accused with any other person than the one therein named. It is immaterial whether we apply the "same transaction test" or the "same evidence test"; the finding against the special plea was proper. The "additional fact test" and the "essential ingredient test," which have been alluded to above, have no application to a case of the character now under consideration. It is immaterial what the pleader intended when the indictment was drawn. It is also immaterial what the grand jury intended when they found the first indictment. It is immaterial that both the pleader and the grand jury had in mind but one marriage, and that the indictment intended to charge that this marriage was contracted. Under the indictment as it was framed, no other transaction could have been properly the subject of a legal investigation than an unlawful marriage between the accused and Gussie Shingler. An unlawful marriage with Bessie Shingler was a separate and distinct transaction from the alleged marriage between him and Gussie Shingler. The finding against the plea of former acquittal was demanded by the evidence offered to support the same.

2. The only other question argued in the brief of counsel for the plaintiff is that raised upon an objection to the admission of evidence set forth in the fourth ground of the motion for a new trial. The evidence objected to was as follows: Lawrence, a witness for the state, testified: "I found a woman and seven children near Lemay, North Carolina, and I called upon her, visited her home, and showed her the picture of C. R. Bridges,—the picture that you have there is the one that I showed her,—and she recognized it as the picture of C. R. Bridges. She bore the name of Annie Gully, but her maiden name was Bridges. I found that by her marriage certificate in her Bible and her own statement, and how she is known there

through the country,—it was general repute that that was her name." The motion for a new trial assigns error upon the admission of this evidence in its entirety, and says that the evidence was inadmissible because it was hearsay. Counsel for the plaintiff in error, in his brief, argues that the statement that Annie Gully recognized the picture shown her as the picture of her husband was hearsay, and improperly admitted. Let it be conceded that this was a valid objection to that much of the testimony. The objection went to the whole of the evidence, and, if any part of it was admissible, the objection was properly overruled. See *Penitentiary Co. v. Gordon*, 85 Ga. 160, 168, 11 S. E. 584 (5); *Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437 (1); *Chambers v. Wesley*, 113 Ga. 343, 344, 38 S. E. 848 (2), and cases cited. It appeared from the evidence that the accused had admitted that his real name was Gully, that he had a wife and children living in North Carolina, and that her maiden name was Bridges. It was therefore competent for the witness to testify that at a given place in North Carolina, which he had visited, he found a woman with seven children, who was reputed in the neighborhood to be named Annie Gully, and that there was a like repute that her maiden name was Bridges. So much of the testimony offered was admissible. As to what weight should be given it was an entirely different question. What this witness said in reference to the picture of Bridges was inadmissible, but as the objection was to the whole testimony, and part of it was admissible, the objection was properly overruled.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 543)

McINTOSH v. STATE.

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—FORMER JEOPARDY.

1. An acquittal under an indictment charging the accused with the offense of using obscene and vulgar language in the presence of a female will not operate to bar a prosecution for using opprobrious words and abusive language to and of another, even though both indictments related to the same act.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Nick McIntosh was convicted of using abusive language, and brings error. Affirmed.

W. F. Slater, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

COBB, J. The accused was placed on trial upon an indictment charging him with using opprobrious words and abusive language to and of one C. S. Waters on the 31st of April, 1902. He filed a special plea of

former jeopardy. There was a finding against him on this plea. He then pleaded not guilty, and there was also a finding against him on this plea. The case is here upon a bill of exceptions assigning error upon the judgment overruling a motion for a new trial. While the record contains several assignments of error upon rulings made during the trial, the only assignments of error insisted on in the brief of counsel are those which complain of the finding against the special plea of former jeopardy.

It appears that, prior to his arraignment on the indictment in the present case, the accused had been tried in the city court of Savannah upon an accusation charging him with having on the 31st day of April, 1902, used obscene and vulgar language in the presence of females on a street car, and that the trial on this accusation resulted in an acquittal. It appears from the evidence introduced on the trial of the issue framed up on the special plea that C. S. Waters was the conductor of a street car, and that the accused had used to him opprobrious words and abusive language while on the car; that he then left the car, and, when on the ground, again used language of a similar nature; that what occurred on the car and on the ground constituted one continuous transaction, lasting about two minutes; and that the occurrence in which the opprobrious words were used was under investigation in the trial in the city court. It is to be determined whether, under this state of facts, the acquittal in the city court operates as a bar to a prosecution under the present indictment. An indictment for using obscene and vulgar language in the presence of females does not charge the same offense as an indictment which charges one with having used opprobrious words and abusive language, tending to cause a breach of the peace. The offenses are separate and distinct. While both offenses are made penal by the same section of the Code (Pen. Code, § 396), they are no less separate and distinct offenses. A person may in one transaction so conduct himself as to be guilty of both of these crimes. If one uses to and of another opprobrious words and abusive language which is obscene and vulgar, and this is done in the presence of a female, both offenses are committed, though there is only one transaction. In such a case the rule in *Blair's Case*, 81 Ga. 629, 7 S. E. 855, is to be followed. It is there said that if the evidence required to convict under the first indictment would not be sufficient to convict under the second, without proof of an additional fact which was necessary to constitute the offense, former jeopardy could not be pleaded in bar of the second indictment. See, also, *Smith v. State*, 105 Ga. 724, 32 S. E. 127; *Copenhagen v. State*, 15 Ga. 264. One who uses vulgar and obscene language in the presence of a female is guilty of a violation of law, whether that language is

used to or of another or not. To constitute the offense of using opprobrious words and abusive language, even where the language used is also obscene and vulgar, it is essential to a conviction that the language must be used to and of another, and in his presence. A conviction could have been had under the accusation in the city court upon evidence which would not have authorized a conviction under the indictment in the superior court. That part of the transaction which could have been properly investigated under the accusation was not necessarily involved in the investigation under the indictment. In that trial it was wholly immaterial whether the language was obscene and vulgar, or whether it was used in the presence of a female. The finding against the plea of former acquittal was proper. See, in this connection, *Gully v. State*, 116 Ga. —, 42 S. E. 790.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 444)

GEORGIA IRON & COAL CO. v. ALLISON et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

EJECTMENT — RIGHT OF ACTION — SUPREME COURT — REVIEW OF FORMER DECISION — DEMURRER — ABSTRACT OF TITLE.

1. Under the rulings made in *Hilliard v. Connelly*, 7 Ga. 172, and *Brewster v. Wooldridge*, 28 S. E. 43, 100 Ga. 305, the trial judge did not err in overruling a demurrer to a declaration in the common-law form of ejectment on the ground that this form of action had been abolished. The rulings made in the cases named are to the effect that the right to institute an action in that form was neither destroyed nor abridged by the judiciary act of 1799, nor by any of the subsequent acts of the general assembly prescribing the form and character of pleadings which should thereafter be used in this state. (a) The request of counsel for the plaintiff in error to review the cases named cannot be granted, inasmuch as one member of the court is absent, and cannot participate in the decision of this case. See section 5 of the act approved December 17, 1896 (*Van Epps' Code Supp.* p. 76, § 6252).

2. A demurrer to a declaration brought in the form above stated, on the ground that an abstract of title was attached thereto, was properly overruled. (a) The provision found in section 5002 of the Civil Code, to the effect that an abstract of the title relied on shall be annexed to a declaration for the recovery of land and mesne profits, was codified from an act approved December 8, 1860 (*Acts 1860*, p. 43), which by its terms, amended an act approved December 27, 1847 (*Cobb, Dig.* p. 490), which prescribed a short form of a declaration for the recovery of land and mesne profits, and does not apply to actions in ejectment brought in the common-law form.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Flite, Judge.

Action by J. F. Allison and others against the Georgia Iron & Coal Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John W. & Paul F. Akin, for plaintiff in error. J. W. Harris and J. T. Norris, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 559)

BROWN v. STATE.

LEONARD v. SAME (two cases).

(Supreme Court of Georgia. Nov. 12, 1902.)

CRIMINAL LAW—OVERRULING DEMURRER—EXCEPTIONS—RECEIVING STOLEN GOODS—DEMURRER.

1. A judgment overruling a demurrer to an indictment may be made the subject of exceptions pendente lite, and error may be assigned on such exceptions in a bill of exceptions sued out in due time, complaining of the final judgment in the case. In the case of *Banks v. State*, 89 S. E. 947, 114 Ga. 115, there were no exceptions pendente lite.

2. An indictment charging the accused with the offense of receiving stolen goods, in that after "a certain lot of brass, to wit, five thousand pounds," had been stolen, the accused received the same, "to wit, certain lot of brass fittings, to wit, four hundred pounds, of the value of three hundred dollars," knowing the same to have been stolen by the person from whom received, should have been held bad on special demurrer raising the objection that the allegations as to the articles received were not sufficiently specific; the description not being sufficient to identify the articles alleged to have been received, nor to put the accused on notice of the charge he was to meet.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

Richard Brown, D. M. Leonard, and E. A. Leonard were convicted of crime, and bring error. Reversed.

Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

COBB, J. Brown and the Leonards were indicted for receiving stolen goods. They were convicted, and complain that the court erred in overruling a demurrer to the indictment, as well as in refusing to grant them a new trial.

1. The demurrer was overruled on June 25, 1902. Exceptions pendente lite complaining of this ruling were certified and entered of record on July 17, 1902, during the term at which the ruling was made. The motion for a new trial was overruled August 13, 1902. The bill of exceptions complaining of the latter ruling, and also assigning error on the exceptions pendente lite, was tendered within 20 days from the date last mentioned, and was duly certified. The law allowing exceptions pendente lite applies in criminal cases, and the exceptions in the present case were certified in due time. See *Strickland v. State*, 115 Ga. 222, 41 S. E. 713. In *Banks v. State*, 114 Ga. 115, 89 S. E. 947, there were no exceptions pendente lite.

2. The indictment charged that one Charles

Kimball had been lawfully convicted of a burglary of the storehouse of Rourke & Sons, a firm composed of named persons, and that he "did steal from said storehouse of said firm a certain lot of brass, to wit, five thousand pounds, the property of said firm," and that the accused, "well knowing said personal property to have been stolen and feloniously taken as aforesaid, did then and there receive same of and from the said Charles Kimball, to wit, certain lot of brass fittings, to wit, four hundred pounds, of the value of three hundred dollars, the property of said firm, contrary to the laws," etc. The demurrer raises the objection that that part of the indictment describing the articles alleged to have been received is not sufficiently specific; that it does not identify the articles, and does not put the accused on notice of the charge they are called on to defend. All that is necessary to show that the term "fitting" is very general and comprehensive is to look at the definition of the same in some of the standard lexicons. A "fitting" has been defined to be: "Anything used in fitting up; especially (pl.) necessary fixtures or apparatus; as, the fittings of a church or study; gas fittings." *Webst. Dict.* It has also been defined as "anything employed in fitting up permanently; used generally in the plural in the sense of fixtures, tackle, apparatus, equipment; as the fittings of an office; gas fittings." *Cent. Dict.* It will not be contended, we suppose, that an indictment for larceny, describing the articles stolen as a certain lot of fittings, of a given weight and value, would be sufficient as against a special demurrer. *Walthour v. State*, 114 Ga. 75, 39 S. E. 872. Does the mere addition of the material of which the fittings are made make the description sufficient? Is one charged with having received stolen goods, in that he received a "certain lot of brass fittings," of a given weight and value, informed by such averment of the charge he is to meet? Is there anything in such a description to enable him to prepare his defense? Are the articles referred to the brass fittings of a church, or a dwelling, or a ship, or a railroad car, or a buggy, or a carriage, or a bicycle, or an engine? Almost any article of a durable nature may have about it brass fittings. Brass fittings embrace numerous articles, large and small, of various kinds and descriptions, and used for many purposes. An indictment for receiving such articles, knowing them to have been stolen, should be sufficiently specific to reasonably identify the articles alleged to have been so received. In *Walthour v. State*, supra, Mr. Justice Little quotes approvingly the following from Mr. Bishop: "The description should be simply such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge." He also quotes with similar approval the following from Mr. Whar-

lon: "There must be such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded." One reason for requiring the description to be definite is that otherwise the accused would not be able to plead the judgment as a bar to another indictment. See 12 Enc. Pl. & Prac. 979. See, also, the other cases and authorities cited in the Walthour Case. While the description in the present case is not as general and indefinite as that in the Walthour Case, and that case is therefore not absolutely controlling, we think the principle of that decision requires a holding in the present case that the description was fatally defective for the reason that there was nothing therein by which any article or number of articles could have been identified with any reasonable degree of certainty. If the language of that part of the indictment under discussion had been followed by the words "consisting of oil cups, globe valves, injectors, drainers, gauge cocks, siphons, lubricators, piping, return bends, steam gauges, inspirators," it might have been sufficient to have put the accused on notice of the articles they were alleged to have received. See, in this connection, *Cody v. State*, 100 Ga. 103, 28 S. E. 106. But it is certain that an allegation that the articles received were "brass fittings" of a given weight and value would not have accomplished this purpose. Let us assume that the accused are entirely innocent,—and of course, this must always be done in passing upon the sufficiency of an indictment; at what a loss would an innocent man be in the preparation of his defense, when he is called on to meet the charge simply that he received, knowing them to have been stolen, 400 pounds of brass fittings, of the value of \$300. No person could thoroughly prepare to meet such a vague and indefinite charge. While Pen. Code, § 929, provides that an indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury, it has been more than once held that "this section was not intended to dispense with the substance of good pleading, nor to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial, nor to deprive him of the right to have an indictment perfect as to the essential elements of the crime charged." See *O'Brien v. State*, 109 Ga. 51, 53, 35 S. E. 112, and cases cited. The criminal pleader should always avoid unnecessary allegations which are descriptive of the offense, but at the same time he should be careful to make the descriptive averments sufficiently definite and certain to put the accused on notice of the charge he is to meet. The court erred in overruling the demurrer.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

(116 Ga. 570)

ANDERSON v. STATE

(Supreme Court of Georgia. Nov. 13, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. There was no error of law complained of. The evidence was sufficient to support the finding of the trial judge, who presided without a jury. There was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Cartersville; A. M. Faute, Judge.

Shelley Anderson was convicted of crime, and brings error. Affirmed.

Jas. B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

COBB, J. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness. CANDLER, J., not presiding.

(116 Ga. 495)

REYNOLDS & HAMBY ESTATE MORTG. CO., Limited, v. MARTIN.

(Supreme Court of Georgia. Oct. 31, 1902.)

PARTIES—ALIENS—FOREIGN CORPORATIONS—JURISDICTION—RECEIVERS—FRAUD.

1. A petition for a receiver and other equitable relief against two foreign corporations, two individual citizens and residents of another country, and the sheriff of the county in which the petition is filed,—the sheriff being only a nominal defendant,—which does not set forth that either of the foreign corporations has any office, officer, agent, or place of doing business in this state, or that either of the alien individuals resides in said county or is to be found therein, does not set forth any jurisdiction in the superior court of the county of the sheriff's residence in this state, for a proceeding in personam, or a right to obtain a personal judgment against any one of the four principal defendants. An entry of service by the sheriff cannot supply the omission to set forth jurisdiction in the petition.

2. No ground for equitable relief in the defendant in error as an individual is set forth in the petition. (a) It is not made to appear that what he calls a fraud was a fraud upon him in any legal sense. (b) The matters and things set forth in the petition as a reason for interfering with a final judgment obtained by the plaintiff in error against the defendant in error, also set forth in the petition, could have been pleaded to a suit on the bond resulting in this judgment, if they possessed any legal efficacy. (c) The delay and laches of the defendant in error furnish a further reason for noninterference by a court of equity.

3. The defendant in error does not show that, as a stockholder of the two foreign corporations, he is entitled to a receiver to take charge of their assets in this state.

(Syllabus by the Court.)

Error from superior court, White county; J. B. Estes, Judge.

Suit by John Martin against the Reynolds & Hamby Estate Mortgage Company, Lim-

ited, and others. From a judgment for plaintiff, the above-named defendant brings error. Reversed.

J. L. Oakes and H. H. Perry, for plaintiff in error. Spencer R. Atkinson, W. A. Charter, and G. S. Kytie, for defendant in error.

ADAMS, J. John Martin filed in the superior court of White county, in this state, a petition for relief against the Gold Reefs of Georgia, Limited, the Reynolds & Hamby Estate Mortgage Company, Limited, alleged in the petition to be corporations of the kingdom of Great Britain and Ireland, and there domiciled, and Frederick Hunt and Edwin Bowley, also alleged to be citizens of that kingdom, and the sheriff of White county; the last named being only a nominal defendant, and not one against whom, under the decisions of this court, any substantial relief was prayed. A separate demurrer to this petition was filed by the Reynolds & Hamby Estate Mortgage Company on various grounds, which was overruled by the court below, and a bill of exceptions was taken to the judgment of the court overruling this demurrer. The prayers of the petition are for process against each of the defendants named, requiring them to appear at the next term of White superior court to answer the complaint; for the appointment of a receiver to take charge of, and, under the jurisdiction of the court, enforce the collection of, a judgment in favor of this company against the defendant in error set forth in the petition, to retain the proceeds of this judgment to answer such final judgment and decree as may be rendered in favor of the defendant in error; that the receiver be required to take possession of and hold, subject to the final decree and direction of the court, certain real property alleged to belong to the corporation known as the Gold Reefs of Georgia, Limited, one of the defendants, to the end, if the court should finally decree in favor of the defendant in error against the Gold Reefs of Georgia, Limited, that this company is indebted to him in the sum of £1,826, alleged to have been obtained from the defendant in error in consequence of a gross fraud, that the defendant in error might in this way realize on any judgment which might be rendered in his favor in the premises; for a writ of injunction preventing this company from incumbering its Georgia property, and the Reynolds & Hamby Estate Mortgage Company, Limited, from assigning or setting over its judgment to any third party, and preventing the sheriff from advertising the property for sale under this judgment; and finally for general relief. There is no specific or direct prayer for a judgment or decree against any defendant. It is not, in terms, alleged that the defendant in error is entitled to a decree against any defendant, and the indication of

the desire to obtain a decree against the Gold Reefs of Georgia rests upon implication, rather than upon specific statement or prayer. The petition sets forth that the defendant the Reynolds & Hamby Estate Mortgage Company, Limited, had at the November term, 1901, of White superior court, obtained against the defendant in error a general as well as a special judgment for the full amount of a bond given by the defendant in error to this company on the 22d day of February, 1898, covering the sum of £4,000 principal, and secured by a mortgage, which judgment includes £1,826, of which, according to the petition, the petitioner has been cheated and defrauded as stated in the petition. It is admitted in the petition that the defendant in error received £2,174 of the face of his bond, and the general purpose of the petition is to obtain redress as to this balance of £1,826 through the intervention of a court of equity by the appointment of a receiver, the collection of the judgment, and the seizure of the real property heretofore mentioned. The petition also sets forth the alleged rights of defendant in error as a stockholder in the two corporations, and the threatened destruction of those rights. There are no specific prayers that seem to be entirely germane to the status of a stockholder, and these allegations may be inserted for the purpose of giving additional weight and strength to the appeal of the defendant in error for relief as an individual against what he denominates a gross fraud.

1. There is no statement anywhere in the petition which suggests that any one of the four principal defendants has any residence of any kind in the county of White. All of them are alleged to be citizens and residents of the kingdom of Great Britain and Ireland. Neither of the two corporations is alleged to have any agent of any kind in this county. The sheriff of the county is made a party defendant for the purpose of arresting his proceedings under the execution based upon the judgment above mentioned. His connection with the case as a nominal defendant would not give to the court jurisdiction of the case. *Rounsaville v. McGinnis*, 93 Ga. 579, 21 S. E. 123; *Coal Co. v. Anderson*, 103 Ga. 810, 30 S. E. 640. We do not see how the court could render a judgment in personam against any one of the defendants, with or without service by publication. So far as we are aware, all the authorities are against jurisdiction for this purpose, unless, of course, the nonresident is found in this state, and here served. See, for example, *Dearing v. Bank*, 5 Ga. 505, 48 Am. Dec. 300 et seq; *Schmidlapp v. Insurance Co.*, 71 Ga. 240; *King v. Sullivan*, 93 Ga. 627, 20 S. E. 76. In the last-mentioned case this court, through Mr. Justice Lumpkin, says (noticing the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, freely used in the argument by the distinguished counsel for the defendant in error): "A proceeding of

the kind above mentioned [one against specific assets of a foreign corporation for the purpose of subjecting them to a judgment against the corporation] is, so far as the corporation is concerned, a proceeding in personam; and therefore, in order to give the court jurisdiction for the purpose indicated, actual service is essential. In the case of a foreign corporation which has no office, officer, agent, or place of business in this state, such jurisdiction cannot be obtained by merely serving the corporation by publication. This doctrine is supported by the principle announced in *Pennoyer v. Neff*, in which it was held that a personal judgment rendered by a state court against a nonresident of the state in an action upon money demand was without validity where the defendant was served by publication, but upon whom no personal service of process within that state was made, and who did not appear."

2. Treating the petition as a proceeding in rem,—that is to say, as an application for an equitable seizure, through the medium of a receiver, of the property of the defendant, to be held until the final decree in the case, and recognizing the ample power of a court of equity of this state to so seize such property and render a judgment against the same in a proper case made, we nevertheless hold that no such case is stated in this petition.

(a) We are unable to find how a fraud, in any legal sense, has been perpetrated upon the plaintiff below. He admits giving to the Reynolds & Hamby Estate Mortgage Company his bond, under his hand and seal, whereby he acknowledges to have received from this company as a loan £4,000, but says that at the time he executed this instrument he did not suspect, and had no reason to suspect, the purpose of this company, in connection with the Gold Reefs of Georgia, to perpetrate upon him the gross fraud which he undertakes to set out. It seems that the defendants Hunt and Bowley were to make the loan which the Reynolds & Hamby Estate Mortgage Company was subsequently organized to carry; that the defendant in error received £2,174 in cash; that he was induced to believe that before the balance of the loan, which, under the agreement, was to be paid in stock of the Gold Reefs Company, could be issued to him, it would be necessary for him to subscribe to the stock of the Gold Reefs Company to the amount of £1,826, and that in payment of this sum he drew a draft in favor of the Gold Reefs Company on the mortgage company; that this draft (he claims) ought to have been paid in cash, and, instead of the mortgage company so paying it, the Gold Reefs Company exchanged its own stock with the mortgage company for stock of the latter company of the value of the face of the draft. The pleader complains in strong terms of this payment, and alleges that it did him sub-

stantial harm as a stockholder in these companies, and as the owner of property held under a mortgage by the mortgage company. We do not see how the drawer of the draft can complain of this, because of the principle that an agreement to pay means, without more, a payment in cash. The petition does not show, certainly with any clearness, that this did not occur before the giving of the bond. The natural inference would be that it occurred before this, and was probably known by the defendant in error when he executed this obligation, acknowledging at the date of the obligation an indebtedness in the full amount of the loan. He seems to have received all that this contract contemplated, viz., £2,174 in cash, and the balance in the stock of the Gold Reefs Company. The complaint that the officers of the Gold Reefs Company saw fit to receive in payment of its draft shares of the mortgage company, instead of cash, seems to be predicated upon the idea that this company thus surrendered its opportunity of collecting cash, which could have been used in its mining operations to the advantage of the defendant in error as a stockholder, and also as the owner of property in the improvement of which he expected this money to be used. The defendant in error voluntarily became a stockholder in these foreign corporations, and is presumed to know that he thereby conferred upon them a large discretion as to their obligations and the use of money received by them. It is stated in the declaration that Hunt and Bowley agreed that the stock of the Gold Reefs of Georgia which was to be delivered to petitioner in lieu of cash should be paid for by them; that this was the substance of their agreement, and was the sole consideration in inducing him to accept said stock in lieu of cash; and that it was well known to Hunt and Bowley and to the said Gold Reefs of Georgia at the time petitioner undertook to receive said stock that this company was in practically an insolvent condition, not even having an interest in the property of petitioner, upon which property was principally based the organization of the company. The agreement between the petitioner and Hunt and Bowley set forth in the petition seems to provide for this payment. The bond subsequently given to the mortgage company, more than a year thereafter, does not suggest, nor does any allegation in the petition state, that this agreement entered in any way into the consideration as between the mortgage company and the petitioner. As already suggested, we think it is fairly inferable that the petitioner gave this bond to the mortgage company when cognizant of the breach of the contract. We do not find any allegations in the petition which negative this conclusion. In the language of the headnote, it is not made to appear that what he calls a fraud was a fraud upon him in any legal sense.

(b) It seems to us that the judgment obtained by the mortgage company against the defendant in error in November, 1901, concludes him as to the claims made in his petition for relief in the case at bar. If what he says be true, and his allegations mean anything, they mean that he did not owe the mortgage company £1,826 of the £4,000 embraced in the bond and the judgment. His contention seems to be that the consideration as to this part of the debt had really failed. In the latter part of paragraph 8 he alleges that "as a result of said conspiracy so entered into between the said Gold Reefs of Georgia, Limited, and the said Hunt and Bowley, and the said Reynolds & Hamby Estate Mortgage Company, Limited, he has been robbed by the said Gold Reefs of Georgia, Limited, the said Hunt and Bowley, and the said Reynolds & Hamby Estate Mortgage Company, Limited, of the sum of £1,826." In paragraph 10 he alleges that this mortgage company "has caused the said mortgage given by him to secure said bond to be foreclosed in the superior court of White county, and, as well, has obtained against him a general judgment for the full amount promised to be paid in the terms of said bond, with interest, which said sum includes the £1,826 of which your petitioner has been cheated and defrauded as aforesaid." In another portion of paragraph 8 the petitioner says "that neither Hunt and Bowley, nor the Gold Reefs of Georgia, Limited, ever advanced to him, nor paid on his account, the said sum of £1,826, but, on the contrary, accepted from the Reynolds & Hamby Estate Mortgage Company, Limited, its own stock in lieu of cash, left the Gold Reefs of Georgia, Limited, in an insolvent and helpless condition, and thus deprived your petitioner of the very advantage which he had in view when he undertook to receive the stock of the Gold Reefs of Georgia, Limited, in lieu of cash." He directly connects the mortgage company with the conspiracy and fraud resulting in a failure of consideration as to the £1,826, and avers it was fraudulently organized for the very purpose of cheating him out of this consideration; and if we give full effect to all that the defendant in error claims, and his conclusions therefrom as to their legal efficacy, we would necessarily determine that he did not owe this part of the bond to the mortgage company, and that it was not entitled to a judgment for these £1,826. It is not pretended that the defendant in error was not fully cognizant of all the facts set out in his petition when he was proceeded against in White superior court, in a suit wherein a general judgment was sought and secured. "A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which, under the rules of law, might have been put in issue in the cause wherein the judgment was rendered." Civ. Code, § 3742. This section of the Code

codifies a well-established and familiar principle. See *Kenan v. Miller*, 2 Ga. 329; *Watkins v. Lawton*, 69 Ga. 674, 675, with the general authorities cited in this last decision.

(c) As we understand the petition, more than four years elapsed after the perpetration of the alleged fraud before any application was made for relief. The petition suggests that the petitioner desires to rescind the contract under which he received this stock of the Gold Reefs Company, because, in the latter part of the petition, immediately before the prayers, appears the following statement: "Petitioner now and here tenders to the court, for delivery to the Gold Reefs of Georgia, Limited, the stocks of that company received by him as aforesaid in payment of his draft drawn as aforesaid," etc. "But in order to the rescission, he must promptly, upon discovery of the fraud, restore or offer to restore to the other whatever he has received by virtue of the contract, if it be of any value." Civ. Code, § 3711. "The duty is placed upon the party who seeks to avoid the contract on the ground of fraud to make such efforts to discover the fraud as would amount to ordinary diligence in law." *Association v. Robinson*, 104 Ga. 272, 30 S. E. 918, 42 L. R. A. 261. After holding this stock, which, according to his allegation, was palmed off upon him in pursuance of a fraud, he waits more than four years, taking advantage of the chances of the enhancement of the stock in value, and then, after a judgment of a court against him in a suit where he could have been heard, asks a court of equity for relief against the consequences of his own laches. Independently of any question of rescission, we observe, in the language of this court in *Sandeford v. Lewis*, 68 Ga. 484: "He that seeks relief in a court where equity reigns must come with clean hands and without unfair conduct himself. He must knock at her doors, too, without delay and laches." In *Marshall v. Means*, 12 Ga. 68, 56 Am. Dec. 444, the learned judge says: "Neither equity nor law will assist those who neglect to take care of themselves. 'Vigilantibus non dormientibus jura subveniunt' is one of the earlier maxims which we learn both at the bar and from the books." In *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. 437, 31 L. Ed. 396, the court say: "A party who makes an appeal to the chancellor should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations in his answer. To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any

avermment in the answer of defendant. If the case as it appears at the hearing is liable to the objection by reason of the laches of the complainant, the court will, upon that ground, be passive and refuse relief. In the latter case [referring to a case in 94 U. S.*] it was said that equity would sometimes refuse relief where a shorter time than that prescribed by the statute had elapsed without suit." It is not necessary, however, to stress the defense based upon delay and laches, if relief must be denied the defendant in error as a party asserting his individual rights, because of the conclusiveness of the judgment obtained against him.

3. We do not see how any relief can be granted the defendant in error against the two foreign corporations, or either of them, in which he became a stockholder. If the corporations were domestic corporations, and the defendant in error were one of our own citizens, his case is not brought within the principles laid down in *Alexander v. Searcy*, 81 Ga. 548, 8 S. E. 630, 12 Am. St. Rep. 337, and in other cases, and codified in section 1860 of the Civil Code. It must be a strong case to justify a court of this state in attempting to interfere, directly or indirectly, with the affairs of a foreign corporation, or the administration of its corporate business. The fact that it proposes to take its assets to its own domicile,—that which it had when the party asking for relief voluntarily became a stockholder,—cannot be such a case. The only authorities cited by counsel for the defendant in error upon his proposition that the courts of this state may, in a proper case, appoint a receiver for a foreign corporation, are 2 Cook, Stock & S. § 746, and 5 Thomp. Corp. §§ 6860-6861. The former authority does not, in this section, deal with the subject of foreign corporations, and the language of the section is authority for the proposition that the case must be a strong one to justify the remedy against any corporation, and that the case made in this petition does not comply with the requirements laid down by this author. Judge Thompson is of the opinion that in the case cited by him there "may be the greatest propriety in a court of equity laying hold of the assets and impounding them for the benefit of its local creditors." This citation suggests expressions that may be found in some of our decisions to the effect that our courts will not send its citizens to a foreign jurisdiction for the purpose of seeking redress when a remedy can be afforded them by proceedings in rem against the property of foreigners. But this defendant in error does not bring himself within the principle of these decisions, either by averment of his citizenship or by stating a proper case for relief. It is true that he alleges in general terms that he was "of said county," referring to the county of White; but as held by this court in *Carswell v.*

Schley, 59 Ga. 17, "the citizenship of a defendant is not indicated with due certainty by simply describing him as 'of said county,' meaning the county in which the suit is pending. Such a description only implies a residence which subjects him to suit, and is consistent with citizenship in another state or with alienage." The second ground of the demurrer makes the point that the pleadings do not show that the plaintiff is a citizen of this state or of the United States, and the failure to amend the petition is significant. We do not mean, of course, to hold or to intimate that an alien cannot sue another in the courts of this state where service can be made, or that it is the policy of our courts to deny redress to aliens. We do mean to say, however, that it is not the policy of our courts to grant the extraordinary relief by injunction and receiver to aliens against aliens, when nothing appears to justify such relief except what is stated in the petition before the court. In any case, under the provisions of our Code, "the power of appointing receivers and ordering injunctions should be prudently and cautiously exercised, and except in clear and urgent cases should not be resorted to." Civ. Code, § 4902. The general rule decidedly is that the courts of one state will not interfere in controversies relating to the management of the affairs of foreign corporations. 6 Thomp. Corp. § 8011. This eminent author thus states the rule: "As a general rule, actions brought by stockholders, generally in equity, to restrain or redress frauds or breaches of trust committed by the directors or officers of the corporation, or by a majority of its shareholders, in the management of its business and property, can only be brought in the courts of the state under whose laws the corporation was created. This rule rests partly on jurisdictional grounds, and partly on grounds of policy and expediency."

Without passing upon all the grounds of the demurrer, we hold that, for the reasons indicated in this opinion, the court erred in not sustaining the same and dismissing the petition, and the judgment is accordingly reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(181 N. C. 287)

BELDING v. ARCHER et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

TRUSTS—REMOVAL OF TRUSTEE—BREACH OF TRUST—CHANGE OF VENUE—OBJECTIONS—WAIVER—PARTIES—JOINDER—DISCRETION—EVIDENCE—OPINION—HEARSAY—INSTRUCTIONS—REQUEST TO CHARGE—APPEAL—HARMLESS ERROR.

1. Where the court was authorized to grant a change of venue for convenience of witnesses, and on objection being made to the removal to a certain county the court gave plaintiff his choice of one of three counties, whereupon plaintiff's counsel said that he would "take" one of the counties named other than the county select-

**Sullivan v. Railroad Co.*, 94 U. S. 311, 24 L. Ed. 324.

ed by the court, and the cause was sent to the county so selected, plaintiff thereby waived any irregularity in the proceeding.

2. Where, in an action against a trustee for breach of trust in making an alleged wrongful sale of trust land, plaintiff knew the relation of the purchasers at the time he brought the suit, but did not make them parties, it was within the discretion of the court to deny his subsequent motion for an order making such purchasers parties defendant.

3. A trust agreement appointed defendants as trustees to sell or use certain property, and to pay indebtedness thereon. It recited that it was made in settlement of obligations under previous contracts with the trustees and in settlement of certain suits brought by them with relation to the property, and provided in detail the obligations and duties of the trustees with relation to the property, superseding the prior contracts. *Held*, in an action to remove the trustees for breach of trust, that the prior contracts were merged in the subsequent breach of trust, and were, therefore, immaterial in such action.

4. A deed of trust gave the trustees power to sell the property or any part thereof, to pay debts, at private sale, and at such price and in such manner and on such terms as they deemed proper, provided that no sales should be made of the whole of the property unless sufficient was realized to satisfy the claims of the several parties mentioned therein. Another section conferred power on one of the trustees, without the co-operation or assent of the other, to sell the property at public auction within 90 days after any default in payment of the amounts due him therein; and, if he should not elect to do so, he should have the privilege of proceeding under a prior contract, merged in the trust agreement, and under judgments previously recovered by him. *Held*, that the trustees jointly had power to contract to sell a part of the property privately for the purpose of the trust.

5. In an action to remove trustees for breach of trust, a report concerning the trust property, made by one of the trustees, was inadmissible as against the other.

6. In a proceeding against trustees for breach of trust, plaintiff's reason for entering into the deed of trust under which the trustees acted was immaterial.

7. Where trustees were required to pay indebtedness, which was a lien on a large tract of timber lands, either by a manufacture of the timber or a sale of the lands, evidence tending to show the impracticability of attempting to manufacture the lumber was admissible in a proceeding to remove the trustees for alleged breach of trust in their failure to cut and market the timber on the land.

8. Where an expert witness is introduced to testify to the value of a tract of land from a personal examination, an inquiry as to how he spent his time while prospecting the property was proper.

9. Where the removal of trustees appointed to sell land was asked by an alleged breach of trustees in making an improvident sale, and defendant contended that the acreage mentioned in the pleadings had been considerably reduced by lappages of surveys, a surveyor acquainted with the land, and who had done surveying in reference to the lappages, and had surveys connected with the adjoining tracts, was entitled to testify to estimates of the land embraced in the lappages, though he did not have particular surveys of the particular lappages in question.

10. In a proceeding for the removal of trustees for breach of trust, letters and communications between one of the trustees and the owners of the property, without the knowledge of the other, were inadmissible against the latter.

11. A deed of trust executed to provide for the settlement of certain indebtedness on timber lands, after referring to certain suits and judg-

ments, recited that, in order to settle such matters and all litigations, it was agreed that the amount due to one of the trustees was settled and agreed on at a fixed sum, and plaintiff thereafter recognized the terms of the settlement. *Held*, in a suit to remove the trustees for breach of trust, that the records in such suits were properly admitted, though plaintiff was not a party to the suits.

12. Conveyance by one trustee and his wife, as individuals, to such trustee and another, as trustees, operated as a valid conveyance to the co-trustee, though the grantor as an individual could not convey to himself as trustee.

13. Where a witness, on being asked if he had heard of any large sales of land in a certain county, answered that he had only known of them through hearsay, and stated nothing more, such answer was harmless.

14. Where trustees were sought to be removed for alleged breach of trust in making improvident contract to sell lands, evidence of the value of other lands similarly situated, and of a similar character, was admissible on the value of the lands sold.

15. Where trustees were sought to be removed for breach of trust in selling land instead of cutting and manufacturing timber on the lands, a witness, who had been in the lumber business 35 years, and was thoroughly acquainted with all parts of the same, and who testified that he took charge of the property with a view to selling it for the defendants, and that he was acquainted with the timber, its location, the rivers and the roads, and the general character of the country, was entitled to testify that, in his opinion, it would not have been practicable for the trustees to have undertaken the manufacture and sale of the timber.

16. Where a writing is collateral to the issues, its contents are provable without producing the paper.

17. Where trustees were sought to be removed for breach of trust in making alleged improvident sale of a part of the property, evidence of interviews between one of the trustees and others in reference to a sale of the land, and options to purchase the same, and a conversation between one of the trustees and a chemist on an analysis of samples of mineral earth from the lands submitted for examination, were competent to show efforts to sell, bearing on the trustees' good faith.

18. Where trustees were appointed to sell or use certain property, and from the proceeds pay an indebtedness to one of the trustees, evidence, in an action to remove the trustees, that the plaintiff, through one of the trustees as his agent, wished to pay his part of the indebtedness to the other trustee, and offered to raise his part of the fund, was admissible.

19. Where land was conveyed to trustees to pay debts specified in the deed of trust, evidence, in an action to remove the trustee, as to the manner in which the amount due to the creditors, as stated in the deed, was arrived at, was not material, and its admission was harmless.

20. Where, in a proceeding to remove trustees for alleged breach of trust, the issues submitted by the court covered the case, and were clear, it was not error for the court to refuse to submit issues tendered by the plaintiff.

21. Where a deed of trust authorized the trustee to sell the land conveyed, or to undertake the cutting, manufacture, and sale of timber on the land separate from the land, to liquidate indebtedness provided for, and provided that no sale of the whole property should be made unless sufficient money be raised to satisfy the claims of the several parties mentioned in the deed, such deed did not prevent the trustees, acting in good faith, from selling a part of the land for a fair value, in the absence of proof

that the contemplated sale injuriously affected the value of the land remaining.

22. Trustees appointed to sell or use land, and from the proceeds pay indebtedness charged therein, were not guilty of a breach of trust in themselves failing to go upon the property, and in appointing an agent to take possession thereof for them, if in so doing they exercised a sound discretion.

23. Where trustees were sought to be removed for an alleged breach of trust arising from their acts with relation to land conveyed to be sold or used for the purpose of paying indebtedness, whether the trustees took possession of the land within a reasonable time after the execution of the deed was a question for the jury.

24. Where, in a proceeding to remove trustees for misconduct in relation to certain litigation, the court charged that the trustees were bound to prosecute the actions, and that, if nonsuits were negligently permitted, and by reason of such nonsuits injury resulted to the estate, the trustees would be guilty of a breach of trust, it was not error for the court to refuse plaintiff's request to charge on the same subject.

25. Where it was contended that trustees sought to be removed had been guilty of negligence in failing to keep trespassers from the land, a charge that if the trustees, through their agents, did not use such care and diligence as an ordinarily careful business man would use in his own business, under such circumstances, to protect the land, the trustees would be guilty of a breach of trust, was sufficient.

26. An instruction that if trustees failed to use their best judgment and reasonable skill to raise money from the trust funds, and by reason of such failure the trust property was sold for taxes, the trustees were guilty of a breach of trust, was a sufficient presentation of such issue.

27. An instruction that if trustees suffered logs, which were a part of the trust estate, to remain unprotected and become worthless, they were guilty of a breach of trust, but that it was not incumbent on them to take charge of the logs if they were worthless, or if the trustees, in their honest and best judgment, were of the opinion that the logs were so damaged that it was not for the best interests of the trust for them to take charge of them, was a sufficient presentation of such issue.

Appeal from superior court, Clay county; Jones, Judge.

Action by D. W. Belding against R. N. Archer and others, individually and as trustees, for the removal of defendants as trustees, and for judgment for breach of trust. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

On the 9th of November, 1893, Milo Belding conveyed to the defendant Archer, for the consideration of \$25,000, certain real estate, sawmills, and booms, and personal property at and near Lenoir City, Tenn., and also certain timber logs in Graham county, N. C. Archer, under the terms of the conveyance, was to conduct the business of cutting, sawing, and selling lumber, and to do so to advantage it was necessary that the mills and booms be repaired, and the tributary streams cleared out, that logs might be floated to the mills. Out of the proceeds of the sale of the lumber Archer was to reimburse himself the \$25,000 advanced by him, and all advances and amounts he might make for the repairing of the mills and booms and clearing the stream of obstructions; apply \$5,000 per annum to the pay-

ment of his salary, and \$5,000 for his proportion of the profits; the balance of the profits to go to Belding, and the whole property to be afterwards reconveyed to Belding. On the 8th day of January, 1895, the defendants entered into a contract, Krohn and McGarry styling themselves "trustees," of the first part, and Archer of the second part, in which contract the one between Milo Belding and defendant Archer of November, 1893, was referred to and set out *ipsisssimis verbis*, and in which contract of 1895 there was a conveyance to said Archer of all the rights in law and equity of Milo Belding in and to the property conveyed in the contract of November, 1893, and also the timber on 47,000 acres of land in Graham county, N. C. The conveyance was in trust, the property to be used in the sawmilling business, with entirely new features; the business to continue to 1900, and then the entire property to be reconveyed by Archer to the parties of the first part upon performance of certain conditions mentioned in the contract. Afterwards Archer alleged breaches of the contract of 1895, brought suit in Loudon county, Tenn., and also in Graham county, N. C., against the other defendants and others, and recovered a judgment in each court for more than \$100,000. Afterwards, on the 8th of December, 1899, the defendants entered into the following agreement:

"Exhibit A.

"Memorandum of agreement, made in triplicate, between Robert N. Archer, of Cincinnati, Ohio, party of the first part, and Louis Krohn, of the same place, and Thomas F. McGarry, of Grand Rapids, Michigan, as trustees, parties of the second part, and the Union Savings Bank and Trust Company, of Cincinnati, Ohio, party of the third part. witnesseth: That whereas, the parties of the third part, together with J. W. Cooper, of Murphy, N. C.; the estate of C. S. Bragg, Henry Stix, Nathan Stix, and D. W. Belding, of Cincinnati, Ohio; D. M. Hyman, of Denver, Colorado; Alvah N. Belding, of Rockville, Connecticut; and Milo M. Belding, of New York City, New York,—are the owners and interested in about sixty-five thousand acres of land in Graham, Cherokee, and Clay and Swain counties, North Carolina (about forty-five thousand acres in the county of Graham, the balance in the other counties above named); and whereas, there has been litigation pending between the said Archer and the said Louis Krohn and others in the chancery court of Loudon county, Tennessee, and in the superior court of Graham county, North Carolina, and the said Archer claims to have obtained judgment in his said case in Tennessee, and claims to have obtained the judgment of the court in his favor in the North Carolina case, and claims to have a lien on the timber rights on the Graham county lands mentioned, as security to him for the amount due to him in said

cases, the validity of which is disputed by said second parties: Now, therefore, in order to settle said matters and all litigation, it is hereby mutually agreed as follows:

"(1) That the amount due the said Robert N. Archer is hereby settled and agreed upon as follows: at the sum of eighty-five thousand dollars (\$85,000).

"(2) That the sum shall be paid as follows: Fifteen thousand dollars (\$15,000) in four months, fifteen thousand dollars (\$15,000) in eight months, fifteen thousand dollars (\$15,000) in twelve months, twenty thousand dollars (\$20,000) in sixteen months, from date, and twenty thousand dollars (\$20,000) in twenty months from date, with six (6) per cent interest on all of said sums. That, in addition thereto, there is due and shall be paid the sum of one thousand dollars (\$1,000), still due on what is known as the 'Boom Company Note' at the Merchants' National Bank of Cincinnati, Ohio, with interest thereon to the date of payment; and all costs in the suits between said Robert N. Archer and parties of the second part and others in Loudon county, Tennessee, and in Graham county, North Carolina, but there shall not be included in said costs any further counsel or witness fees; all further expenses and counsel fees for appealing and arguing the case of Hebard v. Archer et al., in the United States court of appeals at Cincinnati, Ohio, including the cost of transcript, clerk's fees, and the cost of printing record thereof; also the just and reasonable expenses, costs, and charges of handling said property, first of managing and conducting the affairs thereof under this agreement and the deeds accompanying the same, and all taxes which are now or may be legally levied and assessed thereon, and all expenses, costs, charges, and counsel fees in the premises; and a reasonable compensation to said Robert N. Archer and Thomas F. McGarry, trustees, and their successors, for their services in the premises, not exceeding one hundred dollars (\$100) per month to each. But the said Archer and McGarry assume no personal obligation in regard to the sums mentioned in this paragraph, but merely consent that they may be ultimately paid out of said property.

"(3) As security for the payment of these various sums, the parties of the second part undertake to obtain conveyances from the owners of the timber in Graham county, North Carolina, fully set forth and described in the contract between the parties of the first and second part, entered into on the 8th day of January, 1895, conveying a clear and unincumbered title thereto to the said Robert N. Archer, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, as and hereinafter called 'trustees,' under a suitable deed of trust prepared and agreed upon and executed by the parties in interest contemporaneously with the signing of this agreement. And in case of nonpay-

ment to said Archer of any of the amounts when due, and for sixty days thereafter, the said whole amount then owing said Archer shall become due and payable at once, and said trustees, or either of them, in case the other refuses to act, at the option of said Robert N. Archer, shall proceed to sell said Graham county lands and other lands hereinafter mentioned, or any part thereof, after four consecutive weeks, to parties in interest, at public auction, and pay the proceeds thereof towards the liquidation of amounts, unless the said Archer shall exercise the option to assert his original rights, as specified in the seventh paragraph hereof. And said Archer or said McGarry, or both, their successors, are authorized to bid on said property, or any part thereof, at any sale of said property.

"(4) Simultaneously with the execution hereof, as further security for the payment aforesaid, the said parties of the second part undertake to be deeded from all the owners of the Graham county lands (except J. W. Cooper and the estate of Caleb S. Bragg, deceased, deeds conveying the clear and unincumbered title thereof in fee, but in trust to said Robert N. Archer and Thomas F. McGarry, as trustees, as well as deeds conveying the clear and unincumbered title thereof in fee, but in trust, to about twenty thousand acres of land in the counties of Swain, Clay, and Cherokee, North Carolina, owned by the parties mentioned in the first-recited clause of this agreement (except said Cooper and said estate of Caleb S. Bragg, deceased), under and upon the same expressed trust as specified in the deed of the timber in Graham county, North Carolina, aforesaid; and also as soon as practicable thereafter to obtain, if possible, deeds from said Cooper and estate of Caleb S. Bragg, deceased, covering their interest in the property aforesaid, if the same can be done under suitable terms and arrangements: provided, however, that the deeds of the twenty thousand acres in Clay, Swain, and Cherokee counties, aforesaid, and the deed of the fee of the lands in Graham county, aforesaid, shall subject said property by them conveyed to the payment of the following parties on or before five years from the date hereof, with interest at the rate of six (6) per cent. per annum:

Estate of J. W. Cooper, Murphy, North Carolina	\$10,536 42
Estate of C. S. Bragg, Cincinnati, Ohio	7,500 00
Henry Stix, Cincinnati, Ohio	20,000 00
Nathan Stix, Cincinnati, Ohio	6,975 00
D. M. Hyman, Denver, Colorado	3,500 00
Louis Krohn, Cincinnati, Ohio	25,000 00
Chas. C. and Geo. H. Hopkins, Lansing and Detroit, Michigan	15,000 00

"That, with the exception of the first two sums of those last above mentioned, to be paid to the estate of J. W. Cooper and the estate of C. S. Bragg, which are to remain liens only on their undivided interests, re-

spectively, in said lands, and are to be paid only in case said estate of Cooper and said estate of C. S. Bragg, deceased, make the conveyances aforesaid, all other amounts shall be subordinated to the said Archer for the sum to be paid to him, and of said expenses, taxes, counsel fees, costs, and boom company note; and after the said Archer's lien said Henry Stix shall have priority over the balance for the sum of ten thousand dollars (\$10,000), and interest [on] one-half of the sum due him; otherwise said sum last above itemized, including the remaining ten thousand dollars (\$10,000), and interest to Henry Stix, shall be paid ratably,—which deeds of conveyance, and the amount due thereon, and the terms upon which the same shall be delivered, shall first be deposited in escrow with the Union Savings Bank and Trust Company, of Cincinnati, Ohio, hereinafter designated as the 'depository,' to be delivered by it to said trustee when this contract is signed and delivered: provided, also, that the said trustees shall, prior to final payment, have the right to sell the timber separately on the said twenty thousand acre tract, to be cut and removed therefrom; but no title therein shall pass to or vest in the purchaser of said timber until the sum of one dollar per thousand feet of timber shall be first paid in or deposited with the said depository for and on account of the indebtedness of the estate of J. W. Cooper, estate of C. S. Bragg, deceased (provided they deed to said trustees, Henry Stix, Nathan Stix, D. M. Hyman, Louis Krohn, and Charles C. and George H. Hopkins, to whom the same shall be disbursed by said depository, preferring the estate of J. W. Cooper and the estate of C. S. Bragg, provided they deed as aforesaid), and Henry Stix, under the terms, priorities, and conditions as aforesaid, but otherwise in proportion to their several and respective indebtedness aforesaid; the balance to be paid to said Robert N. Archer, or sufficient thereof to satisfy his claim in full.

"(5) And the said trustees, Robert N. Archer and Thomas F. McGarry, are also authorized and empowered at any time to sell said property, or any part thereof, at private sale, at such price, in such manner, and upon such terms and conditions as they deem proper: provided, however, that no such sale shall be made of the whole of said property unless sufficient be realized to satisfy the claims of the several parties herein mentioned, principal and interest, hereinbefore scheduled and set forth.

"(6) In the event of the death or resignation of either or both prior to the termination of said trust, said Robert N. Archer's place shall be filled by the joint agreement of Frank K. Rodman and C. B. Matthews, or their successors, of Cincinnati, Ohio, and Thomas F. McGarry's place by Krohn and D. W. Belding, or their successors, of Cin-

cinnati, Ohio; and, in case either side fails to act for ten days after vacancy, the others shall make said appointment.

"(7) In consideration of the premises aforesaid, and as further security for the several amounts aforesaid, the said Robert N. Archer agrees to legally execute and deposit with said depository a deed for the said timber in Graham county, North Carolina, and his interest in the boom and mill at Lenoir, Tennessee, all his interest in the Tennessee Improvement Company, conveying the same to the said Robert N. Archer and Thomas F. McGarry for the purposes of the trust herein specified, and an absolute and complete discharge and satisfaction of the judgments obtained by him in Tennessee and North Carolina aforesaid, and a release of all personal liability for the payments provided by this agreement, to be delivered by said depository to Louis Krohn and Thomas F. McGarry upon the payments of the moneys mentioned above to said Robert N. Archer; and, in case of the nonpayment of the moneys above mentioned to said Robert N. Archer in manner and form as above expressed, the said Robert N. Archer shall, for the space of ninety days after any default, have the option to enforce this instrument, or be remitted to his original rights under the contract of January 8, 1895, and the suits mentioned [in] the third paragraph hereof, as if this contract had never been made; and said discharge and satisfaction and said deed just mentioned shall be null and void, and all parties shall be returned to their original rights.

"(8) It is further mutually understood and distinctly agreed that, after the payments herein provided for in this contract, with interest thereon, shall have been made, the balance or residue, if any, shall belong to and shall be legally conveyed, transferred, and assigned to Milo M. Belding, of New York City, New York, Alvah N. Belding, of Rockville, Connecticut, David W. Belding, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, their heirs, legal representatives, and assigns.

"(9) Said Robert N. Archer further agrees to convey at the same time to said trustees, for the purpose of the trust, the amount of money, if any, now in the hands, in the custody, and control of or due the master and receiver of the superior court of Graham county, North Carolina, as well as the master and receiver of the chancery court of Loudon county, Tennessee.

"(10) It is distinctly understood and expressly agreed that no authority is vested in said Robert N. Archer and Thomas F. McGarry, trustees, to incur any liability or debt against the owners of the said property personally in the use of the property or otherwise; and that the trust imposed upon the said Robert N. Archer and Thomas F. McGarry in this agreement is accepted upon the

express condition that said trustees shall not incur any personal liability or responsibility whatever, except for their own willful and intentional breaches of the trust herein expressed and contained.

"(11) It is further agreed that all moneys received by said trustees in the matter of this trust shall be deposited with said depository, and that, as soon as the sum of one thousand dollars is on hand, applicable to the payment of any of the respective claims to be paid under this contract, it shall be so applied by the depository upon receipt of the joint voucher or vouchers of said trustees.

"(12) It is further mutually agreed that upon receiving payment in full and being relieved from all obligations in premises, the said Robert N. Archer's trusteeship herein shall cease and terminate, and that he shall thereupon execute the necessary deeds and conveyances, without recourse to him to legally vest the property in the successors or the owners, as the case may be.

"(13) It is further agreed that after the payment of the said Robert N. Archer in full all the lands and timber hereinabove mentioned shall, as security for the payment of any of the sums due the parties mentioned in paragraph 4 of this contract, in the order therein expressed, and said lands shall be sold or disposed of, and the avails in the depository paid under the terms and provisions of this agreement.

"(14) The trust herein created is hereby fixed and terminates five years from the date hereof, but shall remain as long as any of the funds herein provided for remain unpaid; but no charges shall be made for their services by said trustees after said five years.

"(15) Said Henry Stix and Nathan Stix are hereby, by each of the parties hereto, absolved, released, and discharged from any and all personal liability which may in any manner be claimed to exist against them, or either of them, by reason of any of the amounts claimed or named herein as being due, or under any judgments or suits or proceedings heretofore instituted, to which either of the parties hereto are parties; and all claims which may or might be asserted against them, or either of them, arising out of said suits or any of the proceedings hereinbefore referred to, or under this contract, is, by each of the signers hereof, expressly waived and released, and all such claim is in consideration of the premises and the sum of one dollar paid by said Henry Stix and Nathan Stix, expressly waived and hereby discharged, said Robert N. Archer, however, expressly reserving the personal liability, if any, of all others."

On December 9, 1899, the parties in interest executed the following instrument:

"Exhibit A.

"This indenture, made this, the 9th day of December, A. D. 1899, between Milo M. Belding and Emily Belding, his wife, of New

York City; Alvah H. Belding and Lizzie Belding, his wife, of Rockville, Connecticut; David W. Belding and Jeanette Belding, his wife, Louis Krohn, widower, Henry Stix and Fannie Stix, his wife, Nathan Stix and Ricka Stix, his wife, all of Cincinnati, Ohio; D. M. Hyman and Bettie Hyman, his wife, of Denver, Colorado; and Thomas F. McGarry and Nettie B. McGarry, his wife, of Grand Rapids, Michigan,—parties of the first part, and Robert N. Archer, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, trustees, parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of one hundred dollars (\$100) to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents grant, bargain, sell, remise, release, and forever quit-claim unto the said parties of the second part, and to their heirs, successors, and assigns, forever, the following pieces, parcels, and tracts of land, situate in Graham county, North Carolina, and described as follows, to wit: [Here follows description of the lands.] Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; to have and to hold the same, and every part thereof, unto the said parties of the second part, their heirs and assigns, in trust for the use, benefit, and security, as hereinafter mentioned, of the several persons, their respective executors, administrators, and assigns, and for the purpose of carrying out a contract of even date herewith between Robert N. Archer, of the one part, and Thomas F. McGarry and Louis Krohn, trustees, of the other part, with the preference, priority, and distinctions herein mentioned; nevertheless to take immediate possession of the same, manage, control, safeguard, sell, dispose of, cause to be manufactured and sold the timber of said lands, in whole or in part, in such manner as the said parties of the second part shall deem best to convert said timber or lumber into money in the speediest and most advantageous way, but without authority to incur any indebtedness or liability binding upon grantors, and immediately deposit their proceeds in the Union Savings Bank and Trust Company, of Cincinnati, Ohio. With and out of the avails of such money the said Savings Bank and Trust Company, upon vouchers duly approved by said trustees, shall—

"(1) Pay and discharge the just and reasonable expenses, costs, and charges of handling said property, and in managing and conducting the affairs of the same, including the expense of any agent or agents therein employed; to pay all taxes which shall be levied and assessed thereon, and all expenses, costs, charges, counsel fees in the premises; and a reasonable compensation to the parties of the second part, or their successors, for their services in the premises, not exceeding the sum of one hundred dollars (\$100) per

month each: provided, that no more than this amount shall be paid from said trust for services, notwithstanding a similar amount is provided in a certain deed executed by David W. Belding and wife and Henry Stix and wife, of even date herewith.

"(2) To pay or deposit with the Union Savings Bank and Trust Company, of Cincinnati, Ohio, the amount of one dollar (\$1) per thousand feet for all the timber or lumber sold and removed from the lands embraced in this conveyance in the counties of Cherokee, Clay, and Swain; it being the intention of this paragraph of this instrument that, before any title shall pass to or vest in the purchaser of said timber so removed from tracts situated in the counties of Clay, Swain, and Cherokee, the sum of one dollar per thousand feet shall be first paid in and deposited with the said Union Savings Bank and Trust Company, and on account of the indebtedness of J. W. Cooper, estate of Caleb S. Bragg, deceased, Henry Stix, Nathan Stix, D. M. Hyman, Louis Krohn, and Charles C. and George H. Hopkins, to whom the same shall be disbursed by the said Union Savings Bank and Trust Company as provided in a certain contract or agreement entered into as of this date between said Robert N. Archer, as party of the first part, Louis Krohn and Thomas F. McGarry, as trustees, parties of the second part, and the Union Savings Bank and Trust Company, of Cincinnati, Ohio, as party of the third part.

"(3) Pay and discharge in full the amount due to the said Robert N. Archer at the time and in the manner mentioned in said agreement last above mentioned.

"(4) After the payment of said expenses, cost, charges, and liabilities, as aforesaid, to pay and discharge in full the amounts due estate of J. W. Cooper, estate of Caleb S. Bragg, deceased, Henry Stix, Nathan Stix, D. M. Hyman, Louis Krohn, Charles C. and George H. Hopkins, at the time, in the manner, and under the terms and conditions mentioned in the order, and under the terms specified. The surplus or residue, if any there be, shall be paid or turned over to Milo M. Belding, Alvah N. Belding, David W. Belding, and Thomas F. McGarry, their heirs, legal representatives, nominees, or assigns.

"(5) And the said parties of the second part covenant and agree that, upon the payments being made as in the first four paragraphs above provided, they will execute and deliver their deed or deeds to the said Milo M. Belding, Alvah N. Belding, David W. Belding, and Thomas F. McGarry, duly, fully, and legally conveying to them, their legal representatives and assigns, all the rest, residue, and remainder of said property, and every part and parcel thereof.

"(6) It is further understood and agreed, however, that the parties of the first part convey no other, further, or different rights by this instrument than sufficient to place the

title of said lands in the parties of the second part under and by virtue of this conveyance.

"(8) The trust herein created is hereby fixed and terminates five years from the date hereof, but, however, said lands and timber thereon shall be and remain as security to Robert N. Archer for the payments to be made to him as set out in said contract at the time therein specified, and shall so remain as security as long as any part of said payments remain unpaid; and, in case of default in making any of the payments, as mentioned in the said contracts, said lands and the timber thereon shall be sold by the grantees herein, and the proceeds of said sales shall be paid on account of the sums so due said Archer. And the said lien hereby created shall be paramount to every other lien or interest in said property."

On the 29th day of October, 1900, the defendants Archer and McGarry entered into a contract with Edward J. Leighton and others for a sale of the land in Graham county, the contract being in the following words and figures:

"Exhibit C.

"This memorandum of agreement, entered into this 29th day of October, 1900, between Robert N. Archer, city of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, state of Michigan, trustees, parties of the first part, and Edward I. Leighton, Frederick W. Bruch, George Reeves, John Matthews, Benjamin P. Bole, and William R. Hopkins, of the city of Cleveland, state of Ohio, parties of the second part, witnesseth: That the said parties of the first part hereby sell to the parties of the second part certain lands situated in the county of Graham and the state of North Carolina, known as the 'Belding Lands,' and which are more particularly described in two certain deeds of conveyance, one dated on the 9th day of December, 1889, and the other dated on the 22d day of March, A. D. 1900, whereby Milo M. Belding and Emily E. Belding, his wife, of New York City; Alvah N. Belding and Lizzie Belding, his wife, of Rockville, Connecticut; David W. Belding and Jeanette Belding, his wife, Louis Krohn, widower, Henry Stix and Fannie Stix, his wife, Nathan Stix and Ricka Stix, his wife, all of Cincinnati, Ohio; D. M. Hyman and Bettie Hyman, his wife, of Denver, Colorado; and Thomas F. McGarry and Nettie B. McGarry his wife, of Grand Rapids, Michigan,—conveyed to the parties of the first part, as trustee, certain lands in said Graham county, in said deeds described, and all other tracts and parcels of land situated in Graham, Clay, Swain, and Cherokee counties, situated in the state of North Carolina, in which the grantors in said conveyance were interested jointly or in common; and that said lands in Graham county, which are covered by this contract, and sold by virtue of the power conferred upon the parties of

the first part by the deeds mentioned and by the contracts known as the 'trust agreement' entered into between Robert N. Archer individually and Louis Krohn, of Cincinnati, Ohio, and Thomas F. McGarry, of Grand Rapids, Michigan, trustees, and the Union Savings Bank and Trust Company, of Cincinnati, Ohio, dated, respectively, December 9, 1899, February 24, 1900, and March 15, 1900, on deposit with the said Union Savings Bank and Trust Company, of Cincinnati; and the said sale is upon the following terms and conditions:

"(1) The said parties of the second part agree to pay for said lands the sum of one hundred and twenty-five thousand dollars (\$125,000) in the manner following, to wit: The sum of fifteen thousand dollars (\$15,000) cash upon the individual claim of the said Robert N. Archer, and the balance of said claim, amounting to seventy-five thousand dollars (\$75,000) in equal payments of fifteen thousand dollars (\$15,000) each every twelve months; the cash payment above mentioned to be made and the deferred payments to date from the date of the delivery of the deed of the said premises to the said parties of the second part, upon the conditions hereinafter named. Said deferred payments are to bear 6 per cent. interest, payable semiannually, and to be secured by a first lien on the lands in Graham county, above named, and evidenced by notes of the parties of the second part. Out of the purchase price there shall be allowed the parties of the second part the sum of \$10,536.42 for the acquisition of the interest of the Cooper estate in the lands in all four of the counties of Graham, Cherokee, Clay, and Swain, in North Carolina, and for the acquisition of the interest of the Bragg estate in the lands in the same counties, the sum of \$7,500; but the interest obtained from these two estates in counties other than Graham county shall be for the benefit of the parties of the first part; but for the purpose of accomplishing the acquisition of said interests the option to purchase the respective interests of the Cooper estate and the Bragg estate shall be assigned to the parties of the second part. If the acquisition of the said interests require more than the two sums last mentioned, said additional sums shall be paid by the parties of the second part; but they shall be recouped out of the Bragg and Cooper interests in the lands in Cherokee, Clay, and Swain counties, so far as said interests are sufficient, and there is no personal liability on the parties of the first part, or deduction from the purchase price first above mentioned, other than said sum amounting to \$18,036.42. Six thousand dollars (\$6,000) of said purchase price is to be paid to John G. Creith as his compensation for the sale of said Graham county lands. The balance of said purchase price, to wit, the sum of ten thousand nine hundred and sixty-three dollars and fifty-eight cents (\$10,963.58) is to be paid to the parties of the first

part, to be distributed under the terms of their trust. This sale is also dependent upon the following further conditions: That there shall not be less than 38,000 acres of land in the purchase, and not less than 140,000,000 feet of timber, outside of the hemlock, of a marketable character; and the parties of the second part are, by November 15, 1900, or sooner, to verify the statement as to the amount of said timber, and to proceed at once, and as rapidly as possible, to verify the statement as to the title and acreage, as it is understood that the parties of the second part, at their option, need not complete the said purchase unless the above-mentioned acreage of 38,000 acres, at least, with the above-mentioned amount of timber, can be conveyed to them by a good title, unincumbered except with the purchase price mentioned in this contract; and, in case said parties of the second part complete the said purchase, and go into possession of the said property in Graham county, North Carolina, and should cut more than fifteen million feet of timber per annum, the deferred payments herein mentioned shall be anticipated to the extent of one dollar per thousand feet of timber on the excess over said fifteen million feet, to be paid on said claims of Robert N. Archer individually; and any or all of these deferred payments may be paid at any time after the date of this contract, whether said payments are due or not. The said parties of the second part are to place in the custody of the Franklin Bank, of Cincinnati, Ohio, a check for \$7,500, to be applied to the first payment to Robert N. Archer when the deed for the said property is delivered in accordance with the terms of this contract. Said sum to be forfeited and paid to the parties of the first part in case the parties of the second part should fail upon reasonable notice, after compliance with the terms of this contract with the parties of the first part, to accept the said deed and carry out the terms of the contract to be performed by said parties of the second part; it being distinctly agreed that this sum shall be liquidated damages for the general breach of the contract by the parties of the second part."

Merrimon & Merrimon, for appellant. T. F. Davidson, Thos. A. Jones, C. B. Matthews, Dillard & Bell, and R. L. Cooper, for appellees.

MONTGOMERY, J. (after stating the facts). The cause of action, as it is stated in the original complaint and in the three amendments, is based upon alleged injury to the plaintiff's interests growing out of the alleged failure of the defendants to discharge their duties as trustees under the trusts imposed upon them in the several instruments of writing set out in the complaint. It is alleged that the contracts of November 7, 1893, January 8, 1895, December 9, 1899, and the other contracts and conveyances supple-

mental to the one of December 9th, are all to be construed together, and that they disclose a trust on the part of the defendants Archer and McGarry, which required them to take immediate possession of the land, and cut and market the timber, and, with the proceeds, pay first the expenses and costs of such cutting and marketing the timber, and then apply the balance to the creditors named in the deeds of 1899; and that that not having been done, a breach of their trust has occurred. Further specific breaches of the trust are alleged in the amendments to the complaint as follows: "First. That the defendants Archer and McGarry neglected and failed to prosecute or defend certain civil actions pending in the counties of Graham and Cherokee involving the title to portions of the land in question, and in neglecting and failing to keep off trespassers and squatters from the land, and preventing them from cutting and removing timber from the same. Second. That they failed and neglected to pay the taxes upon said land to the county of Graham, and suffered the same to be sold for taxes. Third. That, as plaintiff is informed and believes, they have suffered a large number of logs, which had been cut previous to the 9th of December, 1899, and left upon said land, to remain there unprotected from the weather, and that the same have decayed, and are greatly damaged, if not entirely worthless, to the great damage of the plaintiff. Fourth. That prior to the commencement of this action, as the plaintiff is informed and believes, they, professing to act as trustees, and in violation of the trust imposed upon them, entered into a contract with certain parties, in said contract named, whereby they undertook to bind themselves to sell and convey the lands in Graham county; and that, upon information and belief, the amount to be realized from said sale is not one-half the value of said land, and said contract shows that said trustees have in their said negotiations calculated nicely the amount that would be required to pay the claims of the said Archer, and provide for the purchase of the Cooper and Bragg interest, and pay \$6,000 to one Creith, and the balance to be distributed to said trustees and in payment of counsel fees, leaving nothing whatever to the real owners of said land." The judgment prayed for by the plaintiff is that the defendants reconvey to the plaintiff his interest in the property mentioned in the complaint; that they be removed from their trusteeship, and be restrained and enjoined from any further control of the property; and for such other and further relief as the plaintiff may be entitled to. The defendants answered, and the plaintiff made replication, and his honor submitted the following issues: (1) Did defendant Robert N. Archer negligently fail to discharge the duties imposed upon him in respect to the trust property by the memorandum of agreement and deed of trust dated as of December 9, 1899,

and the deed and agreements supplementary thereto? (2) Did defendant Thomas F. McGarry negligently fail to discharge the duties imposed upon him in respect to the trust property by the memorandum of agreement and deed of trust dated as of December 9, 1899, and the deed and agreements supplementary thereto? (3) Was the price at which the said defendants undertook to sell said land in Graham county a fair price for the same?

The record in this case contains nearly 600 pages. A considerable portion of it has been of no service to the court, but has served rather to embarrass and perplex us. There are 96 exceptions brought up for review,—one concerning venue, one concerning a motion to make new parties, fifty-six on matters of evidence, one concerning the issues tendered by the plaintiff, and the remainder in respect to his honor's charge, and his failure to give instructions asked by the plaintiff. A motion was made by the defendants to remove the case from Cherokee county to Graham county for the convenience of the witnesses, and it was announced by the court that the removal would be made to Graham county. Upon objection being made by the plaintiff, his honor said that, in order that a speedy trial might take place, he would remove it to either Graham, Macon, or Clay, and stated to the plaintiff that he might select either of those counties; whereupon the plaintiff's counsel said he would "take" Clay county, if he was compelled to choose, and the case was removed to that county. Whatever irregularity there may have been in the proceeding was cured by the action of the plaintiff himself. His honor had the power, under the statute (Code, § 195, subsec. 2), to remove the case to Graham for the convenience of the witnesses. The plaintiff, instead of submitting, chose Clay county instead of Graham, and he cannot complain.

The plaintiff, a few days before the trial, served a notice on the defendants that he would move to make Leighton and others, the would-be purchasers of the land, parties defendant to the action; and before entering upon the trial the plaintiff moved for the order, and the same was refused. The matter was discretionary with the court. The plaintiff, when he issued the summons and drew his complaint, knew the relation of those persons whom he sought to make parties to the subject-matter of the suit, and their interest in the controversy, as well as he did when he made the motion. If the motion had been made by the defendants themselves to become parties, the case would have been different.

Exceptions 3 and 4 were made to the refusal of his honor to admit evidence concerning matters which were embraced under the contracts of 1893 and 1896. Together with these exceptions, we may consider the refusal of his honor to submit the third issue tendered by the plaintiff, which was in

these words: "Did the defendant Robert N. Archer negligently fail and refuse to perform his covenants, obligations, stipulations, and duties under the contracts of 1893 and 1895, as the same were consolidated by the contract of the 8th January, 1895, in breach of trust contained in last named said contract?" And also that part of his honor's charge, excepted to by plaintiff, which, in substance, was that by the terms of the judgment of Loudon county, Tenn., the judgment of the superior court of Graham county, N. C., and the memorandum and agreement and deed of trust of date December 9, 1899, the contract of November, 1893, and the one of January 8, 1895, were annulled, and merged into the said memorandum and agreement and deed of trust dated December 9, 1899, and that they should not consider the contracts of 1893 and 1895 in making up their verdict; and that the duties and powers and responsibilities of the defendants Archer and McGarry are set forth in the memorandum of agreement and deed of trust of the 19th of December, 1899, and the supplemental agreements thereto, and these different instruments should be construed together as one instrument in determining the rights of the parties in this action. We think his honor committed no error either in refusing the evidence, in refusing to give the instruction asked, or in giving the instruction which he did give. The record in the Tennessee and North Carolina suits and the agreement and trust deed of December 9, 1899, show upon their face that the ends and objects for which the contracts of 1893 and 1895 were executed were concluded; that they had ended disastrously to all the parties concerned, and with a very large debt due to the defendant Archer under the terms of those contracts, that the agreement between the defendants of December, 1899, referred to the litigation concerning the contracts of 1893 and 1895, and the parties, to put an end to all those matters and litigations, stated and fixed the debt due to defendant Archer at \$85,000; and, as far as could be done, agreed upon the manner and method of payment of that debt by a sale of the property mentioned in the agreement; and the parties in interest, the plaintiff and others, in December, 1899, undertook to carry out the agreement and memorandum. That part of the property embraced in the contracts of 1893 and 1895, which was conveyed by the agreements and deeds of December, 1899, is dedicated to different purposes entirely from those for which it was used under the contracts of 1893 and 1895. There is not a stipulation in the contracts of 1893 and 1895 like any one in the agreement and deed of 1899; in fact, there is nothing left in law or in fact of the contracts of 1893 and 1895. It was contended, however, for the plaintiff that the contract of 1895 was still in force, and to be construed with the other written contracts bearing on the case, because of the

last clause of article 7 of the memorandum and agreement of December, 1899. Reference is made to the contract of 1895. That reference is in these words: "And in case of the nonpayment of the moneys above mentioned to Robert N. Archer in manner and form as above expressed, the said Robert N. Archer shall, for the space of 90 days after any default, have the option to enforce this instrument, or be remitted to his original rights under the contract of January 8, 1895, and the suits mentioned in the third paragraph hereof, as if this contract had never been made; and said deed just mentioned shall be null and void, and all parties shall be returned to their original rights." Now, if that section 7 of the memorandum and agreement of December, 1899, had been the only power given in that instrument by which Archer and his codefendant, McGarry, could have sold the property mentioned in the agreement for the payment of Archer's debt, then the contract of 1895, together with the suits referred to, would have been in force, and the agreement and deed of trust of December, 1899, would have been void, and of no effect. But there is another clause or section in the agreement and memorandum of 1895, which confers upon Archer and McGarry, trustees, the power to sell the property for the payment of Archer's debts, and also for the payment of other debts mentioned in the agreement; and the power is in these words: "And the said trustees, Robert N. Archer and Thomas F. McGarry, are also authorized and empowered at any time to sell said property, or any part thereof, at private sale, at such price and in such manner and upon such terms and conditions as they deem proper: provided, however, that no such sales shall be made of the whole of said property unless sufficient be realized to satisfy the claims of the several parties herein mentioned, principal and interest, hereinbefore scheduled and set forth." The reasonable construction of the two distinct powers given to the trustees to make payment of the debts mentioned in the agreement is this: Under section 5 of the agreement the power was conferred upon both Archer and McGarry to make sale of the property privately, according to their best judgment, at any time they may see fit, during the five years of the life of the agreement. In section 7 of the agreement an additional power was given to Archer himself and alone, without the co-operation, or even assent, of McGarry, the other trustee, to sell publicly at auction, and after advertisement of the sale, the entire property, provided he would do so within 90 days after any default in the several amounts due to him; and, further, it was intended by the agreement and memorandum of 1899 that, if Archer preferred not to proceed under section 7, and sell the property at public auction, he should have the option—the privilege—of proceeding under his contract of 1895 and the suits in

Loudon county, Tenn., and Graham county, N. C. Under section 7 of the agreement of 1899, Archer had no right to make sale himself for the purpose of paying his debt with the proceeds after 90 days from the time the first default occurred; and he alone made no effort to sell at public sale. He therefore had the option to proceed under his judgments based on the contract of 1895, but he did not do that. He, together with the other trustee, McGarry, proceeded to make the sale privately under article 5 of the agreement and memorandum. The power—the authority—for Archer and McGarry, when acting together, to make sale of the property privately under section 5 of the agreement and memorandum of December, 1899, is not denied in the plaintiff's complaint, nor in his replication, but is admitted. The insufficiency of the price agreed to be paid for the property, going to show a breach of trust, is the gravamen of the plaintiff's complaint, and that is clearly to be seen from a reading of the ninth of the plaintiff's tendered issues, viz.: "Was the price at which the said defendants undertook to sell said land in Graham county a full price for the same, as alleged in the defendant's answer?" The defendant trustees, Archer and McGarry, having the power to sell the property privately, have entered into an agreement with certain persons called the "Cleveland parties" for that purpose. Exception is made by the plaintiff to the terms of that agreement, the contention being that upon its face it is beyond the power of the defendants to make. We have examined it carefully, and are of the opinion that the defendants have not exceeded their power in the execution of it.

The fourth exception was to the refusal of the judge to allow a report concerning the property, made by McGarry, alone, in April, 1900, to be used as evidence against Archer. Clearly, the paper was inadmissible against Archer. Archer could not be deposed from his trust because of any conduct on the part of McGarry not known or approved by Archer. His honor was correct in overruling exceptions 5 and 6, in which his honor refused to allow the plaintiff to give his reason why he entered into the deed of trust of December, 1899. However, the evidence substantially got in, because on the question of the value of the timber his honor allowed the plaintiff to testify as follows: "It was reported by McGarry that he would get some \$250,000 for the standing timber on the 49,000 acres of land, or thereabout, that was originally transferred to Archer, leaving the land and whatever minerals there were in the original owners' hands." A witness (Coburn) was introduced by the plaintiff, who gave testimony tending to show that logs could be cut and floated down the streams in Tennessee to certain mills in that state operated by the Crosby Lumber Company,—the same mills that the defendant Archer had been operating under the contract of

1895. That witness was asked by the defendants on cross-examination if the Crosby Lumber Company did not fall in their operations, and that they quit insolvent. The question was a proper one. The plaintiff was seeking to hold the defendants responsible for not getting out his logs to market under the agreement of 1899, and the defendants had a right to show that those persons who had embarked in that enterprise had failed, as evidence of their good faith. That was the seventh exception. The answer which was in response constituted the eighth exception. The ninth exception was directed to the permitting of a question to be put to an expert witness,—Harrell,—as to how he spent his time while he was prospecting the property. We see no objection to the question, but the witness made no answer.

Exceptions 10, 22, 23, 24, 25, 26, 27, and 28 refer to lappages of other surveys of land upon those mentioned in the complaint and answer. The contention of the defendants on this question was that the acreage of the land mentioned in the pleadings had been to a considerable extent reduced by a discovery of various lappages of other surveys and tracts of land over those mentioned in the pleadings, and that that fact ought to be considered by the court on the question of the value of the land contracted to be sold by Archer and McGarry to the Cleveland people. A surveyor acquainted with the land, and who had done surveying in reference to these lands and the lappages, was introduced for the purpose of showing these lappages and the extent of them. So far as we can see, the witness testified to nothing except what he had practical knowledge of and definite information about in reference to the lappages. He did not have particular surveys of these lappages, but he had other surveys connected with the adjoining tracts that gave him such information as that he would reasonably make estimates of the lands embraced in the lappages, and that he did. The exceptions are therefore without merit.

Exceptions from 11 to 15, inclusive, relate to letters and communications made by McGarry individually to the owners of the property without the knowledge of Archer. They were not admitted as evidence against Archer, and there was no error in his honor's ruling.

Exceptions 16, 17, 18, 19, 20, 20a and 20b relate to the records of the suits in Graham county, N. C., and in Loudon county, Tenn. The evidence was properly received. It does not make any difference whether the plaintiff was a party to those suits or not, so far as the introduction of the records was concerned in this case, for the memorandum and agreement entered into between the defendants in December, 1899, referred to these suits; and, while it was said that the judgments were disputed as to their validity, yet the recital in that memorandum and agreement of December, 1899, after referring to

the suits and judgments, further recited: "Now, therefore, in order to settle said matters and all litigation, it is hereby mutually agreed as follows: (1) That the amount due to said Robert N. Archer is hereby settled and agreed upon as follows, at the sum of \$85,000." The plaintiff, in his deed of trust made in December, 1899, pursuant to the memorandum and agreement of the same date, recognized the terms of the memorandum and agreement and the settlement made therein. The records of the court, then, were admissible to show that the matters which the plaintiff alleged were still open and unsettled by the contract of 1896 had been determined and settled, and were the matters referred to in the memorandum and agreement of 1899.

The defendants offered in evidence the deed from Archer and wife to Thomas F. McGarry and Robert N. Archer, as trustees, and also a bill of sale from the same to the same. It is not stated in the record what property was conveyed in these instruments, nor for what purpose they were made, and the instruments themselves are not in the record. But if they were before us, we cannot see why the property conveyed therein did not vest in the other trustee, McGarry, even if the objection on the grounds stated, to wit, that Archer as an individual could not convey to himself as trustee, could be maintained. We think exception 29 cannot be sustained for the same reason given in the discussion of exceptions 10, 22, etc.

Exception 30 is about a harmless matter. A question was put to a witness as to whether he had heard of any large sales of land in Graham county. He answered that he had only known of them through hearsay. Nothing further was said, and no harm was done.

Exceptions 31, 32, 33, 34, 37, 38, 39, and 40 relate to the value of lands in Graham county as evidence of the value of the lands described in the pleadings in this case. The defendants were undertaking to prove the value of the land in Graham county, which they had contracted to sell to the Cleveland people, by showing the value of other mountain lands in Graham county similarly situated, and of similar character. We think the evidence was competent. In *Warren v. Makely*, 85 N. C. 12, it was undertaken to show the value of a certain tract of land by proof of the value of an adjoining tract. There there was no evidence of similarity in the character of the soil, quality of the land, or of anything going to show that the two tracts were alike, and the evidence was not allowed. But in discussing that case *Smith, C. J.*, said: "The question is simple and absolute, unaccompanied with any suggestion that the two tracts possessed the same or similar qualities in soil, culture, location, or improvement, or possessed in common the elements that enter into the estimate of their respective values. * * * As presented to us in the record, and without any explana-

tory circumstances, the question was properly excluded as irrelevant and misleading." Those very matters are presented here in our record, and we are of the opinion that they make the evidence competent.

Exceptions 41, 54, and 55 relate to the practicability of removing, manufacturing, and selling the timber from the lands of the defendants. A witness, who testified that he was 52 years old, that he had been in the lumber and timber business for 35 years, that he had worked in lumber in all capacities—in the woods part of it—from a chore boy up to scaler, foreman, and superintendent, and that he had tried to keep posted in every location where there was timber manufactured and for sale, and that he took the best lumber journals, etc., and who further testified that he took charge of the property with a view to make a sale of it for the defendants, and that he became acquainted with the timber and location, the rivers and the roads, and the general character of the country,—was asked whether or not, from his knowledge of that country, the location of the timber, his experience as a lumberman and timberman, if it would have been practicable for these trustees to have undertaken to have that timber manufactured, and sell it profitably. He answered, "No, I do not." The plaintiff's exception upon objection to the question and answer was that it was not competent for the witness to give his opinion upon the question presented, and that it was undertaking to give the witness the opportunity to decide what is the province and duty of the court and jury to pass upon, and therefore incompetent. It is common learning that opinion evidence, as a rule, ought not to be received. But there are exceptions to the rule, and it seems to us that this is a proper instance in which an exception ought to be allowed. And the witness may not be treated as an expert, but as an ordinary witness, who is entitled to an opinion based upon facts within his own knowledge; the circumstances from which that opinion is deduced being such as cannot be made palpable to others. There are so many contingencies and difficulties, inherent and extraneous, about the timber business, especially in mountainous sections lacking facilities for transportation, nearness of markets, etc., that it would be almost impossible for the ordinary jury to arrive at a just estimate of the expense attending such a business without the aid of the judgment and opinion of those persons who have experience in the same.

Exceptions 42 and 43 cannot be sustained. The paper writing introduced as evidence was collateral to the issues, and its contents provable without producing the paper. *Carden v. McConnell*, 118 N. C. 875, 21 S. E. 923.

Exceptions 44, 45, and 46 relate to interviews between Archer and C. R. Palmer and Ridder in reference to a sale of the land and an option to purchase. It was competent tr

show efforts to sell the property, good faith, etc.

Exception 47 was to the permitting of Archer to give evidence of a conversation between himself and a chemist on an analysis of some samples of mineral earth submitted to him for examination. The court admitted it only for the purpose of showing good faith, and not on the question of the value of the land.

The forty-eighth exception relates to the exception of Archer to the effect that the plaintiff, through McGarry, who represented him, wished to pay the first installment of the debt due to Archer, and had offered to raise his part of it. We see no error in its admission.

The forty-ninth exception was entered to the permission of his honor for Archer to state how the debts due to the Cooper and Bragg estates, mentioned in the agreement of December 9, 1899, were arrived at. If it was not material, it was harmless.

Exceptions 50 and 60 refer to the ruling of the court on the matter of the issues. The plaintiff tendered, in the first place, nine issues, which were all refused, and, later on during the course of the trial, tendered another one as to the damages the plaintiff might be entitled to on account of any breach of the trust. It is not stated what became of the last issue tendered, but, as it was not submitted to the jury, his honor must have declined it, for the reason that no evidence had been offered to show damages. We have seen that his honor committed no error in refusing the third issue tendered, and he committed none in refusing the other eight, for they simply particularized the alleged breaches of trust, and the ones submitted covered the case, and were clear.

Having treated the exceptions to the evidence and those concerning the issues, we come to a consideration of the law of the case. The defendants Archer and McGarry were charged with the execution of the most responsible trusts concerning very valuable property. That property was to be utilized by them for the payment of a very large indebtedness in the way of incumbrances upon the same. As we have already said in the discussion of one of the matters of evidence, the defendants had the power under the agreement and deed of December, 1899, to make a private sale of the property, in whole or in part, and at any time they saw fit. In the memorandum and agreement of December, 1899, there was no provision made for, nor any suggestion of, the manufacture and sale of the timber separate from the land itself. But the deed made by the plaintiff and others to the defendants Archer and McGarry in 1899 contains this provision (quoted *literatim et punctuatim* from the pleadings and from the instructions given by the court to the jury): "Nevertheless to take immediate possession of the same, manage, control, safeguard, sell, dispose of, cause to

be manufactured and sold the timber off said lands in whole or in part, in such manner as the said parties of the second part shall deem best to convert said timber or lumber into money, speedily and in the most advantageous way, but without authority to incur any indebtedness or liability upon grantors." In addition to what we have already said on the power of Archer and McGarry to sell the property, it may not be amiss to add that, if the language just quoted was all that was used in the agreement and memorandum and deed of 1899 on the subject of the sale of the land itself, we would have grave doubts about the power of the defendants to sell the land which they have contracted to sell to the Cleveland people. But the deed of 1899, as we have seen, refers to the memorandum and agreement of the same month and year, and the makers declare it their purpose to carry out the memorandum and agreement; that latter agreement giving, as we have seen, full power to sell the land itself. And, besides, the deed itself in the last clause reads, "And, in case of default in making any of the payments as mentioned in the said contracts, the said land and the timber thereon shall be sold by the grantees herein, and the proceeds of said sale shall be paid on account of the sums so due said Archer." In the discharge of their duties as trustees it was in their sound and honest discretion, in making provision for the payment of the indebtedness, to take choice between a sale of the land itself for that purpose and the undertaking of the cutting and manufacturing of the timber or lumber separate from the land. They were not required to test the experiment of the latter plan if they honestly and reasonably believed that it ought not to have been tried. If they thought the best plan to relieve the indebtedness was by a sale of the land itself, they had the power to sell it, and it was their duty to do so. They were given that discretion in the memorandum of agreement and in the deed, and all they were required to do was to exercise it conscientiously and with reasonable care. But the plaintiff, in this connection, insists that it is not in the power of the defendants to make the sale they proposed to make to the Cleveland people, for the reason that there is a proviso in the sale to the effect that no such sale shall be made of the whole of the said property unless sufficient money be realized to satisfy the claims of the several parties therein mentioned, principal and interest,—that is, that the trustees shall not have the power to sell all of said property, whether they sell the same as a whole or the whole by parcels, unless sufficient money could be realized to pay all the claims secured by the contract,—and that there was evidence offered tending to show that the balance of the value of the land lying in Cherokee, Clay, and Swain counties, added to the amount of the contract price of the Graham county land, would not equal the

whole of the indebtedness provided for in the deed of 1899. That contention cannot be sound. Of course, if all of the land had been contracted to be sold for less than the entire debt, the plain words of the deed would prevent such a sale. But the object in view was the payment of the indebtedness by a sale of the property, and under the contracts the defendants Archer and McGarry had the right to sell any part of the property at such price, in such manner, and upon such terms and conditions as they deemed proper. If, therefore, they sold any part of the property less than the whole in good faith, and for fair value, the true intention of the deed would be carried out. The proviso in the deed doubtless was put there to prevent an improvident sale of the whole, and to subject the conduct of the defendants to scrutiny, and to compel them, if they sold the property in parts or lots, to procure a fair price for such lots. If it could be shown, however, that the contemplated sale of the Graham county land affected injuriously the value of the land lying in the other counties because of the separate sale, then the trustees would not be allowed to consummate the sale, even though the price for the Graham county land was its full value. It was the duty of the defendants to use their best business judgment and reasonable skill to raise the money to pay the indebtedness out of the property, and, if they failed to do so, they were guilty of a breach of trust; and they were to guard and preserve the interest of each beneficiary under the trust in choosing between a sale of the property and the manufacture of lumber, and also in making any sale of the property, if they chose that way. And also, if it was for the best interest of all parties under the trust for the defendants to have manufactured and sold the lumber, or that they could have found out that that was the best way of raising the funds to pay the indebtedness, and failed to do so, they would have been guilty of a breach of trust. The defendants themselves were not required to go upon the property if they used a sound discretion in the selection of Creith, their agent, who did take possession for them.

The memorandum and agreements, as we have seen, bear date for the 9th of December, 1899, but there was evidence that they were not executed or delivered until February, and Creith, as agent, took possession in the early days of March following. The reasonableness of time elapsing between the execution of the papers and the taking possession of the property by the defendants' agent was submitted to the jury, and under proper instructions. As we have already said in discussing the evidence, all the agreements and contracts concerning the plaintiff and defendants made prior to December, 1899, were merged into the latter, and they were not for the consideration of the jury. His honor charged fully along all these

lines, and as we have decided the law to be in the matter; and our discussions have been based on the judge's charge, and the instructions asked by the plaintiff and refused by his honor.

The plaintiff's fifth, sixth, seventh, eighth, and twelfth prayers for instructions have not been considered in what we have said, and we will now take them up. The fifth concerned the evidence in relation to some nonsuits suffered by the defendants in actions brought by others concerning the trust property. On that instruction the court told the jury that the trustees were bound to prosecute the actions if, in their reasonable judgment, the prosecution of such actions was to the interest of the trust estate; and if they should find from the evidence that the nonsuits were negligently had after December 8, 1899, the date of the trust deed, and by reason of the nonsuits injury came to the estate, the defendants would be guilty of a breach of trust; negligence being the want of that degree of care that an ordinarily prudent man would use in the same or similar circumstances. The sixth prayer for instructions was in relation to depredations by squatters and trespassers on the property. His honor told the jury in reference to that matter that the defendants should have used due diligence and care in keeping trespassers off, and, if they should find from the evidence that the defendants, through their agent, did not, after December 8, 1899, use such care and diligence as an ordinarily careful business man would have used in his own business under the same circumstances, then that would have been a breach of trust, and that they should so answer; and, if such precaution was taken, and such diligence exerted, then they did not commit a breach of trust in failing to keep off the trespassers. The seventh prayer was concerning the failure of the defendants to pay taxes on the land. His honor told the jury that, if they should find from the evidence that the defendants failed to use their best judgment and reasonable skill, as it was their duty to do, to raise money out of the trust funds, and by reason of such failure the trust property, or any part thereof, was sold for taxes, then they should find that the defendants had committed a breach of trust, and they should so answer. The eighth prayer for instructions was directed toward the alleged loss of a quantity of felled timber and logs belonging to the trust property, and which were alleged to have been injured and lost by the negligence of the defendants. In reference to that matter his honor said that if the jury should find from the evidence that if the defendants, after December 9, 1899, the date of the trust deed, suffered the same to remain there unprotected, and allowed them to decay and become worthless, they had made a breach of trust in that respect, and the jury should so answer; but that it was not incumbent

on the defendants to take charge of the logs if the jury should find that they were worthless, or if the defendants, in their honest and best judgment, were of the opinion that the logs were so damaged that it was not for the best interest of the trust for them to take charge of them. We see no error in the instructions given, and such parts of the ones asked by the plaintiff that were proper were given, and those parts not proper were rejected.

The instructions of his honor giving on the fifth, sixth, and eighth prayers were excepted to by the plaintiff on the ground that there was no evidence to support these instructions. We take a different view of the evidence. The twelfth special prayer for instructions has been considered in our treatment of the sixth prayer. The jury answered the first and second issues "No" and the third "Yes."

We see no error in the trial, and the judgment is affirmed.

(131 N. C. 784)

STATE v. PEOPLES.

(Supreme Court of North Carolina. Nov. 25, 1902.)

JURIES—DISCRIMINATION AGAINST NEGROES—REMEDY.

1. There is an unlawful discrimination where, in the composition or selection of jurors by whom a negro is indicted or tried, all persons of his own race and color are excluded solely on the ground of race and color; the only qualifications for jury service imposed by Code, § 1722, being payment of taxes the preceding year, good moral character, and sufficient intelligence.

2. Under Code, § 1741, providing that "all exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the indictment," a motion to quash is the proper remedy where negroes have been excluded, solely on the ground of color, from the grand jury indicting a negro defendant.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Will Peoples, a negro, was convicted of gaming, and appeals. Reversed.

W. H. Green, for appellant. The Attorney General, for the State.

MONTGOMERY, J. A true bill for gaming was found against the defendant by the grand jury at April term, 1902, of the superior court of Mecklenburg county, and at the same term he was tried and convicted of the offense found against him. Judgment was pronounced that the defendant be imprisoned in the county jail for six weeks, to be assigned to work on the public roads of the county, and the defendant has appealed from the judgment to this court. On his arraignment for trial, and before plea, and before the jury were impaneled, he moved, through

his counsel, to quash the bill of indictment for the reasons substantially stated as follows: "(1) Because the list of thirty jurors drawn by the county commissioners, and summoned by the sheriff, from which the grand jury were drawn, and which found the bill against the defendant, was improperly selected and summoned, the list not having been taken from a revised jury list, as required under sections 1722, 1723, 1724, 1725, 1726, 1727, 1729, and 1730 of the Code, and the amendments thereto, and that said jury list had not been revised or purged since June, 1898, and then revised with partiality, so as to discriminate unjustly and purposely against competent persons of the negro race, to which the defendant belongs, on account of such persons' race or color. (2) Because the officers whose duty it was to revise the jury list, and to draw the panels to be summoned by the sheriff, from which the grand and petit juries were drawn, had revised, selected, and summoned the thirty-six jurors for the term of the court for said county, from which the grand jurors were drawn that found the true bill against the defendant, with the unlawful and avowed purpose of discriminating against persons of the negro race, who of right, being competent, should not have been excluded from the jury lists on account of their race or color, to the prejudice of the defendant. (3) Because such unjust and unlawful discrimination against the defendant deprived him of a fair and impartial trial in that court, as is guaranteed to him under the constitution and laws of North Carolina, and the thirteenth and fourteenth amendments to the constitution of the United States, and the acts of congress thereunder. (4) Because, in the defendant's belief, he could not get an impartial trial, as guaranteed him by the laws of the land, under such unjust discrimination against him on account of his race and color, there being about 55,000 population in Mecklenburg county, one-third of whom are of persons of the negro race, who pay taxes on more than a quarter of a million dollars' worth of property, and the greater number of whom are equal to the average jurors as serve in the several courts." The defendant then prayed that a subpoena duces tecum be issued from the court to the chairman of the board of commissioners of Mecklenburg county, to the register of deeds, to the clerk of said board, and to the sheriff of said county, requiring them to bring their several records pertaining to the drawing and summoning of jurors for that term of court, and also the jury box and boxes, and to give such information to the court respecting the selecting and summoning of jurors as might be asked of them, and of which they might have knowledge. The prayer embraced also a number of other witnesses. "(2) That the motion to quash the bill of indictment be granted: that the list of jurors selected and summoned

¶ 1. See Civil Rights, vol. 10, Cent. Dig. § 5; Constitutional Law, vol. 10, Cent. Dig. § 734.

ed for this term of the court be set aside because the officers who selected and summoned the jurors had corruptly and avowedly discriminated against the rights of the defendant, so as to prevent a fair and impartial trial under the law of the land, by excluding from the jury list competent persons of the colored race." The motion was followed by an affidavit of the defendant as follows: "That he is informed and believes, and doth so aver, that the cause set forth in affiant's motion to quash the bill is true and well founded in fact and in law, to the best of affiant's own knowledge and belief. Affiant further states that he is informed and believes, and doth ever aver, that it is the well-conceived and avowed purpose of the county commissioners and sheriff of said county and state to so manage the soliciting and summoning of the several jurors to sit as jurors in this court, either as grand or petit jurors, or both, so as to wrongfully and unjustly discriminate against defendant's right to a fair and impartial jury of good and lawful men, by shutting out or by keeping off the jury panels competent and lawful persons of defendant's race; and that affiant verily believes and doth aver that said officers have so acted in selecting and summoning the panels of jurors to attend at this term of court, said grand jury being a continued panel, or spring term panel, selected by the county commissioners January 6, 1902; and that affiant believes that he cannot get a fair and impartial trial in this court, or in any other such court, to which he is entitled under the constitution and laws of North Carolina, and the thirteenth and fourteenth amendments, and acts of the congress of the United States thereto, under such unfair and avowed discrimination against the affiant's just right to a fair and impartial trial in this court, on account of affiant's race and color; and affiant further sets forth and firmly avers that he believes that the grounds of his motion to quash the indictment are reasonable and just, and are warranted by the constitution and laws of North Carolina, the thirteenth and fourteenth amendments to the constitution, and the acts of congress thereunder, and the just and reasonable consideration of mankind, and that he ever believes and avers." Sworn to and subscribed before the clerk of the superior court on the 22d day of April, 1902. The court overruled the motion, and refused the prayer for subpoena duces tecum, on the grounds "that the court had not the power to quash the bill of indictment on the grounds set out in the defendant's motion and affidavit, and could not investigate the matters alleged in the motion and affidavit under a motion to quash." The defendant excepted, entered his plea of not guilty, and proceeded to trial. He then challenged a panel of the petit jury on the grounds heretofore set out. The court overruled the challenge, and the defendant excepted.

The question for decision is not whether a grand jury, in the finding of a true bill against a negro, or a petit jury by whom the indictment is tried, shall be composed, in whole or in part, of the defendant's own color, but it is whether, in the composition or selection of jurors by whom he is indicted or tried, all persons of his own race or color may be excluded by law solely because of their race or color, so that by no possibility can a colored man sit upon the jury. The only qualifications which the laws of North Carolina impose for jury service are the payment of taxes for the preceding year, and good moral character and sufficient intelligence. Code, § 1722. The defendant does not, and, indeed, could not, justly complain of the laws of the state in reference to the manner in which provision has been made for the constitution and selection of juries. His complaint is that, notwithstanding it is required by our laws that such of its citizens as possess the proper qualifications shall be placed on the jury lists, the colored race, of which he is a member, although many of them possess the requisite qualifications, are excluded by the officers who are charged by the law with the duty of selecting jurors, solely because they are of that race. If the facts be such as the defendant declares them to be, what, if any, wrong has he suffered, and, if any, what remedy has he, if any? If he has suffered any wrong, the fact that it may have been caused through the administrative officers of the state, instead of by legislative enactment, does not relieve the situation. It would still be a wrong. *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

It was argued here for the state that the individuals who composed the grand and petit juries were possessed of the requisite qualifications for jurors as prescribed by law, that no harm was shown to have been done to the defendant because of a failure to have negroes on the jury, and therefore that he had no grievance. But is not that an erroneous and superficial view of the matter? In the opinion in the case of *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, Mr. Justice Strong, for the court, said: "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law,—an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others." The right of trial by jury is guaranteed to every citizen of the state. It is ordained by section 13 of article 1 of the constitution of North Carolina that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and

lawful men in open court. The legislature may however provide other means of trial for petit misdemeanors with the right of appeal." And it goes for the saying that the make-up, constitution, and selection of juries is an extremely important part of the protection and benefits intended to be secured by jury trial. The most primitive as well as the most advanced idea of a jury is that it is a body of men selected and drawn to determine the rights of parties under indictment and in other judicial proceedings, and composed of the neighbors, associates, and persons having the same legal status in the community as the litigants or the accused. We know, of common knowledge, that prejudices sometimes exist in communities against certain classes, which control the judgment of juries in their deliberations, and therefore operate to deny such classes such privileges as others enjoy; and race antipathy is as old as historic time, however much some philanthropists and independent thinkers have done or may be doing to eradicate it. It is difficult to understand how the conduct of the officers whose duty it is to select jurors in Mecklenburg county, if it is such as it is declared to be in the motion and affidavit of the defendant, can be considered as fair and undiscriminating against colored persons in that county who may be tried for criminal offenses against the state, or who may be parties in civil actions. It is incomprehensible that while all white persons entitled to jury trials have only white jurors selected by the authorities to pass upon their conduct and their rights, and the negro has no such privilege, the negro can be said to have equal protection with the white man. How can the forcing of a negro to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race, purely and simply because of color, although possessed of the requisite qualifications prescribed by the law, be defended? Is not such a proceeding a denial to him of equal legal protection? There can be but one answer, and that is that it is an unlawful discrimination. A wrong, then, has been done against the defendant, if the facts set forth in the motion and affidavit be true; and in this age of the world there must be a remedy for every wrong. What was the defendant's remedy? The very one he sought to have applied. By section 1741 of the Code it is provided that "all exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the indictment, and if not so taken the same shall be deemed to be waived." It was urged in this court for the state that a plea in abatement was the only course of procedure which the defendant could follow in this case. But in *State v. Haywood*, 94 N. C. 847, this court said that "the regular and appropriate method of making objection to a grand juror, under the

general practice, when the fact upon which it depended did not appear in the record, and had to be established by proof, is by plea and abatement, and, if it does so appear, by a motion to quash." But the court went on to say that "in our practice the distinction has not been recognized as important, and the motion to quash has been held proper in either case." The court went on further to say, "But, whatever difference may be supposed to exist as to the two methods of raising the objection, they are removed and the practice settled by statute;" quoting Code, § 1741. The discrimination which is alleged to have been practiced against the defendant is one that has been passed upon by the supreme court of the United States, and held to be contrary to the fourteenth amendment of the constitution of the United States, and therefore unlawful. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. In the last-mentioned case the facts and manner of procedure in the state court of Texas were just as they are here.

There was error in the judgment of the court, and error in the refusal of his honor to grant the motion, and have the matter set out in the motion and affidavit properly considered and tried. The case is remanded to that end. Error.

CLARK, J. I concur in the conclusion that the presiding judge should have heard the evidence, found the facts, and rendered judgment thereon, and that only because the United States supreme court, the final tribunal upon all federal questions, has so decided. *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664; and *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667. We must bow to that authority, though I am constrained to believe that the argument of Mr. Justice Field in his dissenting opinion in *Neal v. Delaware*, 103 U. S. 405-409, 26 L. Ed. 577, 578, clearly demonstrates that the thirteenth, fourteenth, and fifteenth amendments conferred "no warrant for any legislation of congress interfering with the selection of jurors in the state courts." Chief Justice Waite also dissented in that case, and Mr. Justice Field reiterated in that dissent what he had so well said in his previous dissent (a very able one) in *Ex parte Virginia*, 100 U. S. 349-370, 25 L. Ed. 676, in which dissenting opinion Mr. Justice Clifford concurred. Among other things, in that dissent, Mr. Justice Field particularly says (100 U. S., at page 368, and 25 L. Ed., at page 687): "If, when a colored person is accused of a criminal offense, the presence of per-

sons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the bench would be equally essential, if the court should consist of more than one judge, as in many cases it may; and, if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of any appellate court to which the case, after verdict, might be carried." After this delicate suggestion, that, to be consistent, the United States supreme court should insist upon the admission of colored members, Mr. Justice Field proceeds: "The position that, in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest and fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that, in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race." I can add nothing to the force of Mr. Justice Field's argument, but I can express my concurrence in his view that the last three amendments to the United States constitution were not intended to authorize federal interference with the composition of juries in state courts. The fourteenth amendment is the only one relied on, and that cannot apply, because "a jury de medietate lingue" has never in this country been embraced in "due process of law," nor requisite to the "equal protection of the laws." If recognition of each race is required in the composition of juries, it is equally essential in the composition of the judiciary. Both are constituent elements in the administration of justice. In this state the law excludes no one from the jury or grand jury because of race. Neither does it exclude any one from the bench on that ground. If the words "due process of law" and "equal protection of the laws" warrant federal interference and inquiry as to the manner of selecting jurors when negroes do not appear on the panel, the same rule will warrant investigation of the mode of selecting judges because no negroes are on this or the lower bench. Under the constitution of the Union, as our fathers made it, the state prescribed the method of selecting its own jurors and judges, and supervised the

execution of its own laws in reference thereto. Like Justice Field, I see no warrant for federal interference under powers conferred by the fourteenth amendment. The above-cited decisions of the United States supreme court all hold that only when the alleged discrimination against colored jurors is by virtue of the provisions of the constitution or statutes of the state does the right to remove exist, and that, when the alleged exclusion of colored jurors is by virtue of the method of administering laws which contain no such discrimination, the sole remedy is by appeal to the highest court of the state, and thence by writ of error to the federal supreme court. In *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, Harlan, J., reviews the uniform decisions to that effect, and sustains (at page 589, 162 U. S., and page 910, 16 Sup. Ct., 40 L. Ed. 1075) as valid the legal requirements in Mississippi "that no person should be a grand or petty juror unless he was a qualified elector and able to read and write * * * and should possess good intelligence, sound judgment and fair character."

DOUGLAS, J. In concurring in the conclusion of the court, which I do without hesitation, I deem it sufficient to say that the defendant has been denied a constitutional right. Whether he has been injured or not by such deprivation is not for me to say. The mere fact that a substantial right intended for his protection has been denied him is sufficient to influence my judgment. Whether the juries were in fact improperly drawn remains to be proved, but, for the purposes of this discussion, we must assume the truth of the defendant's allegation, because he has been denied the opportunity of proving it. As this is a right claimed by the defendant under the federal as well as the state constitution, and which has been so recently decided and fully discussed by the supreme court of the United States, any further discussion on my part is entirely unnecessary. *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. This would end the matter, but for some expressions in the opinion of the court. I may frankly say that, while verdicts are sometimes rendered that do not meet my approval, I cannot concur in any statement that any classes are, as a rule, unable to obtain justice on account of the prejudice of the average juror. This may happen in individual cases, especially in criminal trials, where there is great public excitement; and, wherever it appears, a new trial should promptly be granted. My views as to the character, powers, and responsibilities of the jury are expressed in *Cable v. Railway Co.*, 122 N. C. 892, 900, 29 S. E. 877. I fully concur in the conclusion of the court that the defendant is entitled, irrespective of his color, to the fullest protection of the law, and that he may rightfully demand all the rights guaranteed to him by the

constitutions of this state and of the United States, as well as every legal remedy necessary for their protection and enforcement. A denial of the remedy would be a denial of the right.

(131 N. C. 352)

DAVIS v. SUMMERFIELD et ux.

(Supreme Court of North Carolina. Nov. 25, 1902.)

ADJOINING LANDOWNERS—LATERAL SUPPORT—EXCAVATIONS—NOTICE.

1. An owner of land, who excavates by the side of his neighbor's wall to a depth lower than the foundation of the wall, is negligent for failing to notify the neighbor of the extent of his proposed plans, though the neighbor knew that he was going to excavate, and is liable for injuries to the wall caused by his excavations.

Appeal from superior court, Durham county; Neal, Judge.

Action by B. Davis against M. Summerfield and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Winston & Fuller, for appellants. Boone, Bryant & Biggs, for appellee.

CLARK, J. This is an action for damages caused by depriving the soil under plaintiff's wall, of its lateral support, by negligence of the defendant while excavating for a new building on an adjoining lot. The right to lateral support has been before this court in *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753, and the whole subject is discussed in the very full and elaborate notes to *Larson v. Railroad Co. (Mo.)* 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 446, 447. Another full consideration may be found in *Jones, Easem.* §§ 585-631. There was evidence that the defendant made his excavation two feet deeper than the bottom of the foundation of the plaintiff's wall, causing it to crack, and otherwise injuring the plaintiff's building. There was counter evidence, and the jury, as triors of the fact, found a verdict for the plaintiff, and assessed his damages at \$225.

The exceptions presented on the appeal are very numerous, and were very fully and ably argued here, as doubtless they also were below. After careful consideration, we find no material error. The only new point, or proposition not heretofore decided, and the point perhaps most pressed on the argument, is the following instruction, to which the defendant excepted: "While there is evidence that the plaintiff knew that the defendant was going to excavate and build, for she testified to that herself, still the defendant owed to her the duty, which is not an unreasonable one, to tell her of the extent of his proposed plan, so she might adopt measures for self-protection, if she chose to do so; and the court charges you there is no evidence that he gave proper notice to the plaintiff on the line above

indicated. To give this notice involves no expense to the proprietor, and affords opportunity to the adjoining owner to protect his rights, for improvements made by one proprietor may be attended with disastrous results, even when prosecuted by competent workmen." We see nothing unreasonable or erroneous in this instruction. So far from giving such notice, when the plaintiff sent over an employé who said to the male defendant, "Mrs. Davis says please protect her wall; to dig it out in sections," he replied, "I know my business. Let her attend to her business." And when, in her anxiety about the safety of her building, the plaintiff sent over another person to ask of the defendant "not to hurt her wall," asking that the work might be prosecuted in such manner as not to endanger her building, the defendant very ungallantly sent the lady back word "to go to the devil." The action is not for the defendant's rude speeches, it is true; but certainly after these messages from the plaintiff, showing her anxiety to protect her wall, he at least owed it to her, as his honor charged, to give her notice of the manner and depth of his proposed excavations. If informed in that respect, she might have placed supports under her wall, or removed weights from the floors, or otherwise protected her property, or, if plaintiff's plans seemed an illegal invasion of her rights, she might, if so advised by counsel learned in the law, have sought protection by an application for an injunction. The defendant's failure to give such notice and information was, under the circumstances, as injurious to the plaintiff as the manner of his refusal was wanting in credit to himself. *Jones, Easem.* § 610; *Spohn v. Dives*, 174 Pa. 474, 34 Atl. 192; *Larson v. Railroad Co. (Mo.)* 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep., at page 470. The true rule deducible from the authorities seems to be that while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner, to the injury of that wall or building; and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention, that he may underpin or shore up his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections, at a time so as to give the owner of the building opportunity to protect it, and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence.

Upon the whole case, substantial justice appears to have been done, and we find no error requiring a new trial. Affirmed.

¶ 1. See *Adjoining Landowners*, vol. 1, Cent. Dig. § 33.

(131 N. C. 355)

LEFLER et al. v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. Nov. 25, 1902.)

TELEGRAPH COMPANIES—DELIVERY OF TELEGRAM.

1. A telegraph company receiving a message directed to one person in the care of a corporation is discharged by seasonably delivering it to an agent of the corporation, especially where, after extensive search, the sendee cannot be found.

2. The telegraph company was under no duty to state to the agent to whom the message was delivered that it was an important message, and to inform him of its contents.

Appeal from superior court, Rowan county; Shaw, Judge.

Action by Price Lefler and another against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Armfield & Turner, F. H. Busbee, and Geo. H. Fearons, for appellant. Overman & Gregory and Long & Nicholson, for appellees.

FURCHES, O. J. Action for damages for negligence in delivering a message received at Mooresville, Iredell county, to be delivered at Salisbury, Rowan county. The message was as follows: "To Price Lefler, Care So. Railway Co., Salisbury, N. C.: Mother dying. Come at once. D. M. Howard." This message was received by defendant company at 8:20 at Mooresville, and received at Charlotte at 10:55, and at Salisbury at 11:15. The evidence tended to show that the agent at Mooresville endeavored to send the message to Charlotte at once, but the agent at Charlotte did not answer his calls, and he could not do so sooner than he did. Upon the message reaching Salisbury, it was at once delivered to Leroy Shuping, a messenger boy 16 years old, and who had lived at Salisbury all his life. He did not know Price Lefler, nor did he know where he lived, nor whether in Salisbury or not; and it would seem, from the evidence, that he made extensive search and inquiry for Lefler, the sendee, but was unable to find him. And this being so, at 11:15 o'clock he delivered the message to Johnson, the ticket agent of the Southern Railway at Salisbury. This delivery to Johnson was in time for the plaintiffs to have gone to Mrs. Howard's before her funeral, if the delivery had been made to Price Lefler in person.

The discussion of this case has assumed a wide range, as the discussion of such cases usually does. But not to consider what is not necessary for a decision of the case, the discussion is very much limited. The message was delivered to Johnson in proper time, and eliminates the discussion of any negligence there may have been in sending the message, as no negligence can avail the plaintiffs that did not cause the injury. It also eliminates a discussion as to whether the messenger boy, Shuping, used due dil-

igence in trying to find Price Lefler or not, who was not in town at that time. The court properly instructed the jury that Johnson was a proper agent of the Southern Railway Company, to whom a delivery of the message might be made, and a delivery to him was a delivery to the Southern Railway Company, and, as the message was directed to Price Lefler in care of the Southern Railway Company, the said company was made his agent, and a delivery to the agent discharged the defendant from further liability on account of the message. *Telegraph Co. v. Houghton* (Tex. Sup.) 17 S. W. 846, 15 L. R. A. 129, 27 Am. St. Rep. 918; *Telegraph Co. v. Young*, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751. These cases were cited by the plaintiffs for the purpose of showing that, although the telegram was sent in care of the Southern Railway Company, it was still the duty of the defendant to make diligent inquiry for Price Lefler, which the plaintiffs allege was not done. But upon examination of the cases it will be seen that this is only necessary when the party in whose care the message is sent cannot be found. When he is found, and delivery made to him, the defendant has nothing further to do with the telegram. In this case the messenger boy, Shuping, made extensive inquiry for Price Lefler before he delivered the message to the Southern Railway Company. This he need not have done, but might have delivered it to the Southern Railway Company at once. As the said company became the agents of the plaintiffs, a delivery to it was a delivery to the plaintiffs. *Houghton's Case*, supra. And we cannot see, outside of the statute, how the defendant incurred any liability for not informing the plaintiffs' agent what was in the telegram. The plaintiffs were then in possession of the message, and it could speak for itself. If the defendant's messenger could have found Price Lefler and delivered the message to him, that would have been a compliance with its contract, and a discharge from any further liability. But it seems that a delivery to the wife of Price Lefler might not have been a sufficient delivery. It would not have been a literal compliance with the contract; but it would at least be a presumptive delivery, and a question for the jury, and, unless some reason was shown why it was not or should not be, it would be held sufficient. *Gray, Com. Tel. § 23.*

While the court charged the jury correctly that a delivery to the Southern Railway Company was a compliance with the contract, and a delivery to Johnson was a delivery to said company, it erroneously charged the jury that if they found from the evidence that a prudent man would have informed Johnson, when the message was delivered to him, that "it was a very important message," then it was the duty of the defendant to have done so, "and, if it did not, it was guilty of negligence." This was ex-

cepted to, and was error. It was no part of the defendant's duty to inform the plaintiffs or their agent what the telegram contained, and it had no right to inform any one else.

For this error there must be a new trial.

DOUGLAS, J., concurs in the result.

(131 N. C. 781)

STATE v. FINGER.

(Supreme Court of North Carolina. Nov. 25, 1902.)

ATTEMPTED RAPE—EVIDENCE—WITNESSES—COMPETENCY OF INFANT—REVIEW—INSTRUCTIONS.

1. Action of the court in permitting a child, on whom an assault with intent to rape was alleged to have been made, to testify, is not reviewable.

2. On prosecution of a negro for assault with intent to rape, committed on a white girl, evidence that the girl, her family, or companions associated with negroes, was irrelevant.

3. Where defendant testified that on the day alleged he was not at the place named, he could not complain of refusal of his instruction that the jury must consider evidence tending to show that the girl and her family and associates were on such familiar terms with defendant as would warrant the belief that he was playing with the girl on this occasion.

4. Where there is competent evidence of defendant's guilt of an assault with intent to rape, the verdict will not be disturbed on appeal, though the court entertains doubt as to its correctness.

Appeal from superior court, Lincoln county; Starbuck, Judge.

Clarence Finger was convicted of an assault with intent to rape, and appeals. Affirmed.

The Attorney General, for the State.

MONTGOMERY, J. The defendant was convicted of an assault with intent to commit rape upon Lethe Wise, a child under 10 years of age. After an examination of the child, who was tendered as a witness, as to her capacity to testify, his honor found that she was of sufficient intelligence; and she was allowed to give testimony, over the defendant's objection and exception. It was a matter in the discretion of his honor, and we cannot review his ruling in this court. *State v. Manuel*, 64 N. C. 601; *State v. Edwards*, 79 N. C. 650.

The defendant's counsel offered to prove that the Weaver family ate with negroes and associated with them constantly, which testimony his honor refused to receive. We cannot understand how it could be thought to be competent evidence. If it was true that little Bessie Weaver, the companion of Lethe, was, through her family connection, the associate and companion of colored people, that did not give the defendant, who was a colored boy 17 years of age, the right or the privilege to assault Lethe.

The third exception was to the refusal of his honor to allow Mrs. Taylor, a witness, to answer the question, "Do you know the

manner of associating between the Wise family and the negro race?" The exception cannot be sustained. The law makes no presumption that white persons who associate with negroes are debased in character, and even if the little girl, Lethe, were a woman, instead of a child, and a lewd woman in addition, still the defendant had no right to commit an assault upon her.

The defendant's counsel asked several special instructions, all of which were given except the fifth and seventh, which were declined. The fifth instruction asked was in these words: "That the jury have a right to consider, and it is their duty to consider, any evidence that tends to show such a state of relation existing between the witness Lethe, and her associates and family, and the defendant (being a negro), that he was on such familiar terms with them as would warrant the belief that he was playing with Lethe on this particular occasion." The defendant, in his examination, said that he never went to the granary where the children were on that day,—wheat-threshing day; that he was at the machine all that day, throwing down wheat. How could he ask, then, any instruction to the jury that he was playing with the children, in the act with which he was charged by the witness? Or suppose that he was intimate with the children; did that authorize him to play with them in such manner as Lethe testified? The instruction was properly refused.

The seventh prayer for instruction was that there was no competent evidence for the jury of any assault with intent to commit rape. That was properly refused. His honor had held that Lethe was a competent witness, and she testified to facts tending to show the assault.

Upon a careful consideration of the whole evidence in this case, we have grave doubt about the guilt of the defendant. The child's examination before the justice of the peace, the delay in the prosecution of the defendant, his conduct after the offense was committed, cause us to suspect some sinister purpose at the bottom of his prosecution. Dr. Crowell, a witness for the defendant, testified that he examined the private parts of the child, Lethe, at the trial term of the court, and that he found no rupture, nor any indication of penetration. But they were all circumstances for the jury, and the duty of finding the facts, and the responsibility of the finding, were with them.

There was no error in the rulings of his honor, and the judgment is affirmed.

(131 N. C. 375)

LANE v. RANEY.

(Supreme Court of North Carolina. Nov. 25, 1902.)

INSURANCE AGENTS—DIVISION OF COMMISSIONS—RIGHTS AGAINST GENERAL AGENT.

1. Where two subagents were soliciting insurance in the same territory, without exclu

sive right in either, and one of them witnessed and forwarded an application for a policy, the other could not recover against the general agent for a portion of the commissions if the latter had already paid all the commissions to the agent forwarding the application, without knowledge of the other's claims.

2. In an action by one of two subagents against a general agent of a life insurance company for a share of commissions on a policy written on the application of the other subagent, plaintiff's right to recover was not affected by a rule of defendants that where agents claim a division of commissions there should be a joint request for pay, unless plaintiff had knowledge of such rule.

3. Where one of two subagents of an insurance company brought an action against the general agent, claiming one-half of the commissions on a policy written on the application of the other subagent, and it appeared that the application was for a certain policy on agreement for a premium of \$175, while the policy issued called for a premium of \$253.80, one-half of which was given the agent, it was error to permit a recovery for \$43.75, half the commissions on a \$175 policy, since the agents were required to pay the company one-half of \$253.80, which left them but \$48.10 of the \$175 actually received, and plaintiff, if entitled to recover, was entitled to but half of such balance.

Appeal from superior court, Craven county; Winston, Judge.

Action by S. H. Lane against R. B. Raney. From a judgment for plaintiff, defendant appeals. Reversed.

The judge charged the jury as follows:

"Lane was an agent of Raney to get insurance. Did Lane get this policy? If he did, he is entitled to the commissions, unless he has failed to observe some of the rules which Raney had for the conduct of his business, which rules the plaintiff knew, or had reason to know. Did Raney have a rule that when there was a division policy there should be a joint request for pay, signed by both agents? Raney swears there was such a rule. Lane swears he knew of no such rule. Raney says Lane knew the rule, because he had always signed such papers in the policies he had taken out. The defendant urges that it had to have such a rule when two agents were working together on a division of commissions; that it could only then pay one his part, and the other his part; that the policy was written and controlled by Martin, who witnessed the application. Lane claims he induced the insurance; that he knew Gulon, and Martin did not; that Gulon and he were friends, and on his sole account Gulon insured. If the jury finds by the greater weight of the evidence that the plaintiff induced Gulon to take out the policy, and Gulon took out the policy and paid the company \$175, then Lane can recover \$43.75, unless Lane has failed to comply with the rule. As I have said, you must first find that there was such a rule; that the joint agents, when the applications went in, were to sign a statement as to them. Having found the rule, then you will find whether Lane complied. If Raney had such a rule, and Lane knew it, then Lane cannot recover, if Raney has paid

all the money to Martin. If you believe the evidence in this case, then Raney has paid all of these commissions to Martin. If he paid them when he ought not to have done so, then Lane can recover; and whether he ought to have done this depends on whether he had a rule, and whether Lane knew it, or had reasons to know it. If you answer the issue 'yes,' you will say '\$43.75,' and you can add interest thereto from the date Gulon paid to the company. If you answer the issue 'No,' you do not assess any amount."

Battle & Mordecai, for appellant. W. D. McIver, for appellee.

DOUGLAS, J. This is an action brought to recover commissions alleged to be due for obtaining a certain policy of insurance. There appears but little contradiction in the testimony. The defendant, as state agent of the insurance company, employed the plaintiff as a local agent to solicit applications in the county of Craven, "subject to existing agencies and such others as may be established therein." This contract does not pretend to give the plaintiff the exclusive right to solicit business in Craven county, and therefore we see no reason why the defendant could not send Martin or any other agent to solicit applications in the same territory, either in conjunction with or independently of the plaintiff. If the application for insurance had been sent on by the plaintiff, or he had had exclusive control of said territory, it would have been the duty of the defendant to have settled with him for the commissions. But there was no such exclusive control, and the application was witnessed and forwarded by Martin without any notice to Raney, direct or indirect, that Lane had any connection with the application; nor was there anything to put Raney upon notice. To all appearances, the application was Martin's alone; and if Raney in good faith paid the full commissions to Martin, without any notice of Lane's claim, he fulfilled his obligations. We do not mean to say that such notice must have accompanied the application, but it must have been given actually or constructively before the commissions were paid to Martin. The trouble is, we can find no evidence in the record that Raney has ever paid the commissions to any one. The case seems to have been tried upon the theory that he had paid them to Martin, or allowed them on settlement, before he had any notice of Lane's claim; but no one has so testified, as far as appears from the record.

The defendant asked the following instruction, exclusive of the words in parentheses which were added by the court, to wit: "If the jury should believe that Raney made full settlement of the commissions on the Gulon policy with Martin before Lane notified Raney that he was claiming any part of the commissions of same, or made any demand therefor (and the rule was in existence, and Lane knew of the rule, or ought to have

known of it from his business dealings), that the plaintiff would not be entitled to recover." This prayer might have been refused on the ground that there was no evidence to sustain it, but, as given, there was error. Under the circumstances of this case, Raney was entitled to notice, irrespective of any private rule he may have made, and therefore his liability should not have been made to depend upon Lane's knowledge of a rule that was immaterial. If there had been any evidence of payment to Martin, then the instruction should have been substantially given as requested by the defendant.

There are other exceptions by the defendant as to the effect of the defendant's private rules, which have no merit whatever,—as the following, for instance: "The judge erred first in charging that Lane must have knowledge of the rule, to be bound by it. He should have charged, if Raney had such rule, then Lane cannot recover." In this respect his honor's charge was entirely proper.

The last exception, we think, must be sustained, upon the testimony in this case. It is thus stated in the record: "The judge erred also in the charge when he states if Gulon took out the policy, and paid the company \$175, then Lane can recover \$43.75, unless, etc. The error here is in charging the amount that Lane is entitled to recover, if anything. According to the contract, Lane could not be entitled to more than fifty per cent. of the first premium. From the evidence, Gulon had made application for a 20-payment life, whose annual premium was \$175. The company issued a 20-year endowment, whose annual premium was \$253.80. The agent must settle with the company by paying 50 per cent. of the first annual premium to the company for the policy. This policy, from the evidence, could not be delivered to Gulon, except upon the reduction of the first annual premium from \$253.80 to \$175. The agent's settlement with the company must have been by paying over to the company \$126.90 upon the endowment policy, which being deducted from the \$175, money actually received, would leave commissions of \$48.10, of which, according to plaintiff's contention, he would not have been entitled to but one-half of this, to wit, \$24.05." If the evidence of Raney and Martin is to be believed, the commissions on Gulon's policy were only \$48.10, only half of which would belong to the plaintiff, if he were entitled to recover at all.

New trial.

(131 N. C. 371)

MOORE v. MOORE.

(Supreme Court of North Carolina. Nov. 25, 1902.)

DIVORCE—ALIMONY PENDENTE LITE—REDUCTION—MOTION—RENEWAL—COURTS—JURISDICTION.

1. Hearing of motion to reduce an allowance of alimony pendente lite, being in an ancillary

proceeding, need not be had in the county where the action is pending, but may be anywhere in the district.

2. Under Laws 1901, c. 28, § 4, a judge holding by rotation the courts of a district has sole jurisdiction therein, except in certain cases specially provided; and therefore a judge resident of one district, holding by rotation the courts of another district, had no jurisdiction over a motion to reduce an allowance of alimony pendente lite in the district where he resided.

3. Where the district judge has refused a motion to reduce an allowance of alimony pendente lite, a renewal of the motion should not be made under Code, § 1291, providing that such order may be modified or vacated at any time, unless on a material change in condition or evidence, showing a different state of facts, and accompanied by a receipt for so much of the sum allowed as is a reasonably fair proportion of the allowance in accordance with the pecuniary condition of the defendant, as alleged in the motion to reduce, compared with his pecuniary worth as found by the judge who granted the first order.

Appeal from superior court, Alexander county; Council, Judge.

Action of divorce by Jennette G. Moore against Joseph H. Moore. From an order granting defendant's motion to reduce the allowance of alimony pendente lite, plaintiff appeals. Motion dismissed.

Long & Nicholson, for appellant. A. C. McIntosh, for appellee.

CLARK, J. This is a motion for alimony pendente lite, which was before this court. 130 N. C. 333, 41 S. E. 943. When the decision was certified down, the defendant moved, on July 10, 1902, before Judge Starbuck, then holding, by regular rotation, the courts of the Thirteenth judicial district, in which this action is pending, to reduce the former allowance. This his honor refused, rendering the judgment set out in the record. Thereupon, on July 26, 1902, the defendant renewed the motion before Judge Council, the resident judge of the Thirteenth judicial district, but at that time, in regular rotation, assigned to duty in the Fifteenth judicial district, who reduced the allowance to \$3,000, and the plaintiff appealed. Her first exception is that Judge Council had no jurisdiction.

A motion for judgment on the merits, or a motion in the cause, strictly speaking, can be heard only in the county where the action is pending; but a motion in an ancillary proceeding can be heard anywhere in the district, and this, being a motion of that nature, could be so heard. *Moore v. Moore*, 130 N. C. 334, 41 S. E. 943, and cases there cited. There is no defect of jurisdiction on that score, as the hearing was within the district. But under our rotating system, the judge holding by rotation the courts of a district has, during the six months he is assigned thereto (Laws 1901, c. 28, § 4), the sole jurisdiction therein (*State v. Ray*, 97 N. C. 510, 1 S. E. 876, and numerous cases there cited), just as the resident judge had when there was no rotation (*Birdsey v. Harris*, 68 N. C. 92), except in the cases

otherwise specially provided by statute; and those exceptions in civil cases are restricted to restraining orders and injunctions to the hearing (Code, §§ 335-337), and the appointment of receivers (Code, § 379). Habeas corpus proceedings are an exception, also, but that is a prerogative writ. As to contempt proceedings, they are criminal in their nature, for the governor can relieve from the judgment by virtue of the pardoning power. *Herring v. Pugh*, 126 N. C., at page 862, 36 S. E. 287. Judge Councilll was, by virtue of the statute, judge at the time this motion was heard, of the Fifteenth judicial district; and having no jurisdiction in the Thirteenth judicial district, in which he was resident, of any motion in a civil action (*State v. Ray*, supra), other than motions for restraining orders, injunctions to the hearing, and for appointment of receivers, his judgment herein is therefore void.

The plaintiff further contends that Judge Starbuck's order of July 12th made this matter of reduction of the alimony *res judicata*. It is true that, when a judge of the superior court has rendered an erroneous judgment, the remedy is solely by appeal, and that another judge cannot modify or hold it erroneous. *Henry v. Hilliard*, 120 N. C., at page 487, 27 S. E. 130. Such other judge can set aside a judgment at any time, if void or irregular, and may relieve a party from a judgment, within one year after notice of the judgment, for mistake, inadvertence, surprise, or excusable neglect. Code, § 274. Code, § 1291, also provides that, as to alimony *pendente lite*, "such order may be modified or vacated at any time." In *Moore v. Moore*, 130 N. C., at page 337, 41 S. E. 943, this court expressed the opinion that the allowance was a large one, but held that it was "not so gross as to be an abuse of discretion"; and hence, if the motion for a modification should be refused, no appeal would lie. Certainly it would not unless an entirely new state of facts were developed on the new motion, and found by the judge, which would render such refusal an abuse of discretion. Judge Starbuck heard and refused the motion to modify, July 11, 1902, and no appeal was taken; and the order of Judge Councilll making a reduction July 26, 1902, was void, for want of jurisdiction. We will not say that, if a new state of facts is presented on a new motion to reduce the allowance, the judge holding the courts of the district would not be authorized to consider and pass upon it. As no appeal lies, for reasons stated supra, such motion will not cause appreciable delay, and can hardly be deemed vexatious, as each judge holds jurisdiction in a district for six months, and in that time the allowance can be collected by enforcement of the judgment. Indeed, the motion does not suspend execution of the judgment. That is suspended only by an appeal, when an appeal lies and a proper bond is given. The granting of alimony *pendente lite* is given by statute for

the very purpose that the wife may have immediate support, and be able to maintain her action. It is a matter of urgency. Therefore, to avoid delay by appeal, the amount is left to the discretion of the judge, and his action cannot be reviewed unless in a clear case of abuse of discretion. This imposes on the judges of the superior courts the duty of being moderate in their allowances of alimony, because the fact whether the wife has a good cause of action has yet to be passed upon by a jury. On the other hand, an appeal, except in a clear case of abuse of discretion, is not allowable, and the plaintiff should not be vexed nor delayed of the support the statute and the judgment give her by successive motions for reduction. Unless there is a material change in condition, or evidence showing a different state of facts, no motion for a reduction should be made; and even then it should be peremptorily dismissed, unless accompanied by a receipt for so much of the sum allowed as is reasonably a fair proportion of the allowance, in accordance with the pecuniary condition of the defendant, as alleged in the motion to reduce, compared with his pecuniary worth, as found by the judge who granted the first order.

As there was no appeal from Judge Starbuck's order on July 12, 1902, refusing a reduction, and we cannot consider the findings of fact on Judge Councilll's order granting a reduction on July 26, 1902, since he was without jurisdiction, we cannot say that there are not facts which may not now authorize a renewed motion, before a proper judge; but such reiterated motions are not seemly, and may be easily vexatious and oppressive. The judge should not entertain or consider another motion unless accompanied by a receipt for the payment of whatever part of the allowance already made as justice to the plaintiff and her necessities require, as above stated.

Motion dismissed.

(131 N. C. 379)

WESTFELDT et al. v. ADAMS.

(Supreme Court of North Carolina. Nov. 25, 1902.)

ACTION FOR POSSESSION—EQUITABLE TITLE—PLEADING—NECESSITY—ASSIGNEE'S DEED—SEAL—NECESSITY—PROBATE—SURVEY—BOUNDARIES—EVIDENCE—DECLARATIONS OF DECEASED PERSON—REPUTATION.

1. An action at law may be brought to recover possession of land under an equitable title, though the equity is not stated in the complaint, where it is of such a character that the court, on record evidence introduced at the trial, would have corrected the defects in an *ex parte* proceeding.

2. A deed of an assignee of a bankrupt is sufficient to pass title to the purchaser of property sold by such assignee, though the deed was not sealed.

3. Where at the date of the execution of a deed by the assignee of a bankrupt to a purchaser of the bankrupt's property, and the date the deed was registered, the law did not re-

¶ 1. See Ejectment, vol. 17, Cent. Dig. § 170.

quire the probate of the deed to be accompanied by a seal of the probate officer, the deed was valid without such seal.

4. Where a deceased person declared to a witness that a certain tree marked the beginning corner of a tract of land, and at the time of the declaration the parties were not at or near such boundary, but other witnesses thereafter found the corner and identified the tree, the witness was entitled to testify to the declaration by such deceased person, on an issue as to the proper boundaries of the land.

5. Where land was entered in 1860, surveyed in 1877, and in 1886 a surveyor and the entry taker were unable to make a starting point in a resurvey without the assistance of the surveyor who had made the previous survey, evidence of witnesses in an action in 1891 that by general reputation a chestnut tree was the beginning corner, but that they had never heard that the tree was the beginning corner until after 1886, was inadmissible, since it was not shown to have attached before the beginning of the controversy.

Appeal from superior court, Swain county; Geo. A. Jones, Judge.

Action by G. R. Westfeldt and others against W. S. Adams to recover possession of land. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Merrimon & Merrimon, Shepherd & Shepherd, and Joseph J. Hooker, for appellants. F. A. Sondley and Julius C. Martin, for appellees.

MONTGOMERY, J. Four questions of importance are involved in the case on appeal: First, the propriety of an action to recover possession of land where the title is an equitable one, the equity not being stated in the complaint; second, the legal effect of a conveyance for land, not being under seal, when introduced as a link in the chain of title; third, the rule concerning hearsay evidence, as applicable to boundary; and, fourth, the rule in reference to general reputation as to boundary.

It seems to be settled by the decisions of our court that a plaintiff may recover in ejectment upon an equitable title. *Taylor v. Eatman*, 92 N. C. 601; *Condry v. Cheshire*, 88 N. C. 375; *Geer v. Geer*, 109 N. C. 679, 14 S. E. 297. In cases, however, where it is necessary to establish equitable ownership by extrinsic testimony, then the facts and circumstances should be particularly set out in the complaint. Under the former system, in cases where it became necessary to resort to the court of equity to recover possession of land, all the facts necessary to establish the equity and to warrant equitable interference were required to be set out in the bill. And under the present practice, in conformity to the old practice, they must be particularly set forth in the complaint. But where the naked legal title is outstanding in another, or where, upon the face of record evidence introduced on the trial, a court of competent jurisdiction would, in an *ex parte* proceeding, and as a matter of course, order the correction of a mere formal defect in a deed, for instance, it is not neces-

sary to set forth the particular facts constituting the equity in the pleadings. *Geer v. Geer*, supra. And that view is not inconsistent with *Patterson v. Galliher*, 122 N. C. 511, 29 S. E. 773, and the cases there cited. Of course, the same rule would apply in cases where the defendant was defending his possession.

In respect to the second question,—the legal effect of deeds not under seal,—of course, the general rule is that they convey nothing, and are void. Land can only be conveyed by deed, and a deed is an instrument of writing, signed, sealed, and delivered. But there is an exception to the rule, or at least one instance in which the lack of a seal may be dispensed with, under a decision of this court,—a decision which meets our hearty approval. *Geer v. Geer*, supra. There the deed was without seal. On the trial the plaintiff introduced evidence in the nature of a record of the superior court concerning a sale of land for partition. The clerk of the court, who was appointed to sell the land and convey the same to the purchaser, omitted to put a seal at the end of his name; and the court held that "where upon the face of the record evidence, like that before us, the court would in a direct proceeding, as a matter of course, order the correction of a mere formal defect in the execution of its decree, it is unnecessary, though perhaps the better practice, to set forth the facts in the proceeding." In the case before us there appeared no seal to the deed which formed a main link in the chain of the plaintiff's title, and in his complaint there were no equities set out. The plaintiff, however, introduced in evidence the full record of the bankruptcy proceedings on the petition of E. H. Cunningham, filed on the 26th day of May, 1868. That record showed the appointment by the proper authority of F. S. H. Reynolds, of Buncombe county, as assignee of the bankrupt; and the deed in question, in which was conveyed the land in dispute, was executed by Reynolds, the assignee, to George Westfeldt, the plaintiff. We are of the opinion that the same rule ought to be applied here that was applied in *Geer v. Geer*, supra. Certainly the United States district court, through which the administration of the bankrupt law of 1867 was conducted, would upon the inspection of the records introduced in this case as evidence, upon motion, order a commissioner appointed by the court to execute a deed with a seal; the defect in the original being merely technical and formal. Under the circumstances of the case, we think there was no error in the ruling of his honor that the deed was sufficient to pass title.

Probate of the deed was had in Buncombe county, and the land was situated at that time in the county of Macon, and afterwards embraced in the territory of the new county of Swain, formed in 1871. Pub. Laws 1870-71, c. 94. The officer who took the pro-

bate in Buncombe county did not attach his seal to the certificate, and, when the registry of Swain county was introduced by the plaintiff, the defendant objected because the certificate of the probate officer of Buncombe county was not made under that officer's seal. The probate was dated May 1, 1869, and was registered in Swain county on September 16, 1881. At neither date did the laws require the certificate to be accompanied by the seal of the probate officer. Acts 1868-69, c. 64; Battle's Revisal, c. 85, § 5; Holmes v. Marshall, 72 N. C. 37.

The third and fourth questions for consideration can be discussed together: The beginning corner of the tract of land claimed by the plaintiff was the chief matter in dispute. In *Dobson v. Finley*, 53 N. C. 495, in the discussion of the admissibility of evidence by general reputation and of hearsay, Chief Justice Pearson, for the court, said: "It is settled law that both kinds of evidence are competent evidence of private boundary in this state." In the latter, to wit, hearsay evidence, it is necessary, as a preliminary to its admissibility, to prove that the person whose statement it is proposed to offer in evidence is dead,—not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be produced as a witness,—whereas it is manifest that in respect to evidence by reputation this preliminary evidence cannot arise. *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154. In the case before us his honor admitted the testimony of two witnesses (Cable and Francks) as to the beginning corner of the plaintiff's land, who got their information from persons deceased; the witness not having been at the time of receiving his information at or near the boundary beginning, but 25 or 30 miles away; that is, that the corner or the beginning was not pointed out to the witness by the deceased person. Those particular witnesses had never afterwards actually identified the boundary as fitting the description given by the deceased declarant. Other witnesses, however, testified that they found a tree at the alleged beginning corner, answering the description given by the deceased to the first witnesses. If the beginning corner had not been afterwards identified, then the testimony of Cable and Francks would have been inadmissible. Because it was afterwards found, we think it was competent. In *Scoggin v. Dalrymple*, 52 N. C. 46, the court said: "The precise point and the only one presented in the bill of exceptions is whether the declaration of a deceased person is admissible to establish a corner tree which is not in view at the time of the declaration, but the position of which is described by the declarant so that it is found by a witness." (*Italics the writer's.*) The testimony was held to be admissible. "The hearsay becomes definite by the aid of the witness who, following the direction given,

finds the tree; and while it might be considered as of doubtful admissibility, disconnected from the evidence of the living witness, yet, aided by that, it seems to us clearly competent. We do not wish to be understood as laying down a rule that declarations of deceased persons as to corner or line trees not in view would be incompetent. That might depend upon whether their positions were so defined by the declarant as to make it practicable to identify them or prove their location to the satisfaction of the court and jury. The point before us is whether the hearsay evidence offered, connected with the other testimony giving it definiteness, was properly left to the jury; and that only we undertake to decide. The force of the proof would, of course, depend upon the identification of the tree found with the tree meant by the deceased, which was properly submitted as a matter of fact, we suppose, to the jury." We think that the testimony was competent, although the witness to whom the declarant made his statement was not the witness who afterwards identified the boundary. It is not so much which witness afterwards found the corner, as it is the description which the declarant gave of the corner which enabled it to be found.

His honor allowed two witnesses to testify that, by general reputation, the chestnut tree claimed by the plaintiff was the beginning corner. They said they had never heard anything about that tree being the beginning corner until after the year 1886. The land was entered and surveyed in 1860, and this action was commenced in 1891. We are of opinion that the evidence of the witnesses on general reputation ought not to have been received, for two reasons: First, it was too recent; and, second, it had not attached ante litem motam. There were only about five years elapsing between the time when Westfeldt went to the corner, which he claimed as the beginning corner of his land, with the entry taker of the county, and a surveyor to identify and ascertain the beginning corner, and the commencement of this action. Surely, that was too short a time in which traditionary or general reputation evidence could be said to attach. *Deaver v. Jones*, 119 N. C. 598, 26 S. E. 156. Tradition and general reputation, in common sense and in law, must mean that which is derived from the declarations of those who lived or were living at a time, if not ancient, at least comparatively remote. It is clear from reading the whole evidence that the plaintiff did not know in 1886 where his lines were. As we have said, the land was entered and surveyed in 1860. It was then surveyed again in 1877 by the deceased surveyor, McDowell. It was surveyed again in 1886, at which time Westfeldt, a surveyor, and the entry taker were unable to make a starting point in the survey, until they had sent back and got McDowell, who had made the survey in 1877, to join them. It

was again surveyed in 1891. Surely, then, a survey made by the plaintiff in 1886, in which he settled his own beginning point, under all the circumstances shown in the evidence, ought not to be allowed to fix by reputation the boundaries of his land. The ground on which such evidence is admitted at all is that "the declarations are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." There cannot be entire indifference in a community about matters over which there is a controversy, for, as a rule, in disputes, men take one side or the other, and, if they desire to be entirely impartial, they may not see facts through a true medium. In the first volume of Greenleaf on Evidence, at section 132, the author writes on this subject: "To avoid, therefore, mischiefs which would otherwise result, all ex parte declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected. This rule of evidence was familiar in the Roman law; but the term 'lis mota' was there applied strictly to the commencement of the action, and was not referred to an earlier period of a controversy. But in our law the term 'lis mota' is taken in the classical and larger sense of 'controversy,' and by 'lis mota' is understood the commencement of the controversy, and not the commencement of the suit." For the error in the admission of the evidence on general reputation there must be a new trial.

In the discussion of the case we have felt called upon to consider the other questions involved in the case on appeal, feeling certain that they would be raised again in the course of the next trial, and that counsel may know our views on them.

New trial.

(131 N. C. 795)

STATE v. WISEMAN.

(Supreme Court of North Carolina. Nov. 25, 1902.)

JUSTICES OF THE PEACE — JURISDICTION — CRIMINAL ACTION — AMOUNT OF FINE — SUPERIOR COURT — APPELLATE JURISDICTION.

1. Const. art. 4, § 27, limits the criminal jurisdiction of justices of the peace to cases where the fine cannot exceed \$50. Acts 1901, c. 182, § 2, provides that the fine for permitting stock to run at large may reach the sum of \$10 per head. In an action thereunder before a justice defendant was fined only \$16, though the fine might have exceeded the constitutional limit. *Held*, that the justice had no jurisdiction.

2. Where a justice of the peace had no jurisdiction of a criminal case tried before him, owing to the amount involved, the superior court could acquire no jurisdiction on appeal.

Appeal from superior court, Mitchell county; Starbuck, Judge.

A criminal action against S. Wiseman for permitting stock to run at large was dis-

missed by the court, and the state appeals. Affirmed.

The following is the agreed statement of facts on appeal:

Since the trial in the superior court, the warrant and judgment of the justice of the peace have been misplaced, and cannot be found. The warrant upon which the defendant was arrested and tried was drawn in due form, under section "one," chapter 182, of Acts of 1901, and charged that defendant did on May 1, 1902, willfully and intentionally allow about 10 head of hogs to run at large off his premises in Mitchell county, N. C. The words in quotation are the exact words set out in the warrant. The body of the judgment rendered by the justice of the peace, and which was indorsed on the warrant, was in words and figures as follows: "Defendant found guilty. Fined, for 8 hogs, at \$2 per head, \$16.00. Costs, \$2.50." The evidence in the superior court shows that the defendant in the month of May, 1902, allowed 8 hogs to run at large at the same time; the hogs being in one drove or gang. The court, upon motion, arrested the judgment and dismissed the action for want of jurisdiction, inasmuch as the maximum fine for the offense charged, and for which defendant was convicted, was, according to section 2 of said chapter, more than \$50. The solicitor excepted and appealed.

The Attorney General, for the State.

FURCHES, C. J. This is a criminal action commenced before a justice of the peace under chapter 182, Acts 1901. The warrant charges that the defendant allowed 10 hogs to run at large off his premises, in violation of the provisions of the first section of said act. And the second section thereof is in the following language: "That any person or persons violating the provisions of section 1 of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two dollars nor more than ten dollars for each and every offense, for each head of stock so allowed to run at large." The defendant was found guilty in the justice's court of allowing eight head of hogs to run at large off his premises in violation of said act, and was fined \$2 for each hog, making \$16. The defendant appealed from this judgment to the superior court, where he was again tried upon the same warrant, and was again found guilty. But the court arrested the judgment and dismissed the action for want of jurisdiction, and the state appealed.

This statute makes a violation of section 1 a misdemeanor, and does not prescribe any punishment, except as to each hog. But article 4, § 27, of the constitution, fixes the jurisdiction of justices of the peace, and limits it in criminal matters to cases in which the fine cannot exceed \$50, or the imprisonment 30 days. And under this statute the fine is limited to \$10 for each hog. "The fine shall

¶ 2. See Criminal Law, vol. 15, Cent. Dig. § 2573.

not exceed ten dollars for each hog so allowed to run at large." And although he was only fined two dollars a hog, or \$16 for the eight, he might have been fined as much as \$80; this being \$30 in excess of his jurisdiction. It is therefore plain to see that the justice of the peace did not have jurisdiction.

But the state contends that the superior court had jurisdiction of the offense, and, the case having been carried to that court by appeal, that gave the superior court jurisdiction of this offense, and it should have proceeded to judgment. This would have been so if there had been a bill sent in that court, and found "A true bill," as in *State v. Neal*, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810. The jurisdiction of the superior court would then have arisen upon the bill of indictment, and not by virtue of the warrant of the justice of the peace. The justice of the peace had no jurisdiction. The warrant itself showed that, and ousted him of jurisdiction; and, as it gave him none, it could give the superior court none. While the superior court has jurisdiction of such violations of the criminal law as that charged against the defendant, it had no jurisdiction over the defendant until he was properly before the court, upon a bill found, or by appeal from a justice of the peace, who had jurisdiction to try and punish the defendant. In cases where bills are found in the superior court, its jurisdiction is original. But in cases of appeal from justices of the peace, its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and, if the justice had none, the superior court had none. It was in fact trying the defendant on a piece of paper containing a charge against him for violating the criminal law of the state, but without its being authorized by a grand jury or a justice of the peace having jurisdiction of the offense, and therefore not authorized to prefer the charge or to try the case, and the appeal conferred no jurisdiction on the superior court.

We see no error, and the judgment is affirmed.

(131 N. C. 350)

J. A. FAY & EAGAN CO. v. CAUSEY et al.
(Supreme Court of North Carolina. Nov. 25, 1902.)

PRINCIPAL AND AGENT—AGENT'S AUTHORITY—PAYMENT—EVIDENCE—SUFFICIENCY.

1. An agreement by an agent selling machinery that payment might be made in lumber was not binding on the principal, where not ratified.

2. In an action on notes, evidence examined, and held not to support the defense of payment in goods, under an alleged agreement with plaintiff's agent.

Appeal from superior court, Guilford county; Shaw, Judge.

Action by the J. A. Fay & Eagan Company against H. C. Causey and others. From a

judgment for defendants, plaintiff appeals. Reversed.

L. M. Scott, for appellant. J. A. Barringer, for appellees.

MONTGOMERY, J. The execution of the two notes sued on was admitted, and payment was set up as a defense in the answer. On the trial the defendants undertook to prove that payment was made in lumber. The sale of the machinery for which the notes were given in part was made by J. H. Burgess, an agent. The defendant Causey was examined as a witness in his own behalf, and testified that he and the agent agreed that a part of the purchase money (without stating how much) might be paid in lumber, and that about that time a lot of lumber was shipped to Burgess. That was an agreement not binding on the principal, unless it was authorized by the principal; and there was no evidence tending to show that such authority had been given, or that it had been ratified. The witness said that at the time Burgess received the lumber he said nothing about being agent. Neither was there any evidence that any lumber was ever paid as a credit on the notes which are the subject of this action. Burgess did testify that he was authorized to receive payment of the notes in lumber, but not to sell in the first place for lumber; but nowhere does he say that he received anything—lumber or money—on these particular notes. He said that after he had received the lumber he "accounted to Mr. Causey for it, and paid off one or two of his notes, and gave them. I accounted to the company so as to get these papers turned over. I received the lumber on this account for Eagan & Co. I got the lumber as far back as 1892." So it is clear from this witness' testimony that such of the notes given for the machinery (there were three), and which had been paid in lumber, were turned over to Causey by Burgess; and as the notes (two) sued on were never in the hands of the defendant, but in the plaintiff's possession, the payment of them was not the matter about which the witness was testifying. The letters of the defendants, too, support the witness Burgess on that point.

On the 14th December, 1892, several weeks after the lumber had been delivered to Burgess, the defendant Wall wrote to the company, asking how much was due on the notes, and was informed that there were three notes unpaid,—two of \$100 each, and one of \$75. In reply to the letter containing that information, Wall wrote that there had been some trouble about some knives belonging to the machinery not having been delivered, but that, if the company would deduct \$25 for the knives, there would be no more trouble about the accounts. But a series of letters from the company to the defendants, of dates May 26, 1893, June 30, 1893, and July 5, July 8, and July 21, 1893, are

sent to the defendants, making demands for the payment of the three notes. These letters also show that the defendants were claiming payment in lumber to Burgess. On August 3d following, the defendants sent to the plaintiffs a check for \$105.83, and asked that the same be placed to their credit on the machine bought from Burgess; and on September 15th following, they sent \$11.60, with the request to place the same on the machine bought from Burgess. The testimony of the defendants, the correspondence between them and the plaintiffs, and the testimony of Burgess, all taken together, explain the whole transaction, and show that there is no evidence that any payment was ever made on the two notes sued on, except the credit of \$11.60 on the \$100 note, either in lumber or in money. The first instruction asked by the plaintiffs ought, therefore, to have been given.

Error.

(131 N. C. 224)

JOYNER et al. v. SUGG et al.

(Supreme Court of North Carolina. Nov. 25, 1902.)

DEED IN TRUST—RESERVATION OF HOMESTEAD RIGHTS—PROPERTY CONVEYED—MORTGAGE ON WIFE'S LAND—PAYMENT BY HUSBAND—RIGHTS OF PARTIES.

1. The mere fact that a husband who had united in a mortgage of certain land, the legal title of which was held by his wife, subsequently paid off the entire indebtedness himself, his wife paying no part thereof, gave him and his heirs no right to the land as against the wife. Per Douglas, J., and Furches, C. J.

2. A deed of land in trust, "subject to and reserving, however, his [the grantor's] homestead rights therein," etc., passed the entire land, except \$1,000 worth thereof. Per Douglas and Cook, JJ.

3. A deed of land in trust, "subject to and reserving, however, his [the grantor's] homestead rights therein," etc., passed the entire land, subject only to "a determinable exemption from the payment of the homesteader's debts"; and, upon the determination of that exemption by the latter's death, there was nothing left for his heirs at law. Per Clark and Montgomery, JJ.

Appeal from superior court, Pitt county; Winston, Judge.

Action by J. H. Joyner and others against Mary A. Sugg and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Skinner & Whedbee, for appellants. Jarvis & Blow and Connor & Son, for appellees.

DOUGLAS, J. Blaney Joyner in 1893 executed a deed of trust to Allen Warren to secure creditors, in which was included the land in controversy, which was conveyed "subject to and reserving, however, his [Blaney Joyner's] homestead rights therein as secured by the laws of North Carolina." After due advertisement according to the terms of the trust, the land was sold "subject to the reserved homestead right of Blaney Joyner," and was bought by R. L. Davis, with whom Blaney Joyner had arranged

that it should be bought for his benefit; and the deed thereof was made by Allen Warren, trustee, to said Davis, "subject to the homestead right of Blaney Joyner," and coupled with a parol trust to convey the same to whomsoever Blaney Joyner might direct, and by direction of Blaney Joyner said Davis did convey the land, "subject to said Blaney Joyner's homestead right," to his wife, J. A. E. Joyner. Blaney Joyner and his wife united in a mortgage to secure said Davis the purchase money, which was subsequently paid off entirely by Blaney Joyner, his wife paying no part thereof. Blaney Joyner died without issue, and the plaintiffs are his heirs at law. J. A. E. Joyner died subsequently, in 1901, having devised the land to her two nieces, the defendants, who are in possession of the premises.

The plaintiffs seek by this action:

1. To establish that J. A. E. Joyner took the land upon the parol agreement that she would hold the naked legal title for the use of Blaney Joyner in fee, and that, he having paid off the mortgage for the purchase money, the plaintiffs, as his heirs, are entitled to recover the premises. But the evidence set out in the record shows no agreement, nor any acknowledgment of a parol trust by J. A. E. Joyner. The parol trust by R. L. Davis in favor of Blaney Joyner was performed by his execution of the conveyance to J. A. E. Joyner as directed by Blaney Joyner. The mere payment of the purchase money by the latter gave the plaintiffs no rights as his heirs at law, as against his wife, to whom he had a right to give the property, except as to creditors, and the creditors are all paid off.

2. The plaintiffs contend that, if they cannot establish the parol trust, the original deed in trust to Allen Warren, "subject to the homestead right" of Blaney Joyner, is void for uncertainty in both the quantity and quality of the estate, or at least the reservation included the reversion of the homestead, the wife not having joined in the deed, and that, Blaney Joyner being dead, the plaintiffs, as his heirs, can recover the land once covered by his homestead, or which would have been so covered if it had ever been actually allotted.

We may as well frankly say that we find it impossible to fully reconcile all the decisions of this court upon the subject. We will not try to do so, but will attempt simply to present those principles necessary for the determination of this case in the view we take of it. This is the first time that this question has come directly before this court as now constituted. We do not regard the case of *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877, as directly affecting the case at bar. In that case the homesteader neither sold nor attempted to sell the so-called reversion of the homestead. It was sold in bankruptcy proceedings, and, referring thereto, this court says on page 549, 122 N. C., and

page 878, 29 S. E.: "The decree of the district court ordering a sale of the reversionary interest in the land, not having been appealed from by the bankrupt, concluded him, and binds the defendants, who claim under him, and are privies in blood and estate." Again the court says in the sentence immediately preceding: "It [the decree] was not open to collateral attack, and the decision of the district court in the matter, where it had sole jurisdiction, was and is binding on our courts." This was the law of that case. Our earlier decisions seem based upon the idea that the homestead is an estate. This is apparent from the very sentence quoted from *Jenkins v. Bobbitt*, 77 N. C. 385, upon which the defendants rely, and in which Judge Pearson repeatedly uses the terms "homestead estate" and "estate in reversion." Another quotation is as follows: "But a sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it." With the highest respect for the great chief justice, who evidently regarded the homestead as a particular estate carved out of the fee, we are unable to find that the "homestead estate" had any standing at common law. If an estate at all, it would seem to be a life estate in the homesteader, with a contingent remainder for an uncertain term of years to his children, and an ultimate remainder or reversion back to himself if the land remains unsold, or to his grantee if sold. One thing, at least, seems clear: A homestead is either an estate, or it is not an estate. If it is not an estate in itself, but is merely "a quality annexed to land, whereby an estate is exempt from sale under execution for debt," as was said in *Littlejohn's Case*, 77 N. C. 379, then there must be some estate to support the exemption. A naked right of exemption is worthless, unless the debtor has some property that he can retain under the exemption, and he cannot retain that which he does not possess. This exemption gives him nothing, but simply keeps that which he already has from being taken away from him. The idea that the homestead exemption was an estate has been long since abandoned. The theory now of universal acceptance was first clearly enunciated by Bynum, J., speaking for the court, in *Bank v. Green*, 78 N. C. 247, where he says, beginning on page 252: "There is some misconception as to the nature of the homestead law. The homestead is not the creation of any new estate, vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same after as before the assignment of homestead. The law is aimed at the creditor only, and it is upon him that all the restrictions are imposed, and the extent of these restrictions is the measure of the privileges secured to the debtor; and these restrictions imposed on the creditor are that, in seeking satisfaction of his debt, he shall leave to the debtor, un-

touched, \$500 of his personal and \$1,000 of his real estate. * * * The homestead has been called a 'determinable fee,' but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him."

It is needless to cite the numerous cases in approval. A brief quotation from one or two will be sufficient: In *Simpson v. Wallace*, 83 N. C. 477, the court says: "The assignment of a homestead creates no new estate in the exempted land. It simply ascertains and sets apart a portion of what the debtor owns, of limited value, and relieves it of liability for his debts during a specified period, leaving in him the estate already possessed unimpaired." In *Markham v. Hicks*, 90 N. C. 204, this court says: "The argument in support of this contention [that the sheriff could sell the land subject to the homestead exemption] proceeds upon the misconception that there is a divided estate in the debtor, produced by the separation and setting apart of the exempt from the remaining land; one enduring for his own life, and prolonged for the benefit of his wife and minor children; the other, the residue of his previous estate." The court then held, citing with approval *Bank v. Green*, supra, that the estate cannot be so divided, and that the sheriff cannot sell the reversion even in the absence of statutory prohibition. Therefore it is not an estate. We cannot have a shadow without something to cast the shadow. Neither can we have a quality of exemption without something to be exempted.

Some confusion may have arisen from the indiscriminate use of the word "homestead" as applying either to the right of exemption or the land exempted. As used in the constitution, it is evident that the homestead is the land itself. The homestead right is the right to hold and use the land free from execution for debt. In other words, the homestead is the land itself, the homestead right is the right of the owner to hold the land exempt from execution, while the homestead exemption is a quality attached to the land by virtue of said right. The homestead right may exist as a pure abstraction, but there can be neither homestead nor exemption without the land. While the exemption follows from the homestead right, it seems that when once attached it follows the land into the hands of the purchaser, while the homestead right remains in the vendor. This is no longer an open question. So, whatever doubts some of us might have as to its logical correctness must yield to what has become a rule of property. *Stare decisis*. In any event, it is not involved in this case. For the homestead right to be of any benefit to a man, it is evident he must own

some estate in land to which it can apply. This is clearly the meaning of the constitution. In article 10, § 2, it says: "Every homestead and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof or in lieu thereof * * * any lot in a city * * * owned and occupied by any resident of this state * * * shall be exempt from sale under execution. * * *"

And again, in section 3, it says: "The homestead, after the death of the owner thereof, shall be exempt," etc. And in section 5 it says: "If the owner of a homestead die," etc. (The italics are ours.) Section 8 provides how the owner of a homestead may sell. Throughout this entire article appears an inseparable connection between ownership and exemption.

The assignment of the homestead adds nothing to the owner's title. It merely locates that part of his land which is exempt, and which he continues to hold under his former title. We do not see how he can sell his land, and retain a mere quality annexed to the land. We do not say that he cannot by a proper deed convey his land, with a reservation to himself of a life estate. This would be, in effect, the conveyance of the remainder after the life estate. Perhaps he could further extend his reservation for the life of his wife and the minority of his children, but none of these questions is involved in this case. The deed of trust to secure creditors, under consideration, expressly states that the land in controversy is conveyed "subject to and reserving, however, his [Blaney Joyner's] homestead rights therein as secured by the laws of North Carolina." He does not pretend to convey the so-called reversion of his homestead. On the contrary, he expressly reserves all that the law would allot to him as a homestead if he had made no deed. The object of an assignment for the benefit of creditors is not to give the creditors the right to resort to the land for the payment of their debts, as that right they already have, or can obtain by means of a judgment. Its object is to prevent the lien of subsequent judgments, and to regulate the distribution of his assets, either by preferring such creditors as he wishes, or preventing any preference. Assignments are usually made in an emergency, when there is no time to lay off the homestead. All that the debtor can do is to reserve the homestead right allowed by law. What is that right? This court has said in *Bank v. Green*, supra, that it is a "restriction imposed on the creditor, * * * that in seeking satisfaction for his debt he shall leave to the debtor untouched five hundred dollars of his personal and one thousand dollars of his real estate." This court has said in *Simpson v. Wallace*, supra, that it "leaves in him the estate already possessed, unimpaired." It is held that the reversion of the homestead cannot be sold under execution, because there is no

reversion. *Markham v. Hicks*, supra. In fact, no part of the land can be sold under execution until the homestead is laid off. Upon such allotment the homestead—the land itself—is still held by the owner under his former title, and cannot be touched; that is, interfered with in any manner. The sale of the fee in reversion would, of course, interfere with it, and would seriously impair the homesteader's former estate. If he owns the land in fee, he is entitled to any rise in value, subject to the liens. A thousand dollars' worth of land near one of our growing towns may in a few years become so valuable as to pay off all incumbrances and leave a handsome surplus. But if the reversion has been sold, he has no incentive to improve the property or render it more salable, as the result of his labor and thrift would go to the speculator, who perhaps has bought the fee for a nominal price. Therefore not only the letter of the constitution and the decisions of this court, but public policy, favor the retention of the title in the man who alone can develop the property.

When Blaney Joyner, in executing his deed in trust, reserved his homestead rights, he reserved \$1,000 worth of the land. Assuming the land to be worth \$4,000, in legal effect he conveyed to the trustee only three-fourths of the land, reserving to himself a fourth undivided interest, to which he retained the legal title. To that extent he was a tenant in common with the trustee. This unity of possession could have been severed by the assignment of the homestead, which would have been equivalent to partition. This the trustee does not seem to have done, as he sold the land in its entirety, but he could not convey any greater title than he held. Therefore the undivided fourth interest remained in Blaney Joyner, as it would have done in the case of any other tenant in common. Under the facts as developed in this case, we are of opinion that the plaintiffs, as heirs at law of Blaney Joyner, are the owners of an interest in the land in controversy of the value of \$1,000, to be estimated as of the time of the execution of the deed of trust by Blaney Joyner to Allen Warren. We are further of opinion that the remainder of said land passed by said deed from said Joyner to said Warren, and from him to Mrs. Joyner, by whom it was devised to the defendants.

Error.

FURCHES, C. J. (concurring). On the 5th day of September, 1893, Blaney Joyner made and executed a deed of trust to one Allen Warren upon the land in controversy, containing about 450 acres, and worth, according to the evidence, somewhere about \$4,000. Blaney at the time of making the trust was a married man; Jackey Ann Eliza Joyner being his wife, who did not join in the making of said deed of trust, and never signed or acknowledged the execution thereof. This land

was afterwards sold under the deed of trust by the trustee therein named, and was bought by one Davis in trust for Blaney, who, at the instance of Blaney, conveyed the same to J. A. E. Joyner, and she and her husband, Blaney, joined in a mortgage to said Davis to secure the purchase money. Blaney did not live long after this transaction, and since then the said J. A. E. Joyner has died, leaving a last will and testament, devising said land to the defendants, who are her nieces; neither she nor said Blaney leaving children or lineal descendants surviving them. The debt secured by the mortgage of Blaney and wife to Davis has been paid, mostly before the death of Blaney, and the residue before the death of Jackey Ann Eliza. The deed in trust to Warren was in form a deed in fee simple, with this provision: "Subject to the homestead exemption of Blaney Joyner." The plaintiffs are the heirs at law of Blaney Joyner, and claim that as said land, before the deed to Warren, belonged to Blaney, and as said deed conveyed nothing, the land belonged to Blaney at the time of his death, at which time it descended to them; and this action is brought to recover possession thereof.

The plaintiffs claim, first, that Davis bought the land for Blaney at the trust sale of Warren, and therefore held the same in trust for him. I do not think this is denied by the defendants, but they say that said trust was discharged when Davis made the deed to J. A. E. Joyner at the request and direction of Blaney; and no new trust was declared when this deed was made, nor when the mortgage was made back to Davis to secure the purchase money he had paid for the land at the trust sale made by Warren. I agree with the contention of the defendants, and with the opinion of the court, as to this transaction between Davis and Mrs. Joyner.

But as to the other point presented by the case on appeal,—as to whether the deed of trust from Blaney to Allen Warren conveyed the land therein named, and now in controversy,—I differ from the opinion of the court. In my opinion, Blaney could not convey this land without the joinder of his wife, and the fact that he inserted the following clause in said deed of trust: "Reserving, however, his homestead right therein as secured by the laws of North Carolina,"—makes no difference in the right of said Blaney to make said conveyance. This consideration of the case involves the much-discussed question of the homestead,—so much discussed in *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635. The court differed so much in its views at that time—every member of the court filing a separate opinion, which my friend Col. Edwards styled "five dissenting opinions in one case"—that I was in hopes it would not return to trouble the court again, at least while I was a member thereof. But it is here, and I must meet it with the best thought I am able to give it.

Where a question has been "settled," if a question can become settled,—that is, where

a question has received for a considerable length of time a uniform construction,—it is often better not to disturb it, even if erroneous. *Stare decisis*. But this question was not considered settled in *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437, which was by a divided court, and which overruled and construed away many of the former opinions of this court. It was not considered settled in *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. 506, 34 Am. St. Rep. 483, which was by a divided court, and overruled a good portion of *Hughes v. Hodges* and many other decisions. It was certainly not settled in *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635, which settled nothing, except the rights of the parties to that action; and there has been nothing since *Thomas v. Fulford* to settle it. I know it is claimed in the opinion of the court that it is settled by *Jenkins v. Bobbitt*, 77 N. C. 385, and *Williams v. Scott*, 122 N. C. 548, 29 S. E. 877. But upon an examination of those cases, I am satisfied it will be found they do not do so. It is known to every lawyer who has any practice in bankruptcy that when the bankrupt claimed his homestead the federal court held that the homestead did not pass to the register by the adjudication, nor to the assignee by his general assignment, and he could not sell it under said assignment. But upon a petition filed in the cause by creditors, where the bankrupt was a party, the court, unless cause was shown to the contrary, would decree a sale of the reversion, and appoint a commissioner (who was usually the assignee) to make sale of the reversion, subject to the homestead right under the state law, and to report said sale to court. This was the kind of sale at which the plaintiff bought, in *Williams v. Scott*. A sale made under a decree of the federal court, to which the homesteader was a party, is claimed as a precedent, and as settling the case now under consideration. But it does not do so, and has no application to this case; and our court has decided the same thing, in principle. Minor children are entitled to a homestead, but this court has held that, in an application to sell real estate for assets by the personal representative, where the minors are properly made parties to such application, and make no defense, and a decree of sale is entered against them, and the land sold, they are estopped from afterwards claiming a homestead.

This brings me to a consideration of the main question,—did the trust deed of Blaney Joyner to Allen Warren convey the estate in the land in controversy, no homestead having ever been laid off or allotted to him or his wife, and his wife not having joined him in the deed? It seems to me that, if it were not for the many conflicting opinions as to whether it does or not, there would be but little trouble about it. If article 10, § 8, of the constitution, which says, "Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a

homestead from disposing of the same by deed, but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law"—I say, if this section of the constitution was now to be construed for the first time, in my opinion it would be held that in such cases as this the wife should join in the deed, or it would be invalid. The constitution says it shall "be void" if she does not sign the deed, and is not privately examined. And the trouble arises now from the fact that the court has undertaken to construe the plain words of the constitution, which were so plain that they were not susceptible of construction. Until the homestead is laid off and allotted, all the lands the debtor owns are, in law, his homestead, and are protected from sale by this provision of the constitution, which is self-executing. The allotment is not to create the homestead,—this is done by the constitution,—but to restrict and define its location and boundary, if the homesteader owns more than \$1,000 worth of land. But no sale of any part of it can be made by creditors until this allotment is made. These propositions are so well established that I do not incur the opinion with a citation of authorities. No homestead had been laid off here; and, until that was done, every part of Blaney Joyner's land was his homestead; and any deed of his attempting to convey it without his wife's joining him was, in the language of the constitution, void. This argument has not, and cannot, it seems to me, be answered. But it is attempted to be answered by saying that, in the deed of trust to Warren, Blaney reserved his homestead right under the constitution and laws of North Carolina. What were these rights, and where was the homestead? It has never been laid off and located, and if his deed was valid to convey the fee-simple estate in the whole tract, as is claimed in the opinion of the court, such reservation was void, as it was reserving the right to have a homestead located on Warren's land. This he could not do. Section 2, art. 10, of the constitution, provides that the "owner" of the land shall select the homestead, when his land is worth more than \$1,000; that he shall be a resident of the state, and the "owner and occupier" of the land so allotted to him as a homestead. So, it is seen, if Blaney's deed to Warren was valid, and carried the title to Warren, Blaney had no land out of which he could have a homestead. If the homestead had been laid off and located by metes and bounds, his deed to Warren would have probably conveyed the estate outside the homestead boundary, for the reason that the homestead had been located, and Mrs. Joyner had no homestead interest in the land outside the homestead boundary. See my opinion in *Thomas v. Fulford*, 117 N. C. 687, 23

E. 635. If Blaney's homestead had been

laid off and assigned to him before the deed to Warren, and it had contained no reservation, would it be contended that his deed, in which his wife did not join, would have conveyed this allotted homestead? And if not, how can it be contended that it conveyed the whole tract before the homestead was laid off, when the whole tract was his homestead until it was reduced by assigning him a part of it, less than the whole?

But it is contended in the opinion that it is settled by the decisions of this court that the deed from Blaney to Warren was a valid deed, and conveyed the title to Warren. As to this proposition I dissent. The earlier decisions of this court upon the subject of homestead, made soon after the constitution of 1868, are full of inaccuracies, as the more recent decisions will show. In the early decisions it will be seen that the homestead was treated as an "estate," and that part that remained after the determination of the homestead was treated as a remainder. But this doctrine has long since been abandoned. In *Bank v. Green*, *Bynum, J.*, exploded this doctrine, and showed that it was no estate of any kind, but only a determinable exemption from sale under execution. This was approved in *Markham v. Hicks*, 90 N. C. 204, and numerous other cases since, until it has become the settled doctrine in this court. This is a very important modification of the law of homestead. Under the doctrine, treating it as an estate with a remainder over, it was logical to hold that the "reversion," as it was generally called, could be sold under execution or by the homesteader without selling his particular estate called the homestead, or to sell the fee, subject to his homestead estate, without his wife's joining with him in the conveyance, as the homestead estate was not affected by such sale. It was then treated as an estate that the homesteader had acquired, distinct from the original estate, and was treated as a new estate, as an estate in dower or curtesy is treated. Under that ruling of the court, it became necessary to pass the act of 1870 to prevent the sale of the remainder or "reversion," as it was generally called. This act to prevent sales of the "reversion" was not brought forward in the Code of 1853, and all acts not brought forward in that compilation were repealed. And creditors commenced to enforce their executions against the reversions. But in *Markham v. Hicks*, 90 N. C. 204, which was after the repeal of the act of 1870, the court held that under the new doctrine the homestead was not an estate, but only an exemption, and the estate and the homestead were but one entirety, and the "reversion," as it was called, could not be sold. And while the court recognizes that the homestead is not an estate, it seems to me that it fails to recognize the results that follow from this change in its opinion. It would make but little difference whether it was called an "estate" or

an "exemption," if they were both the same in all except the name. So it will not be safe to put a decision upon these early decisions without considering the fact that when they were made the homestead was considered an estate, but is now considered only an exemption, and a part of the entire estate, and cannot be sold, although the act of 1870 has been repealed. *Markham v. Hicks*, supra. We are so often influenced by a comparison of cases which are not analogous to the one under consideration, and when we are, it is likely to lead us into error. So it will not do to compare the homestead with dower, and reason from the analogy. Dower is an estate given to the wife, and under the act of 1867, establishing the common-law right of dower in this state, gives to the wife one-third of all the lands of which the husband was seised during coverture, while the homestead is not an estate, and can only be claimed by the owner of the land. But the opinion of the court says, "The question is settled that the deed to Warren passed the title," and cites *Jenkins v. Bobbitt*, 77 N. C. 385; *Hinsdale v. Williams*, 75 N. C. 430; *Murphy v. McNeill*, 82 N. C. 223; *Castlebury v. Maynard*, 95 N. C. 281; *Jones v. Britton*, 102 N. C. 184, 9 S. E. 554, 4 L. R. A. 178; *Hughes v. Hodges*, 102 N. C. 260, 9 S. E. 437; *Vanstory v. Thornton*, 112 N. C. 208, 17 S. E. 568, 34 Am. St. Rep. 483; *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635; and *Williams v. Scott*, 122 N. C. 548, 29 S. E. 877. I have already commented on *Thomas v. Fulford* and *Williams v. Scott*. *Jenkins v. Bobbitt*, and *Bruce v. Strickland*, 81 N. C. 267, are cases where the marriage took place and the land was bought before the constitution of 1868, and fell under *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500. *Murphy v. McNeill* is put on *Jenkins v. Bobbitt*. *Jenkins v. Bobbitt* is one of the cases most strongly relied on by the court as settling the opinion of the court in this case. But it does not, as I think. It falls under the doctrine of *Sutton v. Askew*, and anything said in discussing the case outside of that is but obiter. But if it were not, it is clearly distinguishable from this case, as the homestead in that case was laid off before the sale. In *Castlebury v. Maynard* the homestead had been allotted to the plaintiff before the sale upon his own petition, and the court held that he could not make a good title to the land without his wife's joining him in the deed. It is true that the court held that he could make a good title to that part not included in the homestead. See my opinion in *Thomas v. Fulford*, supra. *Hughes v. Hodges* was by a divided court, and I do not think it sustains the opinion in this case. And while I cannot cite the dissenting opinion of Judge Merrimon in that case, which, in my opinion, was unanswered and is unanswerable, yet I wish specially to call the attention of the profession to it. What *Jones v. Britton* and *Vanstory v. Thornton*

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have to do with the validity of the deed from Blaney to Warren, I am unable to see. And if these cases do not outweigh reason and authority, I do not think "it is settled" that the deed to Warren conveyed the title to this land to him. *Vanstory v. Thornton* and *Jones v. Britton* show that the homestead is a condition, and runs with the land, as a sale did not relieve it from judgment liens that had attached while the homesteader was the owner, whereas, if it had been personal to the homesteader when he sold the land, it would have discharged the lien. The case of *Hinsdale v. Williams* shows that the court in that case was treating the homestead as an estate, and that part, after the homestead fell in, as another estate; and the court then treats it "as at common law," when there is no such thing as estate or common law in it.

The defendants' title depends on the title of J. A. E. Joyner, and her title depends on the title of Allen Warren. If Warren's title was not good, the defendants' title is not good; and, if the deed of Blaney to Warren did not convey the land, it remained in Blaney, and the plaintiffs are entitled to recover. As I do not think the deed from Blaney to Warren conveyed the title, I think there was error.

The foregoing opinion was written as a dissenting opinion to the opinion of the court as originally written, which held that the deed of Blaney Joyner to Warren conveyed the entire tract, and plaintiffs were not entitled to recover anything. Since then there has been a modification of the opinion of the court, and another opinion written; and, while it does not seem to me that the conclusion arrived at is the logical result of the reasoning employed in the opinion, it is at least conservative, and may tend to quiet titles that otherwise might be disturbed by what I consider the logical deduction therefrom. Therefore, without abandoning the arguments contained in my opinion, I now file it as concurring in the opinion of Justice DOUGLAS, which becomes the opinion of the court.

COOK, J. (concurring). As the "homestead interest" is involved in this case, and the numerous decisions of our court concerning it having failed to reach any settled construction, it seems to me that it will be best to disregard what has been so successfully unsettled, and blaze out a new line, run by a construction of the constitution as it is written, without reference to the rules governing estates at common law. The following part of article 10 of the constitution defines what the homestead, as ordained by it, shall be:

"Every homestead and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any

resident of this state and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. * * * Section 2.

"The homestead, after the death of the owner, shall be exempt from the payment of any debt during the minority of his children or any one of them." Section 3.

"If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall enure to her benefit during her widowhood, unless she be the owner of a homestead in her own right." Section 5.

"Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of the wife, signified on her private examination, according to law." Section 8.

Prior to the adoption of our present constitution (1868), a judgment creditor had the right to have sold under execution all of the debtor's land, leaving him without home or shelter for himself and family. To prevent such homelessness, the sections above quoted were ordained and incorporated into our organic law, and we now have to construe their meaning in deciding the questions presented in this appeal.

We do not understand that the purpose of creating the homestead was to prevent the creditor from collecting his judgment out of the homestead, but simply to postpone the time of doing so; thus giving the homesteader a chance to provide a living for himself and family, if he should have one, and an opportunity to make the money to pay the debt. The docketed judgment, by statute, creates a lien upon it, which remains until the time limit of the exemption expires. The word "homestead," in its general significance, as defined by Webster, means "the home place"; "a home, and the inclosure or ground immediately connected with it"; "the home or seat of a family." Its existence so defined is general, and is not confined or limited to any class or condition of people. But as defined by our constitution, it is limited to that class of owners who are involved in debt,—so badly involved that it would require a sale of substantially all their property to pay their debts. For this class the "homestead" of \$1,000 worth of real estate is created by our constitution. If provided for any other class, why exempt it "from sale under execution or other final process obtained on any debt"? Article 10, § 2. "Shall be exempt from the payment of any debt during the minority of his children or any one of them." Section 3. "The same shall be exempt from the debts of her husband." Section 5. Its association and use are inseparably connected with exemption from sale for the payment of debt. There-

fore it must necessarily follow that, if there be no debt for which the owner of a homestead is liable, there can be no homestead, as defined and created by our constitution. But as soon as the debt or liability to pay is created, this exemption from the payment of the same out of the land designated, and of the prescribed value, called the "homestead," springs into existence and action, and stays the hands of the selling power. By "owner," as used therein, is meant he who holds the freehold estate in the land, whether of inheritance or not of inheritance, whether the legal or the equitable estate. As to such homestead, as is so defined, no sale can be ordered or made by statute to enforce the collection of any debt due by the owner during the time limited in the constitution. If the owner be tenant for life, his estate in the land dies with him. If he be tenant in fee, it descends to his heirs at law or devisees, but the land to sell is stayed until the contingencies provided in sections 3 and 5 happen; and then the right of sale begins, and not before. During the stay of sale the judgment lien remains upon the title, which is vested in the judgment debtor; but the judgment debtor's title remains in him, just as it did before the judgment lien attached. If he owned a fee-simple estate, it continued to be a fee simple,—simply incumbered with the lien, and nothing more. Under our statute, a docketed judgment becomes a lien upon all of the "owners" (debtor's) land. The excess of \$1,000 worth may be sold under execution issued upon it, whereby the title of the owner, as to that, is divested from him and transferred into another, and he loses all estate and interest in it. But as to that part exempt from sale,—the homestead,—the title remains vested in the owner, incumbered, it is true, with the judgment lien, nothing more. The homestead, or right of homestead, creates no estate in the owner. The estate is created by the title under which he acquired and holds the land, and in no other way. No remainder is created by the stay of sale, because no estate, "particular" or otherwise, passes out of the owner, or is carved out of the fee. No title passes from the owner by or on account of the homestead, but it remains in him. Therefore, there can be no reversion. There was no title out of him to revert. The entire fee remains in him. Should the owner pay off the judgment, the lien would vanish, and there would be no particular estate to fall in, or outstanding title which could come back; so the estate and title would remain just as before in the tenant in fee,—the owner or homesteader. Upon the death of the owner or tenant in fee, the title to the land descends to his heirs, carrying with it the right of entry and possession, without a change of title,—only incumbered with the lien, which the heir could extinguish by paying the judgment,—or he could refuse to pay, and allow the fee to be sold, and the excess of the

proceeds of sale, after discharging the lien, to be paid over to the personal representative or heir according to law in such cases.

Without debt, there can be no "homestead," as defined by the constitution. When the owner creates his debt, the constitution creates his homestead. When the owner extinguishes his debt, the constitution extinguishes his homestead. They are constitutional, inseparable companions. If there be no debt, there is no homestead or homestead right. Therefore a deed executed by the husband who owes no debt (the wife not joining in the deed) conveys the land free from homestead, but subject to the dower right; but, if he be in debt, the deed is invalid (section 8) as to so much of the real estate designated as is worth \$1,000, but is valid (subject to dower right) as to the excess, whether the homestead has been laid off or not, for it (the \$1,000 worth) becomes definite and certain when the homestead becomes definite and certain; that is, when the homestead is or may be laid off and allotted or assigned. The laying off and assignment of the homestead is not essential to create it. It is created and defined by the constitution (section 2), and any resident of this state is entitled to have at all times as much as \$1,000 worth of his real estate (as therein designated) exempt from sale, and no more, at any time. Should the land assigned increase in value beyond the value limited, the excess could be sold, and the proceeds applied to the judgment debt. Should it decrease in value, the deficiency could be claimed in any land or town or city property afterwards acquired by him. The identity of the \$1,000 worth can be certain by laying it off; so whether laid off or not is immaterial. "Id certum est quod certum reddi potest."

At the time Blaney conveyed the land to Warren, he was in debt, and made the deed of trust to secure his debts; but he did not intend to convey his homestead (\$1,000 worth of it), but conveyed the land "subject to and reserving his homestead rights therein as secured by the laws of North Carolina," in which deed his wife did not join. His homestead rights being the right to own \$1,000 worth of the land in fee or for life, subject to any lien for debt, by reserving the homestead rights he reserved his title in fee to that much of the land. By his deed, title passed to all of the land in excess of \$1,000 worth, but did not pass to \$1,000 worth thereof, which could at any time have been made certain and definite by laying off the same in conformity with section 2, art. 10. So, not having conveyed his homestead, the sale was not invalidated under section 8, art. 10, and the title to that much of the land remained in him, and upon his death descended to his heirs at law. The sale by Warren, trustee, conveyed to Davis, the purchaser, the excess of \$1,000 worth thereof, the title to which passed to J. A. E. Joyner by the conveyance of Davis to her under the

parol trust under which Davis bought. So it is clear to me that plaintiffs, heirs at law of Blaney Joyner, are entitled to recover so much of that tract of land, including the dwellings and buildings used therewith, as will not exceed in value \$1,000, to be selected by them, the present owners thereof.

OLARK, J. (dissenting). I concur with the concurring opinion of the Chief Justice that "it does not seem to me that the conclusion arrived at [in the opinion of the court] is the logical result of the reasoning employed in the opinion." Indeed, it seems to my mind to lead irresistibly to the opposite result. If, as Bynum, J., says in *Bank v. Green*, 78 N. C. 247, which is twice cited with approval by the court in this case, the homestead is "a determinable exemption from the payment of the homesteader's debts in respect to the particular property allotted to him," it necessarily follows that when Blaney Joyner conveyed all his realty, "subject to and reserving his homestead rights therein," the grantee took all subject to that "determinable exemption," and upon the determination of his exemption by his death, leaving no minor children, there was nothing left to pass to his heirs at law. The "reversion," or, more accurately speaking, "the land covered by the homestead, subject to the determinable exemption," was liable to sale subject to such determinable exemption, till an act was passed to prevent it; and that such land is liable to be subjected, the sale being merely postponed till the determination of the homestead, is evidenced by the fact that a docketed judgment becomes a lien thereon, and the statute of limitations is suspended as to such lien. The law forbids the sale under execution of such "reversion" (i. e., the land subject to the determinable exemption), not because it is not property of the debtor, but because, at a forced sale thereof, subject to an exemption of uncertain duration, the property would bring a song, and would either be bought in for the homesteader, or more probably, as was the practical experience, by speculators. Hence the statute was passed, suspending sale under execution till the falling in of the "determinable exemption," but preserving in force the lien of judgments thereon, unimpaired by any statute of limitation. There is no such evil to be guarded against by legislation when the owner makes a voluntary sale, and there is no reason to restrict his *jus disponendi*. The reversion, so called, being the debtor's property, and something apart from his "determinable exemption," on which last there could be no judgment lien, any owner thereof, when, as in this case, no judgment had been docketed, could sell it, and there is no statute to prevent a sale or conveyance thereof by him. That the land allotted is something separate and apart from the "determinable exemption" is evidenced by the further fact that if it increases in value the excess may be valued and sold under an execution. Clark's Code (3d Ed.) § 504a. If it

is separate and apart, a conveyance of all the realty, "reserving only the homestead rights," which is held to be "a determinable exemption," conveys the land subject to such determinable exemption. When, therefore, Blaney Joyner conveyed his realty "subject to his homestead rights," the grantee took it all, subject only to the "determinable exemption" upon that part thereof which should be allotted as his homestead. At the determination of that exemption, which is all that Blaney Joyner reserved, there was nothing to go to his heirs at law. The very fact that the homestead is "not an estate, but a determinable exemption," settles that. Only an estate could devolve upon his heirs at law. His "determinable exemption," which is all he reserved, determined at his death. Indeed, this point has been often before the court, and has been settled against the plaintiffs by our repeated decisions that a conveyance of land "subject to the homestead right" of the grantor is valid, and conveys not only the excess, but also the reversion of the homestead. The facts in *Jenkins v. Bobbitt*, 77 N. C. 385, presented a stronger case for the plaintiffs' contention, in that there the homestead had been actually set apart by metes and bounds before the conveyance, yet *Pearson, C. J.*, says: "Was a conveyance of the land, subject to the homestead, valid to pass the reversion? His honor ruled that it was invalid for want of assent of the wife of the defendant. The wife has no estate, interest, or concern in the reversion. It does not take effect in possession until after the termination of the homestead estate. So we are at a loss to see on what ground the assent of the wife should be necessary in order to give validity to the deed of the husband, by which he conveys his estate in reversion." By "estate in reversion" he indicates merely the "allotted land" subject to the determinable exemption. The word "reversion" is used merely for lack of a better, and because the land, when freed from the determinable exemption, resembles an "estate by reversion," and not because it is such. The idea being clear, the use of a technically inaccurate expression, for lack of a better, should not cause confusion. Then, after adverting to the statute which prevents a sale of such "reversion of the homestead" under execution, and the lack of necessity for such statute, if the wife could prevent such sale by her veto, and that the court in *Hinsdale v. Williams*, 75 N. C. 430, had extended the operation of the act to forbid sales of the reversion by administrators to pay debts, *Pearson, C. J.*, further says: "But a sale by the owner of a homestead of his estate in reversion stands as at common law and the owner has full power to sell it." This case has never been overruled or questioned, and we find in the annotated reprint of that volume (77 N. C.) that it has been cited with approval in *Murphy v. McNeill*, 82 N. C. 223; *Castlebury v. Maynard*, 95 N. C. 235; *Jones v. Britton*, 102 N. C. 184, 9 S. E. 554, 4 L. R. A. 178; *Hughes v. Hodges*, 102 N. C. 236, 9

S. E. 437; *Vanstory v. Thornton*, 112 N. C. 208, 17 S. E. 566, 34 Am. St. Rep. 483; *Thomas v. Fulford*, 117 N. C. 682, 23 S. E. 635; and *Williams v. Scott*, 122 N. C. 548, 29 S. E. 877. In *Thomas v. Fulford*, 117 N. C. 678, 684, 688, 23 S. E. 635, the majority of the court held, in seriatim opinions, that a conveyance "subject to homestead right" was valid and carried the entire estate of the grantor, including the reversion of the homestead, and subject only to the homestead right, which right only exempts the homestead from sale during the life of the grantor, and till his youngest child became of age, laid off or to be laid off. In *Williams v. Scott*, 122 N. C. 548, 29 S. E. 877 (the last case), this was reaffirmed by a unanimous court; *Montgomery, J.*, saying: "The laws of North Carolina prohibit a sheriff from selling the reversionary interest in homestead lands under execution, but they do not prevent the homesteader himself from conveying it. *Jenkins v. Bobbitt*, 77 N. C. 385." As to dower rights, the conveyance of the husband of his realty without the joinder of his wife is valid, subject to her contingent right of dower. *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772; *Gatewood v. Tomlinson*, 113 N. C. 812, 12 S. E. 318.

In my judgment, the judge below ruled correctly. I can find no error in any respect.

MONTGOMERY, J., concurs in the above dissenting opinion.

(131 N. C. 735)

STATE v. BISHOP et al.

(Supreme Court of North Carolina. Nov. 18, 1902.)

MURDER—FIRST DEGREE—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF.

1. Evidence examined, and held not to sufficiently show premeditation to sustain a conviction of murder in the first degree.

2. Pub. Laws 1893, c. 85, divides murder into two degrees, and expressly provides that, to make the offense murder in the first degree, the state must prove premeditation. Held, that though at the common law the killing with a deadly weapon implied malice, and raised a presumption of murder against the prisoner, this presumption, under the statute, only extends to murder in the second degree, and, to make the offense murder in the first degree, the burden is on the state to show premeditation.

Clark and Montgomery, JJ., dissenting.

Appeal from superior court, Bertie county; *Brown, Judge*.

June Bishop, John Belfield, and Jas. Stevenson were convicted of murder in the first degree, and appeal. Reversed.

W. R. Johnson, for appellants. *L. L. Smith*, with the Attorney General, for the State.

FURCHES, C. J. The prisoners were indicted for the murder of Thomas Stevenson, found guilty of murder in the first degree, and are now under sentence of death. The evidence discloses the following facts: *C. T. Peele* is a merchant in Bertie county, and,

¶ 1. See *Homicide*, vol. 28, Cent. Dig. §§ 372, 373.

on the morning of the 9th April, Joe Peele left an order at his store to let Jim Stevenson have 20 pounds of meat and a sack of meal. That evening, about 4 or 5 o'clock, Peele's wagon drove up to the store, with the prisoners in it. Melton Belfield, it seems, came up about the same time. It seems that they had been to some kind of a gathering at a place called "Kelford" that day, and were returning. It further appears that all three of the prisoners and Melton Belfield went into the store, and Jim asked for the meat he was to get. Peele, the owner, and Stevenson, the deceased, who was a clerk, were both in the store. Jim said he wanted to look at some shoes, and the deceased said to Peele, "You show him the shoes, and I will go and weigh the meat," which seems to have been in another room. About this time Melton Belfield commenced to curse the deceased, calling him the meanest things he could think of,—among others, a "son of a bitch." The deceased said he would not take that, and reached up and got his pistol. Peele ordered them all out, and they all went but Melton. He did not go at once, and Jim came back in the store, and took him by the arm and tried to get him out. But it does not seem that he succeeded, as Peele says he gave Melton some "soda," and went with him to the door, and turned to go and weigh the meat, and met the deceased going to the door. He then heard pistols firing, turned back, and they were all out of doors, and the deceased was shot. There were quite a number of shots,—he thinks, as many as 10 or 15; but he saw no one shoot but Melton, and did not see either of the prisoners have a pistol, nor take any part in the fight. These are as near the facts as we can get them from Peele's evidence. It seems that the deceased was shot in four places, and as many as seven shot holes were in his clothing; and, from the evidence of Dr. Capchart, the shots were fired from behind. Some of the witnesses, who were some distance from the place of the homicide, thought there were as many as 20 shots. It does not appear whether the deceased's pistol was empty or loaded. No witness saw either of the prisoners shoot, nor have a pistol. Stevenson was killed almost instantly. Melton Belfield escaped, and was afterwards killed in being arrested. This was an unfortunate affair. Two men are dead, and three are now under sentence of death. The prisoners are further unfortunate,—the man that was killed was a white man, and the prisoners are negroes, and are kin to Melton Belfield.

The charge of the court is not sent up, and we must presume it was correct, except as to the refusal to give the special instructions asked by the prisoners. These were as follows: "(1) That upon the evidence the jury cannot find a verdict of murder in the first degree. (2) That upon the evidence the jury cannot find a verdict of murder in the second degree. (3) That upon the evidence

the jury should render a verdict of not guilty."

From the many decisions of this court since the act of 1893 dividing murder into two degrees, the law of murder in the second degree, manslaughter, excusable and justifiable homicide, is the same as before the passage of that act, except as to the punishment, which is not capital now. State v. Rhyne, 124 N. C. 847, 33 S. E. 128. And outside of the enumerated cases, such as "poisoning, lying in wait," etc., to make the crime murder in the first degree, and a capital felony, the state must prove, in addition to malice, that the killing was done with "deliberation and premeditation." And it is held that such deliberation and premeditation do not mean that the prisoner intended to kill at the moment he gave the fatal blow. This is not sufficient. But he must have coolly and deliberately considered the consequences of his act before putting it into execution, in order to make the killing murder in the first degree, and a capital felony. State v. Foster, 130 N. C. 666, 41 S. E. 284, which case carefully reviews the statute and the decisions of this court thereon, and is an authority for the law as stated above. And we see no evidence in this case showing or tending to show premeditation or deliberation on the part of the prisoners, if they did the killing. The store at which the killing took place was a public place, to which parties were invited and expected to go. They were therefore not trespassers or intruders; and when the difficulty commenced between Melton Belfield and Thomas Stevenson, the deceased, and they were ordered out of the store, the prisoners immediately went out, and Jim Stevenson went back in the store, took Melton by the arm, and tried to get him out. Melton did not go out immediately, and Peele gave him some "soda," and he then went out. Peele then turned and started to the wareroom to weigh the meat, and met the deceased going to the door with his pistol, and very soon thereafter the firing commenced. Peele at once turned back, and, when he got to the door, Melton, deceased, and the prisoners were all out in the road, about 15 feet from the store. The deceased was down. And he saw no one shoot except Melton. Besides this store being a public place, where all persons were invited to go, the undisputed evidence is that one Joe Peele had that morning left an order at the store to let Jim Stevenson have 20 pounds of meat and a sack of meal; and that evening Peele's wagon drove up with the prisoners in it, or with it, and they went in the store, and Jim asked if Peele had left the order, and was told that he had. Upon these facts, the court, though specially requested to do so, refused to instruct the jury "that upon the evidence the jury cannot find a verdict of murder in the first degree." In refusing to give this instruction there was error. But to entitle the state to a verdict for anything, it must prove the killing by the prisoners. That Thomas Stevenson was killed, there is

no dispute. But the evidence strongly tends to show that he was killed by Melton Belfield, and the prisoners deny that they killed him. Admitting that there was some evidence tending to show that there were other shots fired besides those Melton fired (and this is the only evidence showing or tending to show that any one but Melton fired), not a single witness points out or identifies any one except Melton that did fire. It may be well said from this evidence that, if any shots were fired except by Melton and the deceased, it was by some one of the prisoners, but which one or which two was it that fired? No witness says or undertakes to say which one it was. Indeed, they say they cannot say which one, nor can they say that they all fired. Unless this could be done, then, in the entire absence of any evidence that the killing was the result of a conspiracy, agreement, or understanding between the prisoners, or the prisoners and Melton Belfield, to commit the murder, none of the prisoners can be convicted. If they could, it would be to convict an innocent man, rather than fall to convict a guilty man. This is not the law. Where two or more are indicted for murder, and the evidence shows that one of the prisoners is guilty, but the evidence fails to show which one, they must all be acquitted. "Although it may be positively proved that one of two or more persons committed a crime, yet it is uncertain which is the guilty party, all must be acquitted. No one can be convicted till it is established that he is the party who committed the offense." *Campbell v. People*, 61 Am. Dec. 49,—the first case in the book. If the evidence showed that all the prisoners participated in killing James Stevenson, then they would all be guilty of the same offense, if guilty at all. But we submit that the evidence does not show this to be the fact in this case. And as it is contended on the part of the state that it does, and as the entire evidence is made a part of the case on appeal, we insert as a part of this opinion the entire evidence; and we are satisfied, upon an examination of the entire evidence, it will not show, as the state contends it does: (1) That the "four went in a body." (2) "That soon thereafter * * * all four were chasing the deceased, and firing at him as he ran." (3) "That all four jumped in a wagon and drove hurriedly off." (4) "Firing at him as he ran." (5) "All engaged in the joint common assault." (6) "The pursuit by four men following up one who is fleeing and trying in vain to escape." (7) "That the prisoners and Melton going off together." (8) "The deceased acknowledged himself vanquished by fleeing, and was pursued by superior numbers." (9) "And again after he was down, and all four participating in the last bloody and savage act." (10) "When (if the evidence is believed) the four men pulled out their pistols and commenced firing upon one man, and continued to pursue and fire upon him while falling." (11) "The evidence

is that in a few minutes all of them were using pistols." (12) "The white man is seen out of doors, running for his life, with all four chasing him, and four pistols barking on his back." (13) "Then all four men jumped in the wagon and drove off." We say that a careful perusal of all the evidence will fail to show that the above statements were proved as is claimed to have been done by the state.

The common-law definition of murder is stated by Sir Michael Foster on page 255 of his *Crown Laws* as follows: "In every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appears." This definition of murder at common law has been adopted by the courts of this state, and has never been departed from, so far as we know. This definition applies to murder in the second degree, since the act of 1893, dividing murder into two degrees. But it is now claimed for the state that the common-law definition presumes "malice and premeditation." If this were true,—that, when the killing was shown, "premeditation" was presumed,—the state need only show the killing, to make it murder in the first degree. If this were so, it at once emasculates the statute of 1893, and every murder would be murder in the first degree unless the prisoner could prove the negative,—that he did not premeditate. But the statute itself expressly provides that, to make the offense murder in the first degree, the state must prove the premeditation.

There was error, also, in refusing to give the second and third prayers for instructions. Error.

The evidence is as follows:

"Your name is C. T. Peele? Yes, sir. Did you know Mr. Stevenson? Yes, sir. Please state all the facts concerned with the killing of young Mr. Stevenson. On the morning of the 9th April, Joe Peele came to our place of business, and told me to let Jim Stevenson have 20 pounds meat and sack of meal. About an hour a wagon passed the door. About 4 or 5 o'clock, Peele's wagon drove up. Jim Stevenson walked in, and said, 'Did Mr. Peele leave word here to get any meat?' I told him, 'Yes.' We waited a few seconds, and about that time Jim Stevenson said, 'We want to look at some shoes,' and Mr. Stevenson said, 'You go and show them the shoes, and I will weigh the meat and meal.' Stevenson went in the grocery room, and I went for the shoes. Melton Belfield came in and cursed, and in a few minutes June Bishop said, 'Stevenson [meaning the clerk], come on and weigh the meat.' John Belfield said, 'Come on over' where they were, and laughed. Melton Belfield was in there quarrelling, and I ordered him out because he was bringing on trouble. What

happened them? Melton kept cursing, and Mr. Stevenson spoke to him and said he was getting tired, and reached up and got his pistol, and Melton remarked he was not scared of him. I walked around the counter and gave soda to Melton, and told him to get out. That was at the door. I was going to the door. Mr. Stevenson was around the counter. I was at the door. Nobody in the store but us three. All rest went outdoor (the other three men). John Belfield came back in there and was at the door. He came in there and took hold Melton's arm and asked him to come out, but he did not come out. John went out. I went with Melton to the door, and Melton called Mr. Stevenson a damned son of a bitch, and Mr. Stevenson made for the door. The three (defendants) were standing there. What other men were there? I don't know. I left Mr. Stevenson standing in the door, and went to the grocery room. I got about halfway, and heard pistols fire, and when I got back I saw Melton shoot Mr. Stevenson. When you got to the door, did you see these other three men? Yes, sir. How far were they? 15 or 20 yards. How many shots were fired? Fifteen. (Here the witness showed the positions.) How near was Mr. Stevenson to the wagon? He was right at the wagon. When you saw the last shot fired, where did you see these three men? In the road. How far was Mr. Stevenson? Right there. Saw no other men but the prisoners and some women. They were behind Melton Belfield. When I went to the door he fired the last shot, and was standing over him. You say Jim Stevenson was one of the main ones. What did they all do then? They were hollowing to Melton to come on, come on. I ran to Mr. Stevenson, and found him dead. How long did he live? A few minutes. Died right there on the road. Did you find any of the bullets? Yes, sir, I found one in the grocery room. Any hole in the side of the house? Yes, sir; it went in the front, back through, and hit box, and fell in it. It was a 32. Where was that hole in side of house? It went in diagonally. (Here witness showed how it went in.) When you went out first, where was Melton Belfield? He was just a few steps off. Where was he standing? Nearly in the direction of that hole. Did you find any other bullets? Yes, sir; in the store. It fell out of his clothes. Is that the bullet? Yes, sir; 38. Did you bring those clothes here? Yes, sir. (Clothes were here presented and examined, and holes shown to the jury.) Did you order these parties out? Yes, sir. Did they go out? All but Melton. Did the other three come back? Yes, sir; Melton remained in. What did he say? Melton called Mr. Stevenson a damned son of a bitch. What else did he call him? Damned scoundrel, poor white rascal. What connection are they? Melton and John Belfield are brothers, and June Bishop and Jim Stevenson are Melton's brothers-in-law.

"Cross-examination by W. R. Johnson:

You stated they went in there to do some trading. Who was the leader? Melton. When you ordered them out, did these three prisoners go out? Yes, sir. They did not take any part in the row, did they? Not specially. Didn't these men go to Melton and ask him to come out? John did. It appeared to you that they were trying to stop the trouble? Did you find Mr. Stevenson's pistol? Yes, sir. Did he shoot Melton Belfield? I do not know. Did you see pistol in Mr. Stevenson's hand? No, sir. Did these three men here appear to be peaceable? Not particularly. They were quarreling. John called back after Melton, didn't he? Yes, sir. These three men were not taking any part in the shooting affray, were they? I don't know. I was in the grocery room. How long were you gone in the back room? I came back soon as I heard the pistols firing. You ran, did you? Yes, sir. They were trying to get Melton away? Yes, sir. They were not trying to hurt Mr. Stevenson? No, sir. When Mr. Stevenson went out of the door, did you hear Mr. Stevenson say he was going to kill the damned black son of a bitch? No, sir. How far was Mr. Stevenson lying? About 15 steps. There was nothing to indicate that he was pulled out there? I do not think he would have ran out there. He was after Melton Belfield? Yes, sir. Did you see any pistols in the hands of these fellows? No, sir. They were doing everything they could to get him away from there? Yes, sir; John hollowed to him to come out. You do not pretend to say that Mr. Stevenson did not go out of the door? (Here the witness was asked by the solicitor where the man was shot, and the witness showed him.) The bullets could have been shot in him after he fell, couldn't they? I did not see but one shot.

"By the solicitor: When you heard them crying, 'Come on, come on,' that was when you saw the last shot fired? Yes, sir.

"Evidence of J. L. Andrews, for state: Where do you live? In Roxabel. Please state everything you heard or saw concerning this killing. I heard a few reports of shooting. Where were you? In my house. How far off? 37 yards from Peele's store. I thought they had been down to the celebration at Kelford, but it lasted so long I thought something was the matter. How many shots were fired? 15 or 20. What did you finally do? I went to the door, and saw Melton Belfield standing right over Mr. Stevenson, and he shot him as I got to the door. I stepped to the door with the determination of going there, and Belfield ran. Did you see any other persons? No, sir; no one but Belfield and Stevenson. You could see no other persons but those two? I could not think of anything else. Did you find anything about the place after he fell? Next day I picked up a ball just about the place Mr. Stevenson was lying. It was a 32. You know nothing about what happened inside the door? No, sir. You directed your atten-

tion just to those two? I couldn't think of anything else.

"Cross-examination: Your store 37 yards from Peele's door? Yes, sir. You said when you came out you did not see anything but Melton Belfield bending over Mr. Stevenson, shooting? Yes, sir. If these men (the prisoners) had been there, you could have seen them? The shooting was about over. I say, if these men had been engaged in it, you could have seen them? Yes.

"By the solicitor: What position was Stevenson in when you got there? Leaning on his left arm, and commenced leaning over till he fell, and dying in a few seconds.

"By attorney for defendants: Can you swear there were as many as 15 or 20 shots? Yes, sir; sounded like pop crackers.

"Evidence of A. T. Liverman, for state: Your name is Mr. A. T. Liverman? Yes, sir. Were you present in Roxabel on the evening of this shooting? Yes, sir. About 5 o'clock on the 9th April. I did not look at the clock. I went in same direction, about 30 yards. I heard several pistols. I looked and looked the road, and saw several men who seemed to be engaged in a wrangling, and firing went on, and I remained there when over four or five shots were fired. Then three reports, with slight lapse of time between the shots. After that I don't know what took place. I know there were several more pistols. I saw five men,—four around one who seemed to be trying to get away. I saw four men who seemed to be pressing around the man. One man was trying to get away. The four men were trying to stop him. Two men seemed to be behind the wagon. I saw him when he was falling. He appeared whiter than other four. I saw one man at his feet, and one man at the fallen man, and one there. Just as he was falling the pistols were firing repeatedly. I saw two men leave on right of the wagon, and one on left of the wagon, and one seemed to remain a little longer. The last man that remained then ran off, and somebody was hallooing, and I heard some one say, 'Drive, drive.' I was about 160 yards from where the firing began. I went about 120 yards from where Mr. Stevenson fell. You could not tell who the men were? No, sir; the shooting was so rapid, I thought some stray bullet might come down this way, and kept aside. As soon as I stepped out I saw last man leave. Do you recall the last shot? No, sir; the men were standing over him, and the four men seemed to be bending over toward Mr. Stevenson. The wagon did not come towards you? No, sir; there were as many as 15 or 20 shots. What other men besides the four men and the shot man? None at all.

"Cross-examination: Could you not recognize any of the men? No, sir; there was so much smoke, etc. I could not tell who was doing the shooting. You don't pretend to swear that any of these men (the prisoners) fired shots? No, sir.

"Evidence of Dr. A. Capehart: Where do you live? Town of Roxabel, this county. The town is situated at crossroads. It crosses the road coming from Hertford county at right angles. Do you know where the murder was committed? At the crotch of the road, nearly in front of Peele's store. At what angle was Mr. Peele's store? They came from Kelford, there, in the left angle,—this side. Did you see any part of what occurred? I did. Tell the jury. Where were you when you first saw anything of this occurrence? I was sitting in my home, and my attention was arrested by rapid firing. I looked out of my window and saw a number of men. It's about 125 yards to Peele's store. Four or five men seemed to be engaged in what appeared to be gun-shooting. Almost coincidentally with the firing, my eye rested on one of the party falling. I saw three or four men standing around this man, and it appeared that he was being attacked. I saw three flashes of pistols almost at the same time in different positions and from different directions. These parties who were around the man, nearly prostrate, were firing on him. I knew there were more than one pistol being used, because I could tell from the flashes. I saw three of them scamper off. The fourth remained, and fired parting shot. In the meantime the three that ran off were calling to this man, saying, 'Come on, Melton; hurry, hurry.' Some of them got in the wagon and said, 'Drive.' There was a wagon intervening between Peele Bros.' store. (Here the witness referred to the diagram.) Did you see any one in the road but those four? I think not. Did you recognize any one at the time? I did not. Did you identify these three men (the prisoners)? I did not. Go on and state what you did? Some one came over and asked me to come out. I went, and he was dying, lying on his back, when I got there. Describe all about it? He was taken from the road, and was carried to the store and was shrouded. Four balls entered his body,—one on the left side of his neck. One of the balls had hit him in the back; was in the region of the kidneys. The third ball hit about six inches of the left of the spinal column, between the eighth and ninth ribs, and ranged internally. The fourth ball hit him in the shoulder,—hit on outer border of shoulder, did not hit blade,—passed in diagonally, and entered the lung. The ball that hit him in the neck went through lapel of the coat in the collar. What effect would that have on him? All of them would have been necessarily fatal, except possibly the one in the neck. From your examination, in your opinion, what position should they have been in? It would have been necessary for a man to be standing from the side to be hit in the neck; and the ball that hit him in the shoulder, the man must have been standing from the rear of the left side. One in the kidney was found almost vertically down. One between eighth and ninth ribs would have also

been fired from the side. Was shot from behind every time. None from the front. How many bullets in the clothes? Four in the coat and shirt, and this, I think, made seven. The one shot in lower part of his coat did not enter his body,—was taken away. Did you see the ball found in the grocery room? Yes, sir; I found the ball that entered the grocery department from the right of the door. It must have been fired from the left. How far from main store from where you saw the man fall? 12 or 15 yards. How many shots, in your estimation, did you hear? 15 or 20.

"Cross-examination: Firing before I looked out of my window, and when I looked out I saw flashes. At least 12 or 15 shots were fired.

"Re-examination: Who was doing the shooting? I don't know. You did not identify them? I did not. Did you recognize the man that got up in the wagon? I did not.

"Evidence of B. F. Burket, for the state: Do you live in Roxabel? Yes, sir. Where were you at the time of shooting? I was in Mr. Tyler's store. How far? 200 yards. How was your attention directed to it? By shooting. I was behind store, cutting wood. What did you see? I saw four or five men together. Could you tell who they were at time? No, sir; I could tell after they ran off. I saw last shot. Did you hear anything? I heard them hallooing, 'Come on, come on; come on, Melton.' Who were they? Melton Belfield and the three prisoners, John Belfield, James Stevenson, and June Bishop. Were they the ones you saw in the crowd around the deceased man? Yes, sir. Do you know how many shots you heard? I could not tell.

"Cross-examination: How far were you from the scene of trouble? 200 yards from trouble to Mr. Tyler's store. Were you going at the time towards the shooting? No, sir. When you came out, you stopped still? Yes, sir. They were 200 yards, and you recognized them? Yes, sir. Do you mean to swear on your oath that you knew these men, and could identify them on your oath? Yes, sir. Did you see either of these men firing pistols? No, sir. Could you not tell there were more than one doing the firing? Smoke was coming from more than one. Could you see the different puffs of smoke? Yes, sir. What was the position of the men? All together. Did you know who they were? No, sir. Did you see these men with pistols? No, sir. Were not these men trying to get Melton Belfield away from there? I don't know.

"By the solicitor: You could not recognize the men in the mix-up? No, sir. You recognized the men as you stated? Yes, sir.

"Evidence of Ellen Belfield, for the defendant: Just tell what you saw? Well, I know Mr. Stevenson shot Melton Belfield twice. I am his mother. Where had you been that day? Kelford. I went in the store after

pepper. Where had you been? Kelford. Nobody with me but John. I went in Mr. Peele's store,—me and John. I got my pepper. Mr. Stevenson handed it over the counter, and Melton called him a son of a bitch again. Mr. Stevenson said I want going to take that. Mr. Stevenson came out with his pistol. After I saw the blood running, it frightened me. I saw the pistol in his hand when he came out of the store. I saw Melton and Mr. Stevenson shooting. Who fired the first shot? Mr. Stevenson shot twice before Melton shot at all. Where did Melton get his pistol? I saw him get it from his hip pocket. He pulled it out and shot four times. Mr. Stevenson did not pass on by Melton? No, sir. Was John in the store? Yes, sir. At what time did he come out? All were out there when the shooting commenced. John came out before Melton. Did you see John with a pistol? No, sir. Hear him say anything about the firing? I did not see but two pistols.

"Cross-examination: You, the mother of Melton and John? Yes, sir. Were any of these men drinking? I don't know. Where were you? I was in the store when Melton got after Mr. Stevenson about the meat and meal and cussed him. Then Melton got out of the store, and Mr. Stevenson came to the door and shot twice, and Melton shot four times. Facing? Yes, sir. After he was on the ground he shot three or four times. You remember about this matter when it was brought up before the magistrate's trial, and did you say when he made the shot you saw some man on your left? I don't know what happened after that. I left them all in a bunch. What do you mean? I heard two pistols,—Mr. Stevenson's and Melton's. You say Mr. Stevenson shot twice, and Melton four times. Who was that you saw shooting when you testified before the magistrate when you turned your back? The reason I turned my back was because I was sick.

"Evidence of Louisa Stevenson, for defendant: Where had you been on day shooting took place? Kelford. Who went there with you? I went there on the wagon. Who was with you? Dora Savage, Melton, and myself; June Bishop on cart. Stopped at Mr. Peele's to buy some sugar. Who went in there with you? Brother June and sister. June went in there to get some groceries. Mr. Peele asked him to get. You were in the store all the time it took place? I was in there before. He (Melton) came in there and asked Mr. Stevenson about some groceries, and Mr. Stevenson told him he had given it to another, and he told Mr. Stevenson Mr. Peele told him to get 30 pounds of meat. Melton told Mr. Peele Mr. Stevenson cursed at him, and that he had to trade at his store, but, if that was the way his clerk did, he would not trade there any more. He told Mr. Stevenson he would not curse him any more. They did not run on any

more before they were mad. He called Mr. Stevenson a poor son of a bitch. Mr. Stevenson told him he would not take that again, and he called Mr. Stevenson a God damned black son of a bitch. Mr. Peele ordered him out, and Mr. Stevenson followed him and said, 'You damned narrow-faced son of a bitch.' He had a pistol by his side, and came out and met Melton face to face. He shot him twice. Was Mr. Stevenson standing still? No, sir; they met, and shot standing. When Mr. Stevenson shot him, he was running. He put his hand in his pocket for his pistol, and shot him until he was down and done shooting. When he shot Mr. Stevenson, he shot and kept shooting. When Melton and Mr. Stevenson were shooting so, the horses ran off, and a little boy got them, and Melton ran and got up. Where were these men (the prisoners)? They were not around this white man; were around the buggy and wagon. I did not see any of them shoot. Did any of these men say anything to Melton? Jim Stevenson told Melton: 'You done got the meat and meal. Come on out.' He would not come out, and they left him alone.

"Cross-examination: How many times did you see Melton and Mr. Stevenson shoot when they were facing one another? Mr. Stevenson shot twice, and he shot Melton about the head. When Melton shot Mr. Stevenson, Mr. Stevenson jumped by, and shot him when he was passing. Were they the only two men in the wrangle? Only two were shooting. You came up before the magistrate? Yes, sir. You remember saying in that trial that you saw June Bishop near Mr. Stevenson, with his hand in his hip pocket? Yes, sir. Did you hear June Bishop tell Mr. Stevenson he could shoot as many times as Mr. Stevenson could? Yes, sir. What else did you hear June say? He told him (Melton) to use his things; that, if he don't, he would use his. You did not see June Bishop shoot? No, sir. Did you testify in magistrate's trial that somebody shot from behind you, and that June Bishop was behind you? I told you the ball passed me. Which way was it? Passed by me.

"Evidence of Ella Bishop, for defendants: Tell what you know. You are June Bishop's wife? Yes, sir. Well, go on and state what you know? Melton and Jim Stevenson came on the wagon, and asked Mr. Stevenson at the door about some meat and meal. I didn't go in the store. Did these three men (the defendants) come out before Melton and Mr. Stevenson? They came out, and heard Melton in there quarreling, and went back in there to get him out. Then June and John came out. When they were all in the grocery room, Melton came up from the shoe shop and said to Mr. Stevenson, 'How much meat is that?' and he (Mr. Stevenson) said, 'Twenty-eight pounds' and that was what brought on the row. Who came out first,—these three men or Melton? John and June came out before Melton. Did you see Mr.

Stevenson with the pistol? Yes, sir. How far was Melton from him? Mr. Stevenson made three short for him before he fired. When Mr. Stevenson shot, he ran by Melton, and Melton shot him in the back. I did not see but two pistols. These three men did not have any pistols.

"Cross-examination: Melton had one pistol? Yes, sir. What size shot? 32 or 38. How many times would Melton's pistol fire? Five times. Mr. Stevenson's pistol was fired four times. Nine shots were fired in Roxabel. I am June Bishop's wife.

"Evidence of Isaac Jacob, for defendants: Tell what you know about this shooting. Were you in it? No, sir. Did you go to Kelford? Yes, sir. Did you get out of the wagon when these men stopped at store? Who went in the store? I don't know. What was the first thing you saw? I saw a man (Mr. Stevenson) come out of the door, and Melton went and met him, and Mr. Stevenson fired off at him twice, and Melton fired at him three times. That's all I saw. Did you see these other men? No, sir. Did Mr. Stevenson stand still when Melton was shooting? Yes, sir. When Melton shot him he went towards Melton, and passed on by him.

"Cross-examination: Mr. Stevenson shot first and twice? Yes, sir. Did you see the crowd around Mr. Stevenson? No, sir. I saw him when he passed Melton,—was behind the wagon,—and when Melton shot two times he whirled about. When they were face to face, was it possible for Melton to shoot him in the back? He could not shoot him in the back.

"Evidence of Sheriff T. C. Bond, for defendants: State whether or not you saw wound in Melton Belfield's head when you brought him from Weldon? Yes, sir. I did not examine it. Did it look like it was recently inflicted? Yes, sir."

New trial.

COOK, J., concurs.

DOUGLAS, J. (concurring). I concur in the conclusion of the court that there was no evidence of premeditation to go to the jury, and that therefore the prisoners should not have been convicted of murder in the first degree. There seems to be such a vital misapprehension of the evidence on the part of some of us that it seems eminently proper that the evidence should be published in full. If I took the same view of the evidence as some of my Brethren, either of its substance or its lawful deductions, I would certainly vote for affirmance, as I have no scruples in hanging a man who is guilty of premeditated murder. But there must be some proof of such premeditation. At common law the killing with a deadly weapon implied malice, and, where such killing was admitted or proved beyond a reasonable doubt, the prisoner was presumed to be guilty of murder, and the burden rested upon him of showing

such facts as he relied on in mitigation or excuse. *State v. Byrd*, 121 N. C. 634, 28 S. E. 353, and cases therein cited. There was then but one degree of murder, and that was a capital felony. This was changed by chapter 85 of the Public Laws of 1893, which divided the crime of murder into two degrees; the second degree being punishable only by imprisonment. Since the passage of said act the presumption arising from the killing with a deadly weapon extends only to murder in the second degree, and the state is still required to prove beyond a reasonable doubt the facts necessary to bring the homicide within the statutory definition of murder in the first degree. *State v. Booker*, 123 N. C. 713, 31 S. E. 376, and cases therein cited. I am aware that this construction of the act of 1893 was not unanimous at first, as shown in *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; but it was settled before I came upon the bench, and needed not, though it has received, my cordial approval. If it is correct, these prisoners could not have been found guilty of murder in the first degree in the absence of any proof of premeditation. It should be remembered that Melton Belfield, who brought on the fight, and admittedly shot the deceased, is not the one now on trial. He has paid for his crime with the penalty of his life, having died of wounds received in his arrest for this killing. The prisoner now before us is John Belfield, who, according to the testimony of Peele, the principal witness for the state, took hold of Melton's arm and tried to get him to leave the store, evidently in order to avoid any difficulty. Acting the peacemaker is surely no evidence of premeditation.

It is always a matter of regret and concern to me that the question of life and death should depend upon my single vote, but I have no right to shirk the responsibilities of my position, and must decide the question in strict accordance with my convictions of duty. I concur in the opinion of the court to the extent that there should be a new trial.

CLARK, J. (dissenting). There are no exceptions to evidence nor to the charge. The only exceptions are to the refusal of the judge to give the following prayers for instruction: "(1) That upon the evidence the jury cannot find a verdict of murder in the first degree. (2) That upon the evidence the jury cannot find a verdict of murder in the second degree. (3) That upon the evidence the jury should render a verdict of not guilty." It is therefore necessary to consider only the evidence against the prisoners, for, if there was any evidence, it was not error to refuse these prayers.

It was in evidence that the three prisoners and Melton Belfield (afterwards killed in resisting arrest) composed a party of two brothers and their two brothers-in-law, who

went to Peele's store, in Roxabel, on April 9, 1902. They were colored men, and the deceased, Thomas Stevenson, was a young white man, who was clerking in Peele's store. A. T. Liverman testified that about 5 p. m., April 9, 1902, he was at Roxabel. "Heard several pistols, looked, and saw several men who seemed to be engaged in wrangling and firing. Firing went on, and I remained there, when over four or five shots were fired. Then three reports, with slight lapse of time between the shots. After that I don't know what took place. I know there were several more pistols. Saw five men,—four around one, who seemed to be trying to get away. I saw four men who seemed to be pressing around the man. One man was trying to get away. Two men seemed to be behind the wagon. The four were trying to stop him. I saw him when he was falling. He appeared whiter than the other four. I saw one man at his feet, and one man at the fallen man, and one there. Just as he was falling, the pistols were firing repeatedly. I saw two men leave on right of wagon, and one on left of the wagon, and one seemed to remain a little longer. The last man that remained then ran off, and somebody was hallooing. I heard some one say, 'Drive, drive.' I was about 160 yards from where the firing began. I went about 120 yards from where Stevenson fell." He says he did not then recognize any of the men. He further testified that there were 15 or 20 shots, and no one was at the place of the shooting besides the four men and the shot man, and that at the last shot the four men seemed to be bending over towards Stevenson, the deceased. Dr. A. Capehart testified: "I was sitting in my home, and my attention was arrested by rapid firing. I looked out of my window and saw a number of men. It's about 125 yards to Peele's store. Four or five men seemed to be engaged in what appeared to be gun-shooting. Almost coincidentally with the firing, my eye rested on one of the party falling. I saw three or four men standing around this man, and it appeared that he was being attacked. I saw three flashes of pistols almost at same time in different positions, and from different directions. These parties who were around the man nearly prostrate were firing on him, I knew there were more than one pistol being used, because I could tell from the flashes. I saw three of them scamper off. The fourth remained, and fired a parting shot. In the meantime the three that ran off were calling to this man: 'Come on, Melton; hurry, hurry.' Some of them got in a wagon and said, 'Drive.'" He said further that he did not recognize any of the men during the firing; that when it was over he went to deceased, who was dying; that four balls had entered the body, three of which would have proved fatal, and that seven bullets pierced the clothing; that all the balls entered from

behind, none in front; that one ball in the neck must have been fired from the side, and that the ball that hit the deceased in the shoulder must have been fired by a man standing in the rear of his left side; that the ball in the kidney ranged almost vertically down. He says deceased fell 12 or 15 yards from the door of the store, and that 15 or 20 shots were fired. B. F. Burket testified that he saw the shooting; that he knew them when they ran off; that he saw the last shot; he heard them hallooing, "Come on, Melton." He was asked, "Who were they?" and replied, "Melton Belfield and the three prisoners, John Belfield, James Stevenson, and Junius Bishop." He says they were the men he saw in the crowd around the deceased man. On cross-examination he said the puffs of smoke were coming from more than one pistol. Louisa Stevenson, a witness for the prisoners, in her testimony stated that she saw the prisoner June Bishop standing near deceased; with his hand on his hip pocket, and that he told Melton to "use his things, and, if he didn't, he would use his," and that Bishop was behind her when a shot came from that direction. June Bishop's wife, witness for prisoners, in her testimony said that Melton's pistol would fire five times. C. T. Peele testified, among other things, that Melton Belfield and the other prisoners came together to the store that day; that Melton began quarreling, and he ordered him out; that Melton called the deceased a "damned son of a bitch," a "damned scoundrel," "a poor white rascal"; that the deceased reached up and got his pistol; that he went to the rear of the building, and when he got back the deceased was out some 15 or 20 yards in front of the store; that Melton Belfield and the prisoners were the only persons out there, except some women; that some 15 shots were fired, and that as he went to the door the last shot was fired, which was by Melton Belfield; that he did not see any pistol in the hands of deceased; that there were seven bullet holes in his clothes, which were shown to the jury; that, when he ordered them out of the store, Melton remained in, and the other three went out, but came back into the store. On cross-examination he was asked, "There was nothing to indicate that he (deceased) was pulled out there?" To which he replied, "I do not think he would have run out there." J. L. Andrews testified that 15 or 20 shots were fired; that, just as he got to the door, Melton Belfield was standing right over deceased, and shot him just then, and ran off; that the shooting was over, and he saw there then only those two men.

There was some additional evidence for the state, and some evidence for the defense, but it is not our province to weigh the testimony. That belongs to the jury. The only question before us is whether there was any evidence for the state of murder in the first degree.

If the above evidence is to be believed, four colored men, brothers and brothers-in-law, went in a body to the store where a young white man was clerking. One of them (Melton) commenced quarreling, and Melton called the clerk most insulting names, when the clerk reached for his pistol, and the negroes were ordered out by Peele. Melton refused to go. The other three went out, but came back. Soon thereafter, according to the testimony of several witnesses, all four were chasing the deceased, and trying to prevent his escape, firing at him as he ran, and 15 or 20 shots were fired. The evidence of the physician is that the deceased was struck by seven shots, all from the rear, and three of them fatal; that after he fell Melton Belfield stood over him and fired a last shot; that the others called on him to come, to hurry up, and all four jumped in a wagon and drove hurriedly off. Upon this evidence, the killing was an assassination, without provocation, in front of his store, of an unoffending young man, who was entitled to the security of life and person at the hands of the law. It was, if the evidence is believed, a joint killing by four men, all participating therein. The deceased was trying to escape, and four men were surrounding him to prevent it, firing at him as he ran,—some 15 or 20 shots being fired, which was more than one or even three pistols could have fired,—and all seven of the bullets which struck him coming from the rear.

It is not law that when one is killed, several being engaged in the joint or common assault, only he is guilty who can be shown to have fired the fatal shot. If such were the case, it would be a perfectly safe pastime for two men or more to chase down and shoot a fellow mortal, for no one—not even the shooters—could say who did the slaying. On the contrary, the law has ever been that, if one is guilty of murder in the first degree, all who are present, aiding, abetting, or encouraging the perpetration of the crime, are guilty of the same degree of murder as he who fired the shot. As far back as *Reg. v. Wallis* (1703) 1 Salk. 334, it was held that if several make a riot, and a man is killed, all are principals in the murder; *Holt, C. J.*, saying: "Who actually did the murder is not material. The matter is that a murder was committed, and the other is but a circumstance, and all are principals." In a late English case (*Reg. v. Salmon* [1880] 6 Q. B. Div. 79), where three were recklessly firing at a target with long-range rifles, and a boy was unintentionally killed, but it could not be shown by which, all three were held guilty of manslaughter,—the degree of crime upon those facts. Even if any one of the prisoners did not fire a fatal shot, or any shot at all, if he were there acting in support of those who were chasing the deceased and shooting at him, or encouraging or aiding those who did the shooting, he was as guilty

as those who fired the three fatal shots. Whart. Cr. Law, § 211; State v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1183; 1 Bish. Cr. Law (6th Ed.) § 636. It is not necessary to show that these four men went there with a preconcerted plan to act together. That they did act together, and united in a common effort to kill the deceased, makes all guilty of the same degree of crime. Four witnesses testify that 15 to 20 shots were fired, which is as much as three to four five-shooters would have fired if all their barrels were emptied. All these witnesses testify that the four men were engaged in chasing the deceased,—trying to head him off. These four men were identified as the prisoners and Melton Belfield. No provocation was shown to have been given to the three prisoners by the deceased, and, as to Melton, it was Melton who gave the provocation. It ought to take no citation of authority to establish that all four are responsible, irrespective of which ones fired the three fatal shots; and that in such a chase, four men after one, and time elapsing enough to fire 15 to 20 shots, there was evidence of premeditation,—far more than was in Dowden's Case, or in any of the other cases cited below. If this is not murder, in what way could these four negroes have committed murder in the first degree, unless they had laid in wait for their victim? Is it any less murder because, instead of ambush, they resorted to numbers, and in more reckless defiance of law they chased and headed him off, and shot him to death, with 15 to 20 pistol shots, in open daylight, in front of his store? One solitary case is cited as authority that, four men being in pursuit of deceased, no one can be convicted unless it can be shown who fired the three fatal shots. That case is Campbell v. State, 61 Ark. Dec. 49, but an examination shows that the charge there approved was: "If it is uncertain from the evidence, in the minds of the jury, which one out of two or more persons inflicted the stab that would operate to acquit the prisoner, unless there is proof that the prisoner aided or abetted the person ascertained to have killed him." This qualification puts the case in line with the uniform ruling of all courts. When two or more unite in an act which results in death, all are guilty, though only one gave the fatal stab, blow, or shot. 1 Whart. Cr. Law, § 396, and cases cited; also Dumas v. State, 62 Ga. 58; 1 Bish. Cr. Law, § 629 (2), and cases cited; Whart. Cr. Pl. § 301, and cases cited; State v. Johnson, 7 Or. 210; Brennan v. People, 15 Ill. 511; Ruloff v. People, 45 N. Y. 213; 2 Greenl. Ev. §§ 40, 41. But it cannot be necessary to add more cases, for the doctrine is based upon reason and is universally recognized. When several combine in an unlawful act,—as here in chasing the deceased and firing at him,—all who are present, aiding and abetting, are equally guilty, whether all fired at him or not. This is fully and ably

discussed in Spies v. People, 3 Am. St. Rep. 320, and notes. This was the celebrated Anarchist Case, in 122 Ill. 1, 12 N. E. 865, 17 N. E. 898. In People v. Mather, 4 Wend. 230, 21 Am. Dec. 122, it was well said by Marcy, J. (later the celebrated secretary of state of the United States): "The fact of conspiring need not be proved. If parties concur in doing the act, although they were not previously acquainted with each other, it is a conspiracy." Here, if the only fatal shot had been fired by Melton, these prisoners, if five witnesses have sworn the truth (and of that the jury are the judge), were all present, actively aiding by "trying to head the deceased off"; and three of them present, if not all four, emptying their five barreled pistols at him, as the testimony concurs that 15 to 20 shots were fired. Dr. Capehart testified that he saw three pistols flash at once. State v. Straw, 33 Me. 564; Doan v. State, 26 Ind. 495; Washington v. State, 36 Ga. 222; Rex v. Perkins, 4 Carr. & P. 537. In State v. Gooch, 94 N. C., at page 1014, the court cites and approves the following: "In Rex v. Cox, 4 Carr. & P. 538, the rule is thus laid down, 'If two persons are engaged in pursuit of an unlawful object, the two having the same object in view, and, in pursuit of that common object, one of them does an act which is the cause of death, in such circumstances that it amounts to murder in him, it amounts to murder in the other also.'" To the same purport, State v. Whitt, 113 N. C., at pages 718-720, 18 S. E. at page 716, which very much resembles this case. In State v. Gooch, 94 N. C., at page 1013, the court cites with approval Lord Hale's Pleas of the Crown (volume 1, p. 440), which thus lays down the doctrine on the subject: "If divers persons concur in an intent to do mischief, as to kill, rob, or beat another, and one did it, they are all principals; and if many be present, and only one gives the stroke whereof the party dies, they are all principals, if they came for that purpose."

But it is contended that there is no evidence of a deliberate and premeditated killing. The statute does not restrict murder in the first degree to cases in which the slaying has been done by lying in wait or poisoning, or has been planned beforehand. The premeditation or deliberation may take place after the parties meet, and this may be deduced from the attendant circumstances; the absence of provocation; the numbers brought against the deceased; the pursuit by four men following up one who is fleeing and trying in vain to escape; the standing over him after he is down, fatally wounded, and firing the last shot into the prostrate body; the other three, with smoking pistol barrels, standing by; and then their calling to him to "Come on," "Hurry up," "Let us drive," and going off together. In State v. Foster, 130 N. C., at page 671, 41 S. E., at page 285,—the last case before this court, it is said: "It

has been uniformly held by this court that if the purpose to kill was formed before the killing took place, 'no matter for how short a time,' it would be within the power of the jury to find him guilty of murder in the first degree, and not violate the law, nor their oaths as jurors." It should not be necessary to cite cases, for, as the court said, our authorities are uniform to that effect, but among them we may quote: In *State v. Dowden*, 118 N. C. (quoted in *State v. Foster*, supra), at page 1153, 24 S. E., at page 723, it is said: "This court has not followed the intimations of some of the courts of other states that in order to constitute deliberation there must be evidence of a definite design, formed on some occasion previous to the meeting at which the killing was done, and cherished up to and at the time of putting it into execution. * * * The question of the time that elapses between the determination to kill and the killing being immaterial." In *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477, where there was no lapse of time, but one shot fired, and that without warning, *Furches, J.*, held that whether this was murder in the first degree or the second degree was a question for the jury. The same judge (*Brown*) followed that ruling in this case. In *State v. Dowden*, supra, the shooting was done, not with a multitude, as here, but by one man, and "in 10 or 15 seconds" after the deceased told the prisoner to get off the engine; and this court unanimously sustained a verdict of murder in the first degree, *Avery, J.*, saying: "If the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution, there was sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *State v. Thomas* (at this term) 24 S. E. 431; *State v. Norwood*, 115 N. C. 790, 20 S. E. 712, 44 Am. St. Rep. 498; *State v. Covington*, 117 N. C. 834, 23 S. E. 337; *State v. McCormac*, 116 N. C. 1033, 21 S. E. 693." In *State v. McCormac*, 116 N. C. 1036, 21 S. E. 694, the court says, quoting *Kerr, Homicide*, § 72: "The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense." The court then goes on to say: "In arriving at a conclusion, they [the jury] would naturally look to the testimony as to the conduct of the prisoner at and about the time of the homicide, and the attendant circumstances, to throw light upon the question, rather than to a computation of the time intervening between the formation and execution of the design." Is not that the law

in this case? If not, why not? In *State v. Covington*, 117 N. C. 834, 23 S. E. 337, "the only evidence of the circumstances under which the homicide was committed was the prisoner's alleged conversation: That he entered a store to commit larceny. The deceased got between him and the door. That 'I watched my chance, and jumped on the old man and wrenched his pistol, and the old man hallooed, 'Murder!' Then I shot him through the body. The old man said, 'You have got me.' I aimed to shoot him, and this must have been when I shot him in the neck, and I shot him again.'" The court held that it was proper to instruct the jury "in no view of the evidence was the defendant guilty of murder in the second degree or manslaughter, but the jury should find the prisoner guilty of murder in the first degree, if they believed that evidence, or acquit if they did not." Why, then, is it not at least evidence of murder in the first degree that all four in this case were engaged in trying to head off a fleeing man, and at least three, and doubtless all four, were aiming to shoot him (as four witnesses testify there were 15 to 20 shots), and aiming so well that 7 bullets struck him, 3 of them fatal, and all in the rear, and when not a single witness testifies to any legal provocation, and as to absolutely no provocation at all by deceased toward these three prisoners? This case has been repeatedly cited as authority since, and has never been questioned. In *State v. Thomas*, 118 N. C. 1120, 24 S. E. 431, citing *State v. Covington*, it is said that the expression of the prisoner, "I aimed" to kill him, justified a verdict of murder in the first degree, because, on the facts in that case, it tended to show that the prisoner formed the design to kill, "not in the heat of passion aroused by combat, but when the deceased acknowledged he was vanquished." Here there was no combat shown by deceased as to these prisoners, and, if it were shown that there was an altercation with Melton, the deceased acknowledged himself vanquished by feeling, and was pursued by superior numbers,—15 or 20 shots fired; shot every time in the rear, and again after he was down, and all four participating in the last bloody and savage act. In *State v. Norwood*, 115 N. C. 793, 20 S. E. 712, 44 Am. St. Rep. 498, it is said that, if the prisoner "deliberately determined to take the child's life by putting pins in its mouth, it is immaterial how soon after resolving to do so she carried her purpose into execution"; and there are several other cases all to the same effect. It is useless to add to those citations, for in *State v. Foster* (at last term) 130 N. C., at page 671, 41 S. E., at page 285, the court reiterated that "it has been uniformly held by this court that if the purpose to kill was formed before the killing took place, no matter for how short a time," it would be murder in the first degree. And also at last

term the unanimous court in *State v. Conly*, 130 N. C., at page 186, 41 S. E., at page 537, approved the following charge of Judge Coble: "By 'premeditation' is meant thought beforehand for any length of time, however short."

The law is thus clearly and admirably stated by Dr. Wharton (1 Whart. Cr. Law [9th Ed.] § 380), with a long list of authorities to support his text: "To establish the predicate of 'premeditated,' which under most of the statutes is an essential incident of murder in the first degree, it has been said that a positive previous intent to take life must be shown; but this opinion has since been recalled by the court that delivered it, and is opposed to the weight of authority everywhere. And it has also been said that, where the fact of death alone is proved, the presumption is that it is murder in the second degree; it being incumbent on the prosecution to rebut this by something, however slight, from which premeditation can be inferred. But be this as it may,—and when analyzed the position varies very little from that of the crown writers on murder, who draw the presumption of malice aforethought not from the fact of death, but from the nature of the wound, instrument, etc.,—there is a substantial concurrence of authority on the general meaning of 'premeditation.' It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act as if it entered ten years before. And the reason of this is obvious. [Here follow the reasons.] Hence judges have generally united in holding that, while there must be some sort of premeditation (i. e., the blow must not be the incident of mania or a sudden paroxysm of passion, such as suspends the intellectual powers), whether there has been such premeditation is for the jury. * * * The question, in other words, is one of fact, not of arbitrary, technical law." His honor therefore properly left it to the jury in this case. The above is buttressed upon cases so numerous and from so many states that citation of them is omitted here, as they can be found by turning to the section (380) above quoted. Again, in the same work, at section 117, it is said, citing very numerous authorities which can there be found, without repeating them here: "It is constantly laid down that intent at the time of the action is enough. It is not meant to assert by this that a person who under sudden impulse kills another is guilty of murder. To say this would be unwarranted, for the reason that we have no means of saying that a particular impulse is sudden. What we have a right, however, to say, and what the law means by this maxim to say, is this: That, when a homicide is committed by weapons indicating design,

then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer, as a presumption of fact, but not of law, that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant." The authorities are both very numerous and uniform, and sustain the text, and show that our decisions conform to those elsewhere. It may, perhaps, be thus succinctly stated: At common law, and up to the statute dividing murder into two degrees, killing with a deadly weapon being shown, malice and premeditation were presumptions of law. Now, a killing being shown, murder in the second degree is a presumption of law; and if, further, the killing with a deadly weapon is shown, indicating design, then whether there was premeditation is a question of fact for the jury, and they have a right to infer premeditation from the nature of the weapon or other attendant circumstances. In such cases that question is always one to be submitted to the jury, and it was not error to submit it to them on the facts of this case. When (if the evidence is believed) these four men pulled out their pistols and commenced firing upon one man, and continued to pursue and fire upon him while fleeing, that was evidence of a deliberately formed intent to kill, and that intent necessarily preceded the actual killing. It also showed concert of action. The evidence that all the shots came from the rear, and that when the deceased was down, fatally wounded, a shot was fired by one of the number, the others standing by, encouraging him and calling to him to escape with them, is evidence confirmatory of a previously formed intent to kill.

When it is shown that the parties did combine and act together in execution of an unlawful purpose, a previous agreement to do so need not be shown. *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122. But there is evidence of the latter which the jury were well warranted in considering. Four colored men, nearly related, go together to the store. They all go armed, for the evidence is that in a few minutes all of them were using pistols. One of them grossly insults a white man without provocation, and, when ordered out, refuses to go, but reiterates the grossest insults, calculated to bring on a fight, while his three companions, who had gone out, return into the store. Soon after the white man is seen out of doors, running for his life, with all four chasing him, and four revolvers barking on his track. Seven shots strike him, all from the rear. He is shot again after he is down. Then all four jump into a wagon and drive off. No witness—not even those for the defense—states that there were any words or any movements by the deceased against these three prisoners, yet there is evidence that they pursued him and aided in compassing

his death. Is not this unprovoked participation in the tragic death of the deceased some evidence of that premeditated, deliberate killing which constitutes murder in the first degree? "What all the evidence shows" is solely for the jury, not for the court; and the jury have decided that it proves beyond a reasonable doubt that the prisoners are guilty of murder in the first degree,—beyond any reasonable doubt in the minds of any one of the 12 impartial men who heard the evidence, and whose province it was to pass upon the facts. This court cannot sit as a revising jury to pass upon their action. If it be conceded (which I do not claim) that we are wiser and more impartial than the jury who found the verdict, we are at the double disadvantage of not having heard the witnesses or been present at the trial, and that the law does not give us power to weigh the evidence. Smith, C. J., in *State v. Hardee*, 83 N. C., at page 622, says, "Nor will the court look into the evidence to ascertain if the verdict was rendered upon testimony which ought not to have convicted;" citing *State v. Storkey*, 63 N. C. 7, and *State v. Davis*, 80 N. C. 384. There are only two accounts given of the slaying of the deceased. That of the state's witnesses, above recited, which, if believed, is strong, and, it should seem, conclusive, evidence of murder in the first degree. The other version is that of the four witnesses for the defense, three of whom are women and near relatives of the prisoners. Their account is that there was a fight between deceased and Melton; that deceased fired two shots, and Melton three, and no one else fired or had any part in the difficulty; and, if this is true, the prisoners are guilty of nothing. Aside from the relationship, and the fact that every one knows the women left when the shooting began, there is the fact that deceased's clothes showed seven bullet holes, all in the rear, and no one else is shown to have been struck. What was the truth of the transaction was for the jury, to whom his honor left the determination of the facts under a charge not excepted to, and it is not for this court to reverse their finding of the facts. In *State v. Smith*, 126 N. C. 1116, 36 S. E. 165, it was held by a unanimous court, through Montgomery, J., that "where there is evidence, more than a scintilla, on the part of the state, going to show premeditation and deliberation on the part of the prisoner, indicted for murder, it is for the jury to pass upon the guilt of the prisoner, and the degree, if guilty." And further, "The credibility of the witnesses and the weight of the evidence are for the jury, and not for the appellate court, although it may differ from the jury as to the weight of the evidence, where it is conflicting."

The presiding judge could have set aside the verdict, and would have done so, in this case, in the discharge of his duty, if he had thought the evidence did not justify the ver-

dict. That power is wisely vested in him who heard the evidence and saw the bearing of the witnesses on the stand. The only authority committed to us is to pass upon the assignment of errors of law, which in this case is the allegation that there was no evidence. In such case we can only consider the evidence against the appellants, and if there is any evidence, more than a mere scintilla, it is for the jury, and the jury alone, to say whether the evidence is overcome by the evidence for the defense. That is their province, nor ours. Three out of the four witnesses for the defense in this case, as already stated, are women nearly connected with the prisoners, and what weight that fact should have in considering the credit to be given their testimony was for the jury to decide. *State v. Lee*, 121 N. C. 544, 28 S. E. 552. The jury also knew, as we cannot know, the character of the witnesses, and the credit which should be given to the testimony of each. For wise purposes, trial by jury was established by our ancestors, and has been continued and declared inviolable by our present constitution. Any impairment of the powers or curtailment of them by the appellate court revising the judgment of the jury upon the weight of the evidence is contrary to the organic law and our unbroken line of decisions. If the court can pass that line for the prisoners in a state case, there is nothing to hinder like action in any other. To judges of fact, grounds of challenge are always allowed. To judges of law, there are none. Therefore they should be all the more careful not to infringe upon the province of those to whom the constitution and the laws have committed the ascertainment of the facts.

The prisoners have had a fair trial before a learned and impartial judge, with two able counsel to defend them. It speaks well for the forbearance of the law-abiding people of Bertie that this is so. I have been unable to discover any error or wrong done them in this trial.

MONTGOMERY, J. (dissenting). At the time of his death, Stevenson was a salesman in the employment of Peele, a witness in the case. The three prisoners, together with Melton Belfield (now dead), on the day of the homicide went to the store of Peele for a lawful purpose, so far as the evidence discloses. Before the shooting commenced, the prisoners were peacemakers. On his cross-examination, Peele said in answer to the question, "They did not take any part in the row, did they? Not specially. When you ordered them out, did these prisoners go out? Yes, sir." Peele further testified that upon hearing pistol-firing he returned from the back room of the store to the front door; he then saw Melton Belfield shoot Stevenson; that he fired standing right over him; and that he saw no pistols in the hands of the prisoners. But the evidence of Liverman

and that of Dr. Capehart went to prove that the prisoners were engaged in the shooting, and under circumstances tending to show premeditation on their part to kill Stevenson; and upon that evidence, doubtless, the jury convicted them of murder in the first degree. A very short time elapsed between the moment when the prisoners were peacemakers and the time when they did the shooting, according to the evidence of the two last named witnesses, it is true; but premeditation is not a question of time. If the intent to kill springs from a sudden gust of passion, and the act of killing is simultaneous with the formation of the intention, then there is no premeditation. But if the purpose to kill has been considered long enough to fix in the mind the determination to do the act, and then subsequently, either remotely or immediately, the killing is done, premeditation exists. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722; *State v. Foster*, 130 N. C. 666, 41 S. E. 284.

I think there was no error.

(131 N. C. 396)

SMITH et al. v. PATTON et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

CLERKS OF COURTS—BONDS—FUNDS—DEPOSIT IN BANK—LOSS—DESIGNATED DEPOSITORY—PARTIES.

1. The bond of a public officer is liable for money that comes into his hands as an insurer, and not merely for the exercise of good faith.

2. Code, § 72, provides that the bond of a clerk of a superior court shall be liable for all moneys which may come into his hands "by color of his office." *Held*, that where the commissioners in partition paid the proceeds to the clerk, who receipted for it as clerk, the bond was liable.

3. The charter of a bank authorized public officers to deposit in said bank any moneys in their custody, but it specified that such provision should be subject to the provisions of chapter 470, Laws 1889, which provides that no such provision in any charter shall operate to relieve officers from official responsibility, or their sureties from liability on their official bonds. *Held*, that where a clerk of a superior court deposited funds from a partition sale in the bank, and it failed, the bond of the clerk was liable.

4. Code, § 1883, enacts that every person injured by the neglect, etc., of any clerk of a superior court may sue on his bond. *Held*, that claimants of a fund arising from a partition sale, which fund had been deposited with a clerk and lost, may sue on his bond.

Appeal from superior court, Burke county; Council, Judge.

Action on a bond by C. B. Smith, as executor, and others, against P. W. Patton and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

A. C. Avery, for appellants. J. T. Perkins, for appellees.

CLARK, J. Under proceedings to sell land for partition, the commissioner paid

the proceeds of the sale into the clerk's office, taking his receipt therefor as clerk. The clerk deposited the same in the Piedmont Bank, which later failed, and, the fund being impaired or lost, this action is to recover the amount so lost from the clerk on his bond. It is settled in this state that the bond of a public officer is liable for money that comes into his hands as an insurer, and not merely for the exercise of good faith. *Presson v. Boon*, 108 N. C. 78, 12 S. E. 897; *State v. Bateman*, 102 N. C. 52, 8 S. E. 882, 11 Am. St. Rep. 708; *Morgan v. Smith*, 95 N. C. 397; *Havens v. Latham*, 75 N. C. 505; *State v. Clarke*, 73 N. C. 257; and other cases therein cited. Bonds of administrators, executors, guardians, etc., only guaranty good faith. *Moore v. Eure*, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17; *Atkinson v. Whitehead*, 66 N. C. 296. But the defendants contend that there was no law authorizing the clerk to receive these funds, and therefore the bond is not liable. Here the clerk appointed the commissioner to make the sale, without bond, and on approving his report received and receipted for the proceeds as clerk, took out his costs, and entered the amount due each heir at law on his docket, and disbursed a portion of said fund to the parties entitled. This would seem a receipt of the fund by the clerk "by virtue of his office." *Cox v. Blair*, 76 N. C. 78; *McNeill v. Morrison*, 63 N. C. 508; *Judges v. Deans*, 9 N. C. 93. But, if this were otherwise, the clerk received it "as clerk," and so receipted for it. This was certainly a receipt of the money "under color of his office," and, indeed, this is admitted in the answer. The older decisions were made when these words were not in the statute. "The broad and comprehensive provision" embracing money received by "color of his office" was enacted to cover the defect by Code, § 72, and was construed in *Thomas v. Connelly*, 104 N. C. 488, 10 S. E. 520, to embrace all cases where the officer received the money in his official capacity, but when he may not be authorized or required to receive the same. In such case the bond is responsible for the safe custody of the fund so paid in. *Presson v. Boon*, supra; *Sharpe v. Connelly*, 105 N. C. 87, 11 S. E. 177; *Thomas v. Connelly*, 104 N. C. 342, 10 S. E. 520; *Ex parte Cassidy*, 95 N. C. 225; *Brown v. Coble*, 76 N. C. 393; *Greenlee v. Sudderth*, 65 N. C. 473; *Broughton v. Haywood*, 61 N. C. 380. While the charter of the Piedmont Bank (Priv. Laws 1891, c. 41, § 2) authorizes public officers to deposit in said bank any moneys in their custody, it specifies that this shall be subject to the provisions of chapter 470, Laws 1889, which provides that no such provision in any corporation charter "shall operate or be construed to relieve them from official responsibility, or their sureties from liability on their official bonds." The plaintiffs, claim-

¶ 2. See *Clerks of Courts*, vol. 10, Cent. Dig. § 122.

ants of this fund, are entitled to maintain this action. Code, § 1883; *Daniel v. Grizzard*, 117 N. C. 105, 23 S. E. 93.

No error.

(131 N. C. 393)

JUSTICE v. GALLERT.

(Supreme Court of North Carolina. Dec. 2, 1902.)

ADMINISTRATORS — ACTIONS — EVIDENCE — INSTRUCTIONS — EXCEPTIONS — ORAL INSTRUCTIONS — LIMITATIONS.

1. An exception to the court's refusal to give a requested oral instruction cannot be sustained; the court, by the express provisions of Code, § 415, being authorized to disregard it.

2. Where a judge, by the aid of disconnected notes, orally instructed the jury, in the absence of a request by either party that he should give his instructions in writing, the court, on appeal, is bound by the judge's statement of facts as to what the instructions were; and the contents of such notes, which were not handed to the jury, are immaterial.

3. An omission to give an instruction on a particular point is not error, in the absence of a request.

4. Where an action against an administrator was presented to the jury by both parties on the sole issue whether the administrator had so acted as to remove the bar of limitations, failure to charge as to the length of time that would be a bar was not error.

5. Where, in an action against an administrator, a witness for plaintiff testified that he had heard the administrator state to plaintiff's testatrix that when he could get the money he would pay her, which promise was made with reference to the claim sued on, and that he had made the same promise six or eight months after the death of his intestate, the court properly instructed the jury on the questions whether the administrator had admitted the amount due, and had promised to pay it, so as to remove the bar of limitations.

Appeal from superior court, Rutherford county; Winston, Judge.

Action by M. H. Justice, executor of Emily Forney, deceased, against S. Gallert, administrator of J. A. Forney, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

McBrayer & Justice, for appellant. Eaves & Rucker, for appellee.

CLARK, J. The appellant properly concedes that, the requests for instruction having been oral, his exception for failure to charge as asked cannot be sustained. The statute is explicit that "the judge may disregard them." Code, § 415. There was no request for the judge to put his instructions in writing (Code, § 414), and the case on appeal states that he did not do so, but that he jotted down some disconnected notes of his charge, in which notes, as written, it appears that he instructed the jury, on a certain state of facts, to answer "Yes," which was erroneous; but the judge states in the case on appeal that in fact he told the jury, upon that state of facts, if found, to answer "No." The charge was not handed to the jury, and the material matter is what was said to them, and we are bound by the judge's statement of

fact. The counsel for the appellant, in a letter to the judge incorporated in the case, says he has no personal recollection how the judge stated it to the jury, and that, if he said "Yes," he is satisfied it was a clear inadvertence. As the judge said to the jury "No," the inadvertent entry on his notes, "Yes," could do no harm. If the charge, containing the word "Yes," had been handed to the jury (Laws 1885, c. 137; Clark's Code [3d Ed.] § 414), this would have been reversible error, though the judge had orally said "No"; and this though the "Yes," in the written charge was a mere inadvertence. Again, if the charge had been written out at request, under Code, § 414, it should have been signed and filed with the clerk. This would have made it "part of the record," and this would control any statement in the case on appeal. *State v. Truesdale*, 125 N. C. 696, 34 S. E. 646.

It was not error to omit to charge the jury as to the length of time that would be a statutory bar. An omission to charge on a given point is not error, unless there is a prayer to instruct the jury thereon. Clark's Code (3d Ed.) p. 514, and numerous cases there collected. Besides, the case on appeal states, "The case was presented to the jury by both parties on the question of the statute of limitations, on the ground that, if the defendant administrator had recognized the claim, it was not barred, and if he had not, that it was barred; and this the court explained to the jury." So there was no dispute as to the length of time.

The court instructed the jury: "If Mrs. Forney presented this claim to the administrator and demanded payment, and he admitted that the amount was due and promised to pay it, you will answer the issue 'No.'" And further: "The recognition of the amount by the administrator must be positive and unconditional." The defendant excepted on the ground that there was no evidence to support these hypotheses. Upon that exception, we need consider, of course, only the evidence for the plaintiff. R. F. Tate, son-in-law of the plaintiff's testatrix, testified that, within a year after the qualification of the defendant as administrator, he heard the defendant tell Mrs. Forney (plaintiff's testatrix) that when he could get the money he would pay her; that this promise was made in reference to this money; also that the defendant had made him the same promise six or eight months after the death of the defendant's intestate, and that the defendant then stated that he knew that his intestate had the money (alleged to have been deposited with him by plaintiff's testatrix), and that it was a mystery to him what became of it. There was no dispute as to the amount. The controversy was as to whether the administrator had so acted as to bar the running of the statute. This was sufficient evidence to go to the jury. In *Stone-street v. Frost*, 123 N. C., at pages 646 and 647, 31 S. E., at page 838, it is said that it is a sufficient "filing," under Code, § 104, when

the claim is presented within the proper time to the personal representative, and he acknowledges the validity of the debt. "The creditor can never compel the administrator to 'string' the claim. He has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt, and the admission of its validity by the administrator dispenses with any formal proof thereof. When he admitted the validity of the judgment, he admitted the correctness of the amount. There was nothing else to prove." To similar purport, *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211; *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243. In this case there was no dispute as to the amount which, if due at all, was a sum collected on a judgment in favor of Mrs. Forney, plaintiff's testatrix, by defendant's intestate, a lawyer, and left with him for investment, to wit, \$705, less \$150, which was thus invested by him for her. It is not sought in this action to fasten any liability upon the defendant individually.

No error.

(131 N. C. 432)

PETTEWAY v. McINTYRE et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

AGENCY—CONTRACTS CREATING—SUBMISSION TO JURY—HARMLESS ERROR.

1. A lumber company and B. entered into an agreement called a "lease," reciting that the company was the owner of a mill and timber rights and options, and that B. was desirous of manufacturing the timber and operating the mill, and also that B. had contracted with L. to operate the mill and manufacture the timber, and, with another party, to sell the manufactured lumber. The company leased the premises to B. for about three years at a yearly rental of \$1, and the net proceeds of the operations, which B. agreed to account for; and the company agreed to pay B. for his services \$1,500 a year, payable monthly, and a percentage of the net proceeds of the business at the close of each year. The company assigned the agreement to a creditor. The creditor and B. entered into a contract reciting the making of the foregoing agreement, and providing that the creditor would perform the conditions set forth in the company's lease to B., and that B. would perform the conditions therein required of him. It also provided that in case of B.'s death the agreement should not lapse, but should inure to the benefit of the person B. designated, and B. designated the creditor. *Held*, that B. was a mere agent, rendering the creditor liable for the expenses of the operation of the mill incurred pursuant to a contract made by B.

2. Where the agreements between an alleged principal and agent showed the existence of that relation as matter of law, the action of the court in submitting the question of agency to the jury was harmless where the jury found that the relation existed.

Appeal from superior court, Onslow county; Allen, Judge.

Action by Charles A. Petteway against Thomas A. McIntyre and another. From a judgment of the superior court affirming

a justice's judgment for plaintiff, defendants appeal. Affirmed.

Rountree & Carr, for appellants. Meares & Ruark, Duffy & Koonce, and W. D. McIver, for appellee.

MONTGOMERY, J. On the 29th day of October, 1897, the Parmele-Eccleston Lumber Company of New Jersey, a corporation, and Ernest V. Baltzer, of Wilmington, N. C., entered into a paper writing, which is called by the parties thereto a "lease." It consists of nine pages of closely printed matter. In it, it was recited, as a part of the preamble, that the company owned a valuable mill plant for the manufacture of lumber at Jacksonville, Onslow county, N. C., together with valuable standing timber, timber options, timber rights and privileges, and logs, in the counties of Onslow and Jones, N. C., and that Baltzer was desirous of cutting, logging, and hauling the timber, and of manufacturing the same and the logs, and for that purpose, by himself, and in conjunction with others, was ready to operate the mill and undertake the lumbering operations. In the paper writing it was also recited that Baltzer had entered into an agreement with Enoch Ludford to operate the same mill plant, and to cut, log, and haul the timber referred to, and to manufacture it into merchantable lumber, upon the terms and conditions in that contract with said Ludford fully set forth. A copy of that contract was annexed and made a part of the contract between the Parmele-Eccleston Company and Baltzer. It was also recited in the preamble that Baltzer had entered into an agreement with Horace M. Bickford, of Boston, for the sale of the lumber manufactured as aforesaid, upon commission, a copy of which contract was annexed, and also made a part of the contract between the company and Baltzer. It was also recited that, in order to carry out the provisions of all the instruments and agreements above referred to, it would be necessary to purchase rail for a log railroad road, and a locomotive and log cars, and to repair and place in proper condition, as in the contract with Ludford set forth, the mill and plant at Jacksonville. After those recitals in the premises, it was declared: "Now, therefore, in consideration of the premises, and for the recitals herein-after set forth, this indenture witnesseth that the said Parmele-Eccleston Lumber Company, has leased, and by these presents does grant, demise, and lease, unto Ernest V. Baltzer, all those certain premises situate, lying, and being at Jacksonville, Onslow county," etc. The property embraced in the contract the mill plant, all its fixtures and appurtenances, and all the standing timber in Onslow and Jones counties, and their timber rights. Baltzer was authorized, "upon payment of such stumpage or other charges as the said Parmele-Eccleston Lumber Co.

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 431A.

itself was under contract to make, and such charges and disbursements only, to cut and remove all standing timber and logs thereon, and to convert and manufacture the same into lumber, and, without any further costs than aforesaid to said Baltzer, to exercise all the privileges and authority which the company owned and had, or may hereafter acquire, to any railroad or railroads, and upon or over the rights of way now owned or controlled by the said company, appurtenant to, or used by or in connection with, the said mill at Jacksonville aforesaid, and also the privilege of cutting timber for railroad ties and construction, or for other railroad or mill or logging purposes, and of laying, using, operating, maintaining, taking up, and removing such rail and railroad from time to time, as its best interest may, in his judgment, require; and any railroad constructed by said Baltzer, and all materials entering therein, whether obtained from rights of way of said company, or from its lands, or elsewhere, shall be and remain the absolute property of said company, its legal representatives and assigns, and subject to its or their exclusive domination and control for all purposes to the same extent as though the same, and all parts thereof, were upon land, the property of it or them, in fee simple, which said assignment and transfer of timber rights and right to manufacture logs into lumber as aforesaid shall be, however, only for the term of the lease aforesaid, and to terminate with the expiration of said lease, and which indenture of lease and assignment as aforesaid is made for and in consideration of the yearly rent or sum of one dollar, payable annually on the 31st day of December in each and every year of said term. As an additional rent, the said Baltzer, for himself, his legal representatives and assigns, agrees that he will promptly, and not less often than once in each month, turn over and deliver to the said Parmele-Eccleston Lumber Company, or its assigns, the net proceeds and profits of the business to be conducted under the instruments described in the recitals hereto, copies of which are hereto annexed, and under this instrument, less only such sum or sums of money as shall be necessary to pay the premiums for fire and boiler insurance on said mill plant and its appurtenances, and stock on hand, and that he will not apply any portion of the same to any other use or purpose, except by and with the express consent of said company or its assigns. By the term 'net proceeds,' as used in this paragraph, is meant the gross amount of all moneys received from the manufacture and sale of lumber out of the timber hereinbefore referred to, less the following: (a) Amounts due Ludford under his contract, as therein set forth. (b) Amounts due Bickford under his contract, therein set forth. (c) Costs of inspections, clerk hire, stationery, postage, traveling, and the like, necessary to the due prose-

cution of the business and the preservation of its best interests. (d) Amount of stumpage necessarily paid by Baltzer, being at the same rate as now contracted for by the Parmele-Eccleston Lumber Co. The remainder of surplus of income, after deducting the foregoing, shall be the 'net proceeds,' as the term is used and understood in this instrument, and shall be paid over by said Baltzer to said company, or its assigns, as rental for said premises, except only as the same is ultimately subject to fire insurance premiums as aforesaid, and to Baltzer's contingent interest therein by way of additional compensation, as hereinafter appears." The additional compensation to Baltzer provided for in the contract is in these words: "The Parmele-Eccleston Lumber Co., for itself, its successors and assigns, agrees that, for his labor and services in fulfilling his obligations under the provisions of this lease, the said company will, during the term of this lease, except as herein provided, pay said Baltzer the yearly sum of \$1,500, in equal monthly installments, commencing with the day of the date hereof, and in addition to this amount, at the close of each year, will pay him the further sum equal to ten per cent. of the net proceeds and profits of the business to be conducted as aforesaid. The said company in like manner also agrees that it will cause to be given to said Ludford a sufficient bond, in the penal sum of five thousand dollars, conditioned for the faithful performance by said Baltzer of his said contract with said Ludford." Certain other provisions of the contract were that the company was to furnish the locomotive, log cars, and rails, and the necessary bolts and fastenings and switches, with which to build and equip the log railroad, and the sum of \$2,500 with which to put the mill in order. Baltzer, on his part, among other things, contracted to give his personal services to placing the mill in proper condition for operation, and to aid in securing rails for hauling timber as fast as the same might be needed, and the rolling stock necessary to haul the timber. And he further agreed "to cut, log, and haul the same, and to manufacture it into lumber, to his best interests, under the terms of this lease, and to dispose of the same at the best prices which he can obtain. Of the reasonableness, however, it is mutually agreed he is to be the sole judge." The time mentioned in the paper writing called the "lease," during which the term shall last, was from its date, 29th October, 1897, to December 31, 1900. At the expiration of which term, or earlier determination for any cause whatsoever, Baltzer or his legal representatives would quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted.

The contract between Baltzer and Ludford, made a part of the contract between the Parmele-Eccleston Company and Balt-

ter, stipulated that Baltzer would put in good condition the mill and all its appurtenances, and would turn over and lease for the space of three years after the execution of the contract (it having been entered into on the 19th October, 1897) all the mill property and appurtenances of the lumber company; and he also agreed to furnish to Ludford the locomotive and the log cars, and the necessary rails and spikes and bolts, sufficient to operate a log road or roads for the purpose of procuring timber for the mill under the contract, and to lease the property so purchased upon the terms set forth in the agreement, at a nominal rent. Ludford agreed to construct and operate, at his own expense, the logging roads; Baltzer furnishing the cross-ties, they to be gotten out by Ludford. It was further agreed that Baltzer was to furnish Ludford with all the standing timber, together with the rights of way, now owned by the Parmele-Eccleston Lumber Company in Onslow county, and such as should be sufficient to operate the plant during the term of the contract. Ludford agreed further to cut and transport from the forest to the mill all timber of merchantable quality on the property of the company which Baltzer was allowed to cut under his contract with the company, under the directions of Baltzer; and he further agreed to saw the logs, and kiln-dry, rip, dress, and assort the lumber in accordance with the orders of Baltzer, and to place the lumber manufactured by him under the contract in the rough and dressed lumber sheds, in proper order, as he might be directed to do by Baltzer; and he was to have the lumber put upon the cars, or place it in bins furnished by Baltzer for that purpose, according to the order of Baltzer. For his compensation, Ludford was to receive \$6 per thousand feet for board measure for kiln-dry lumber, dressed according to the order of Baltzer, and loaded on the railroad cars at the mill, and \$4.50 per thousand feet for rough, kiln-dried, well-manufactured lumber, according to the orders of Baltzer.

On the same day that the contract between the Parmele-Eccleston Lumber Company and Baltzer was executed, the company and the defendant McIntyre entered into the following contract (Exhibit D): "Whereas, the Parmele-Eccleston Lumber Company has this day entered into an agreement, of which the foregoing is a copy and duplicate; and whereas, the said company is not at present in funds to meet its obligations thereunder, and at the same time is anxious to obtain the benefits to be derived therefrom to its mill plant and machinery, and in this way to realize upon its timber rights referred to in the foregoing agreement; and whereas, the said company is already heavily indebted to Thomas A. McIntyre, of the city, county, and state of New York, for past advances: Now, therefore, this inden-

ture witnesseth that the said Parmele-Eccleston Lumber Co., for and in consideration of the premises, and of the sum of one dollar, lawful money of the United States, to it in hand paid by the said Thomas A. McIntyre at or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over, unto the said Thomas A. McIntyre, his executors, administrators, and assigns, the said indenture of lease, together with all the rights, privileges, rents, moneys, and emoluments, of whatsoever kind, nature, or extent, accruing from said lease to the said Parmele-Eccleston Lumber Company, and all the estate, right, title, interest, term of years yet to come, and property, claim and demand whatsoever, of the said Parmele-Eccleston Lumber Company in and to the said lease. To have and to hold the same to him, the said Thomas A. McIntyre, his heirs and assigns, as fully and in as ample a manner as the said Parmele-Eccleston Lumber Company, its successors and assigns, might hold and enjoy the same, and not otherwise. And the said the Parmele-Eccleston Lumber Company, for itself, its successors and assigns, hereby authorizes and empowers the said Thomas A. McIntyre, his heirs, executors, administrators, and assigns, to take and apply to his own or their own use the sum or sums provided therein as rental, and whatever property and moneys accrue to or from said company or its assigns under the terms of said lease, whenever the same shall be due or receivable, and to take and pursue all steps and means for the recovery of said rent or other property, as by law are provided, as fully to all intents and purposes as the said the Parmele-Eccleston Lumber Company, its successors or assigns, might or could do in the premises. And it is mutually agreed between the parties hereto that the steel rails, locomotive, rolling stock, and other appurtenances in said lease agreed to be furnished by the party of the first part thereto shall be and remain the property of the said Thomas A. McIntyre, until said Thomas A. McIntyre is fully repaid, by the receipt of the proceeds of the said agreement or otherwise, the amount of money advanced heretofore, or in consequence of this agreement, to, for, or on account of said company's interest. And the said Thomas A. McIntyre hereby covenants and agrees to and with the said Parmele-Eccleston Lumber Company to do and perform all the terms and conditions of the said foregoing lease agreement upon the part of the said Parmele-Eccleston Lumber Company contracted to be done and performed."

And on the said 29th day of October, 1897, McIntyre and Baltzer entered into the following agreement (Exhibit E): "Agreement made and entered into this 29th day of Oc-

tober, 1897, by and between Thomas A. McIntyre, of the city, county, and state of New York, and Ernest V. Baltzer, of Wilmington, North Carolina. Whereas, the said Baltzer, by a certain instrument in writing, bearing even date herewith, has entered into an agreement of lease with the Parmele-Eccleston Lumber Company, a corporation duly existing under and by virtue of the laws of the state of New Jersey, doing business at Jacksonville, North Carolina, a copy of which contract is hereto annexed and made a part thereof; and whereas, said Baltzer, by virtue of the power conferred upon him under said agreement of lease, has entered into an agreement with one Enoch Ludford to operate the mill plant of the said the Parmele-Eccleston Lumber Company at Jacksonville, North Carolina, aforesaid (except gang and circular saws), and to cut, log, and haul the timber referred to in the said agreement of lease, and to manufacture said timber into merchantable lumber, upon the terms and conditions in said contract with said Ludford fully set forth, a copy of which contract is, also hereto annexed, and made a part hereof; and whereas, said Baltzer, by virtue of the power also conferred upon him under his agreement of lease with said the Parmele-Eccleston Lumber Company aforesaid, has entered into an agreement with one Horace M. Bickford for the sale of the lumber manufactured as aforesaid, upon commission, a copy of which contract is also hereto annexed and made a part hereof; and whereas, the said the Parmele-Eccleston Lumber Company has assigned to Thomas A. McIntyre the said agreement of lease, and all the profits arising thereunder, and the said Thomas A. McIntyre has assumed all the obligations in said agreement of lease specified to be performed by the said company: "Now, therefore, in consideration of the premises, and of the terms and provisions of this instrument as hereinafter set forth, and of the sum of one dollar by each of the parties in hand duly paid, the parties hereto mutually covenant and agree as follows: (1) That said Thomas A. McIntyre will do and perform all the terms and conditions as said indenture of lease specified to be done and performed by the Parmele-Eccleston Lumber Company. (2) That the said Ernest V. Baltzer will do and perform all the terms and conditions, labor, and services in said lease specified to be done and performed by him. (3) That the said McIntyre will hold the said Baltzer harmless against and from any and all lawful claims or damages which he may suffer as contractor with said Ludford and Bickford and the Parmele-Eccleston Lumber Company, or either of them, or which he may suffer by the termination of either or both the Ludford and Bickford contracts, as in said indenture of lease specified, but this guaranty shall not be construed to cover the result of any default or neglect on the part of the said Baltzer. And whereas, it is declared in and

by the agreement of lease referred to in the first recital hereof that, in case of the death or failure from any cause on the part of Baltzer, the said agreement of lease should not thereby lapse or determine, but that it should immediately inure to the benefit of such person and his assigns as said Baltzer may designate in writing: Now, therefore, I, the said Ernest V. Baltzer, in the event aforesaid, do hereby designate Thomas A. McIntyre and his assigns as the person to whom shall inure the rights, privileges, powers, property, and rights of property, of every name, nature, and kind, with all the responsibilities and subject to all the terms and conditions of said instruments as therein respectively set forth and expressed. Except as otherwise provided herein specifically, the terms and provisions of this agreement shall bind and inure to the heirs, executors, administrators, and assigns of the parties hereto. In case any further or other instruments should be found requisite for the more completely carrying into effect any of the provisions of this agreement, then the parties hereto will execute the same upon demand."

The plaintiff brought this action in a justice's court to recover from the defendant McIntyre an amount alleged to be due on a contract with Baltzer in his operation of the mill plant; alleging that Baltzer was either the agent of McIntyre, or a partner with him in the business. The defendant denied that he was either the principal of Baltzer, or a partner with him in the milling business. From the justice's judgment in favor of the plaintiff, the defendant appealed to the superior court. There was a judgment in that court for the plaintiff.

If those portions of the contract which we have recited and referred to, and which relate to the acts to be done by the several parties thereto, constituted the whole of those contracts, we would even then not be sure that there was not some evidence going to show a partnership between McIntyre and Baltzer. There are other parts of those contracts, though, limiting and narrowing the duties, rights, and privileges of Baltzer, which we will presently notice and discuss, and which, when read with the whole of all of the contracts, satisfy us, as a matter of law, that Baltzer was the agent of McIntyre for the purpose of conducting the business mentioned in the contracts. Notwithstanding the agreement between the lumber company and Baltzer was called a "lease," yet through it all can be seen with perfect distinctness the guiding and controlling hand of the company in the management of the business. No experienced business man, upon reading the four contracts mentioned above, could fail to see that Baltzer was so hampered and embarrassed by the limitations and restrictions of the contract as to be left little of independence of judgment or of action. It seems clear that the purpose of the draftsman of the agree-

ments was to enable the company and McIntyre to conduct the hazardous enterprise of sawmilling through an agent under the forms of a lease of the property to Baltzer. Baltzer was not allowed to keep in his own possession the original of the agreement with the company, the original of the agreement with Bickford, the original of the agreement with Ludford, or the original of the agreement with McIntyre. He was to assign and deposit them with the company, and he was required, further, to assign and deposit with the company all bonds and undertakings which might be delivered to him for the faithful performance of the contracts. Baltzer further covenanted with the company not to dispose of any right he had under the contracts to any one without the company's permission, the covenant being in the following language: "Baltzer covenants and agrees not to assign or otherwise dispose of any of the contracts, nor this lease, nor any of his rights under them or either of them, nor of this instrument, nor of any of his rights hereunder, to any person, firm, or corporation whomsoever, excepting by and with the consent in writing of said company or its assigns, and excepting as provided in the terms of the contracts, copies of which are annexed." He also agreed that in case of his death the lease should not go to his personal representatives. The following is a provision in the contract in reference to that matter: "In case of the death of said Baltzer, this lease shall not thereby lapse or become determined, but the same shall immediately inure to the benefit of such person or his assigns as said Baltzer may have designated in writing." And he further agreed to assign, and did assign, to the company, the right to annul the contract whenever the company saw fit to do so. The language used on that point is as follows: "Baltzer further agrees to, and does hereby, assign, transfer, and set over unto said company, or its assigns, his (said Baltzer's) right to terminate said Ludford and Bickford contracts, or either of them, or their substitutes, as conferred upon him by the terms of said contracts, respectively, and upon the conditions therein expressed; said company hereby agreeing, should it avail itself of such privilege, to pay said Baltzer at the agreed rate of \$1,500 per annum for the remainder of the year after such termination, and also his additional compensation, as hereinbefore set forth, down to the time of such termination." He had reserved the right in his contract with Ludford to end the contract with him upon three months' notice. Baltzer's contract with Ludford, notwithstanding it purported to be a lease of the whole plant, yet when carefully examined, Ludford had very little power and no discretion. He had to cut the lumber under Baltzer's direction, to saw it under his direction, to pile and load it under his direction, and was compelled to abandon his contract whenever

Baltzer demanded it. Indeed, only two rooms of the office building of the plant were to be given to Ludford, and in that contract there was reserved, for the use of the lumber company, access to the office building at all times. The language of the contract on that point was as follows: "The party of the first part reserves to itself an easement for access, for its officers or agents, to and from all parts and portions of the above-described property at all times." It is evident from that language that, in the draftsman's mind, the company was to be the directing power in the management of the business. The presence of its officers and agents at all times upon premises which had been leased and put in the possession of the lessee is incompatible with the idea of a bona fide lease. The defendant McIntyre received, as we have seen, an assignment of this contract between the lumber company and Baltzer, and is affected in law by the several contracts mentioned, just as the lumber company was. In the contract between McIntyre and Baltzer, made after the assignment by the lumber company of its interest of what is called the "lease" to McIntyre, Baltzer covenants with McIntyre, amongst other things, as follows: "And whereas, it is declared in and by the agreement of lease referred to in the first recital hereof that, in case of the death or failure from any cause on the part of Baltzer, the said agreement of lease should not thereby lapse or determine, but that it should immediately inure to the benefit of such person and his assigns as said Baltzer may designate in writing: Now, therefore, I, the said Ernest V. Baltzer, in the event aforesaid, do hereby designate Thomas A. McIntyre and his assigns as the person to whom shall inure the rights, privileges, powers, property, and rights of property, of every name, nature, and kind, with all the responsibilities and subject to all the terms and conditions of said instruments as therein respectively set forth and expressed." McIntyre, under that agreement, got the benefit of the covenant which Baltzer had made with the lumber company,—that in case of his death the lease should not lapse, but should immediately inure to the benefit of such person, or his assigns, as Baltzer might designate in writing. McIntyre then had a right to put an end to the contract which was called a "lease," and he had also been substituted for Baltzer in case of Baltzer's death.

In the brief of the defendant McIntyre it was argued that, if Baltzer was an agent, he was a special agent. But it appears from the contract that he was authorized to operate the sawmill plant, and it is stated in the case on appeal that the plaintiff's debt was contracted by Baltzer in his operation of the mill plant.

His honor submitted one issue to the jury, to wit, "Are the defendants indebted to the plaintiff, and, if so, in what amount?" and

instructed the jury thereon as follows: "(8) If you shall find that said business was in fact the business of McIntyre, and that McIntyre had employed Baltzer to conduct the same in his own name, and that the work done was within the authority given the said Baltzer by McIntyre, then both Baltzer and McIntyre would be liable; and, if so, answer 'Yes'; otherwise 'No.'" The jury answered in the affirmative, and for the sum of \$95.92. As we have said, the contracts in this case, upon their face, constituted, as a matter of law, Baltzer the agent of the lumber company, and then of McIntyre by assignment of the lumber company. His honor ought not to have submitted an issue as to the agency to the jury, but as he did so, and the jury made response as the law of the case was, no harm has been done.

No error.

(131 N. C. 399)

BEACH v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 2, 1902.)

REMOVAL OF CAUSES—FOREIGN CORPORATION—DOMESTICATION—PETITION IN FEDERAL COURT—SUFFICIENCY.

1. In a petition filed in a United States circuit court for the removal of a cause from a state court on the ground of local prejudice, the defendant corporation alleged that it "is, and was at the commencement of this suit, a nonresident of the state of North Carolina, * * * and is not a citizen of North Carolina." On the facts admitted, the supreme court of the state had previously held that the defendant was a domestic corporation. *Held* that, in view of these previous decisions, the allegation in the petition would be construed as merely a denial of the propriety of the supreme court's former ruling, and not as an allegation of fact.

2. A foreign corporation, which has filed its charter and acceptance in the secretary of state's office, and has thereby become domesticated, as provided by Laws 1899, c. 62, is not entitled to remove an action against it to the federal courts on the ground of local prejudice.

Appeal from superior court, Burke county; Hoke, Judge.

Action by Mary L. Beach, as administratrix, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Chas. Price, Geo. F. Bason, and S. J. Ervin, for appellant. J. F. Spainhour and M. Silver, for appellee.

CLARK, J. When this case was called for trial, the defendant, the Southern Railway Company, moved for an order to proceed no further with the cause for the reason that it had been removed to the circuit court of the United States on the ground of local prejudice, presenting copies of the petition, affidavit, bond, and order of removal from said circuit court. The presiding judge, being of the opinion that the defendant, originally a foreign corporation, but since "domesticated" in this state under Laws 1899, c.

62, could not remove an action to the federal court on account of local prejudice (*Allison v. Railway Co.*, 129 N. C. 336, 40 S. E. 91), refused to stay action, and proceeded with the trial. The defendant excepted.

In such case it is optional with the state court to proceed with the trial. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, cited *Crehore v. Railway Co.*, 131 U. S. 243, 9 Sup. Ct. 692, 33 L. Ed. 144; *Howard v. Railway Co.*, 122 N. C. 953-954, 29 S. E. 778. A case on "all fours" is *Lawson v. Railroad Co.*, 112 N. C. 390, 17 S. E. 169; also *Bierbower v. Miller*, 30 Neb. 161, 46 N. W. 431, 9 L. R. A. 228. The trial having proceeded to verdict and judgment, which went against the defendant, it appealed to this court, assigning four grounds of exception, but the other three are without merit, and were abandoned in this court. A foreign corporation, which has voluntarily accepted the terms prescribed by the statute of this state under which it may do business here, and has "domesticated" as provided in said statute, has become a domestic corporation, as therein provided, and cannot remove an action against it to the federal court. This has been fully considered, after elaborate argument by counsel for this defendant, and was so held, in *Allison v. Railway Co.*, 129 N. C. 336, 40 S. E. 91, and also in *Debnam v. Telegraph Co.*, 126 N. C. 831, 36 S. E. 269 (in which case the statute is copied), and *Layden v. Endowment Bank*, 128 N. C. 547, 39 S. E. 47; the reasoning of which cases we adopt and make a part of this opinion. We do not understand the defendant's counsel to deny that, as a matter of fact, the defendant, the Southern Railway Company, has "domesticated" by filing its charter and acceptance in the office of the secretary of state, as required by Laws 1899, c. 62, admission of which fact has been made in this court (*Harden v. Railroad Co.*, 129 N. C. 359, 40 S. E. 184, 55 L. R. A. 784) in so many cases, and as a matter as universally known as that it is a corporation. Indeed, in this present case the defendant's counsel submitted that "this case should take the course pursued in *Allison v. Railway Co.*, 129 N. C. 336, 40 S. E. 91," in which the legal effect of such domestication was presented and decided; and we are fixed with judicial notice that the effect of "domestication" by this defendant was proved or admitted, and its legal effect decided, in that case. *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. The decision in *Allison's Case* that this defendant, the Southern Railway Company, is a domestic corporation, is res judicata of which the court below had judicial notice. The answer alleges that the defendant was "a corporation duly created and organized under the laws of the state of Virginia, and is, and was at the time mentioned, a citizen of the said state of Virginia," but without averring affirmatively that it was "not a corporation or citizen of

this state," and such allegation has been held insufficient in *Thompson v. Railway Co.*, 130 N. C. 140, 41 S. E. 9, and *Springs v. Railway Co.*, 130 N. C. 192-196, 41 S. E. 100, whose reasoning we adopt as a part of this decision. It is true that in the petition in the United States circuit court, a copy of which is filed in this case, it is averred that the defendant "is, and was at the commencement of this suit, a nonresident of the state of North Carolina, * * * and is not a citizen of North Carolina." This court having decided otherwise, on the facts admitted by this defendant, in former cases, we do not understand that this is a denial of the fact, so often admitted by the defendant's counsel in this court, and so well known as to be common knowledge, that the defendant has "domesticated" in the manner required by chapter 62, Laws 1899. We understand this to be merely a denial that the legal effect of such "domestication" has been to make the defendant a corporation of this state, a resident or citizen thereof, and that it is neither more nor less than an affidavit by this defendant that the decision of this court on that point is not law, and that the object of this appeal is to have the repeated rulings of this court that "domestication" has that effect reviewed on writ of error. If such averment in the petition of a legal conclusion is decisive, then the counsel, and not the court, would determine the right to remove. *Tucker v. Association*, 112 N. C. 796, 17 S. E. 532; *Ex parte Pennsylvania Co.*, 187 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738.

On careful reconsideration of those opinions, some of which are above cited, we are constrained to reaffirm them, and to hold that the defendant, having complied with the terms required before it was allowed to do business here, and having become "domesticated" in the manner enacted by the statutes of this state, has become a corporation resident here, and that in holding that this cause could not be removed to the United States circuit court on the allegation of local prejudice the court below committed no error.

(131 N. C. 359)

TOWN OF GASTONIA et al. v. McENTEE-PETERSON ENGINEERING CO. et al.

(Supreme Court of North Carolina. Nov. 25, 1902.)

CONTRACTS—BONDS—GARNISHMENT—LIEN—RIGHTS OF SURETY.

1. Where, by a contract between a town and a contractor, the contractor was not entitled to a fund applicable to the contract in the hands of the town until after he had completed the contract, and furnished releases of all claims for material used, etc., creditors of the contractor acquired no lien on the fund prior to the completion of the contract and the furnishing of such releases by garnishment against the town.

2. Where a contractor had given bond for the completion of its contract with a town, and the surety had agreed to indemnify the town against the demands of the contractor, the contractor's servants, materialmen, etc., the surety was entitled to have money in the hands of the town, applicable to the contract, applied in payment of claims for material, etc., within the obligation of the bond, as against other creditors of the contractor.

Appeal from superior court, Gaston county; Starbuck, Judge.

Action by the town of Gastonia and others against the McEntee-Peterson Engineering Company and others. From a judgment in favor of plaintiffs, defendants Post-Glover Electric Company and another, impleaded, appeal. Affirmed.

This was a civil action tried at the spring term, 1902, of Gaston superior court by Starbuck, Judge. A jury trial having been waived, the court found the facts as set out in the record, to which findings there was no exception, except to finding No. 12. The action was originally brought by the town of Gastonia to recover upon a bond in the penal sum of \$3,000 executed by the McEntee-Peterson Engineering Company, as principal, and the American Surety Company, as surety, to the town of Gastonia, and its mayor and board of aldermen, to indemnify and save harmless the obligees against loss or damage on account of the construction of an electric lighting plant and waterworks pumping station by the engineering company, and to secure the payment for all materials furnished and used and labor performed in the construction of said public works. The engineering company, before entering upon said work, executed a written contract with the town by which it stipulated to construct said works for \$7,270 in accordance with the terms of said contract, and contemporaneous with and as a part thereof executed said bond as principal, with the surety company as surety, for the purposes above stated. The work was completed according to contract and accepted by the town on October 20, 1900, at which time there remained in the hands of the officers of the town a balance of \$1,560.86 of the price agreed to be paid for said work, and the engineering company owed to the plaintiffs (other than the town and its officers) \$3,907.64 for materials furnished to and used by the engineering company in constructing said work, no part of which has ever been paid. On October 18, 1900, the Post-Glover Electric Company instituted a civil action in the superior court of said county against the engineering company to recover the sum of \$302.88 (an indebtedness not contracted for materials or labor used in or about said works), and caused a warrant of attachment to be issued therein, by virtue of which the sheriff of said county on October 19th levied upon said waterworks pumping station and electric lighting plant, as the property of said engineering company, and also served notice of

¶ 1. See Garnishment, vol. 24 Cent. Dig. § 82.

garnishment upon the town and its officers of any funds in the hands of either, belonging to or due the engineering company; and on the 20th of said month the Illinois Insulated Wire Company also instituted a civil action against the engineering company to recover the sum of \$999.18 for materials furnished to and used by the engineering company in constructing said works, and likewise attached and garnished the same property and funds levied upon in the Post-Glover case. The town and its officers filed answers to the notices of garnishment in both cases, in which they denied that they owed any debt or held any funds belonging to the engineering company subject to garnishment, having been compelled for that purpose to employ counsel to advise and represent them in said matters, at the cost of \$300. Subsequently, on February 8, 1901, the town of Gastonia, alone, instituted this action against the defendants for the purpose of adjudicating the rights and interests of the several parties claiming the balance of the funds in its hands, as a part of the contract price for said work, and also to recover the penalty of said bond, to be discharged by the payment of \$300, paid out by it in defending said garnishment proceedings, and the further sum of \$3,907.64, the balance due for materials furnished as aforesaid, less the sum of \$1,560.86, the balance of the original contract price for said work, remaining in the hands of its officers. At June term, 1901, of said court, upon affidavit and petition, the court permitted all the plaintiffs, other than the town of Gastonia, to become parties plaintiff in this action. At the February term, 1902, this action and the cases of the Post-Glover Electric Company and the Illinois Insulated Wire Company against the McEntee-Peterson Engineering Company were by consent, and without prejudice, consolidated. Upon the facts found, the court gave judgment for the plaintiffs for the full penalty of the bond, to be discharged upon the payment of the "balance found to be due upon the said sum of \$3,907.64 for materials furnished by the several plaintiffs above named, with six per cent. interest from the 23d of October, 1900, until paid, after applying thereto the sum of \$1,410.86, the balance remaining in the hands of the officers of said town of the contract price of said work, after deducting the sum of \$150 paid out by it for legal services rendered as aforesaid." The court also adjudged that neither the Post-Glover Electric Company nor the Illinois Insulated Wire Company acquired any lien "upon the tangible property levied upon by virtue of the warrants of attachment issued in said action, or upon the alleged indebtedness of \$1,850.86 of the plaintiff municipal corporation to the McEntee-Peterson Engineering Company, by virtue of the notice of garnishment served upon the officers of said town by the sheriff in said action." From this judgment the Post-Glover Electric

Company and the Illinois Insulated Wire Company appealed.

R. L. Durham, for appellants. Burwell, Walker & Canaler, for appellees.

CLARK, J. (after stating the case as above). The exceptions to the judgment of the court, holding that the attachment levied upon the waterworks pumping station, and electric lighting plant created no liens on the property, cannot be sustained. *Snow v. Commissioners*, 112 N. C. 335, 17 S. E. 176; *Vaughn v. Commissioners*, 118 N. C. 636, 24 S. E. 425. It is true that, in the case of an ordinary debt owing by a town to a third person, the debt may be garnished. 1 Dill. Mun. Corp. (4th Ed.) § 101. But here the engineering company itself could not have recovered the fund until it had complied with its contract with the town, by furnishing it with releases of all claims for material used in constructing the work, and the garnishers can have no greater claim against the town than the garnishees through whom it is sought to make the collection. And further, as this money was not due the engineering company at the date of the garnishment (the work not having been completed and accepted), and as the engineering company never did become entitled to demand the payment of said money, for the reasons above stated, the several creditors who gave the town notice of their claims for material furnished the engineering company thereby acquired a claim upon said funds, at least superior to any rights the garnishers acquired. Besides, the American Surety Company, having become surety to the engineering company for the faithful performance of said contract, upon any default of its principal, by which it became liable on said bond, if it did not become subrogated to the rights of its principal in this fund, it is at least entitled to have it applied to the payment of these claims for materials, in exoneration of its liability therefor. *Patton v. Carr*, 117 N. C. 176, 23 S. E. 182.

No error.

(121 N. C. 363)

TOWN OF GASTONIA et al. v. McENTEE-PETERSON ENGINEERING CO. et al.
(Supreme Court of North Carolina. Nov. 25, 1902.)

CONSTRUCTION CONTRACTS—BONDS—BENEFICIARIES—SCOPE—ACTIONS—PARTIES.

1. A contract required the contractor to furnish all materials, labor, etc., and give a bond for faithful performance, and to pay for all materials used, and wages of laborers employed. The bond given bound the surety that the contractor should in all things comply with the contract. *Held*, that laborers and materialmen employed by the contractor were beneficiaries of the bond, and were proper parties to a suit to enforce it.

2. A provision in a contractor's bond binding him to indemnify a town from all suits against it for or on account of any injuries or damages

sustained by any person, structure, or property, by or from the contractor, or in consequence of any act or omission of himself or his servants or agents, did not cover a liability of the town for counsel fees incurred in defending a garnishment proceeding brought against it by a creditor of the contractor.

Appeal from superior court, Gaston county; Starbuck, Judge.

Action by the town of Gastonia against the McEntee-Peterson Engineering Company and others. From a judgment in favor of plaintiff, the American Surety Company appeals. Affirmed.

The statement of case in the appeal of the Post-Glover Electric Company and the Illinois Insulated Wire Company in this case (42 S. E. 857) is a sufficient statement in this appeal.

Julius C. Martin, for appellant. Burwell, Walker & Cansler, for appellees.

CLARK, J. The defendant engineering company entered into a contract with the town of Gastonia to construct a waterworks and sewerage system and an electric lighting system in and for said town of Gastonia, and, with its codefendant the American Surety Company of New York, entered into a bond to pay all claims for materials used and work and labor done in the construction of said systems; and there is a balance due on said contract by the town of Gastonia, which is claimed by the said engineering company and also by persons who furnished material and performed work and labor in the construction of the said systems under the contract between the town and the engineering company, the said balance being \$1,560.86; and the other plaintiffs seek by this action to charge the other defendant, the American Surety Company, upon its indemnity bond for \$3,000, given as aforesaid, for the amounts alleged to be due them for work and labor performed and materials furnished in the construction of said systems, and, to the end that the amounts due for materials and labor may be determined, all persons holding such claims were properly made coplaintiffs.

The contract between the town of Gastonia and the engineering company contains the following: Section A of the contract provides that the contractor is required to furnish all materials and labor required in the construction of the public works embraced in said contract. Section 5 provides that "the contractor further agrees that he will, and concurrent with this contract, does, execute a bond in the penal sum of \$3,000, in such form and with such sureties as may be approved by the mayor and aldermen of the town of Gastonia, conditioned to indemnify and save harmless said town and board from all suits * * * brought against said town or said board or both * * * for or on account of any injuries or damages sustained or received by any person, structure, or property by or from said contractor, * * * or by or in consequence of any act or omission of said

contractor, his servants or agents, and the faithful performance of this contract, and for the payment of all material used, and wages of all laborers employed by said contractor." Section 10 provides that the said contractor "hereby further agrees that it shall not be entitled to demand or receive payment except in the manner set forth in this agreement, and further agrees that it will produce full releases of all claims from all persons who have furnished machinery or labor for the work, whenever the board may require it." The bond executed by the surety company provides that "if the above-bonded, the McEntee-Peterson Engineering Company, its heirs, executors, administrators, successors, or assigns, shall in all things stand to and abide by, and well and truly keep and perform, the terms, covenants, conditions, and agreements in such contract contained, on its part to be kept and performed, and each of them, at any time, and in the manner and form therein specified, then said obligation shall be null and void."

Though no mechanic's lien could be filed against the property in the hands of the town, it was competent for the parties to contract, and they did contract, that the engineering company should pay for "all materials used, and wages of all laborers employed by said contractor," and the surety company became responsible for the execution of that stipulation. The engineering company has defaulted in this respect to an amount greater than the penalty of the bond executed against the American Surety Company, to wit, in the sum of \$3,907.64, for material furnished by several parties who have been made coplaintiffs in this action for the purpose of ascertaining and determining the amount of the indebtedness severally due them. The town desired to know whether it should pay said balance to the engineering company, or, in view of the fact that it had stipulated with said company, and required surety, that the company should pay off all claims for labor and materials before calling on the town for settlement, whether it was not its duty to require compliance with this requirement in favor of the claimants for labor and material. Those claimants, being the beneficiaries of the contract, could have brought their separate actions on said contract against the engineering company and its surety; and it was eminently proper, and saves multiplicity of suits, the time of the court, and unnecessary court costs, that they should be coplaintiffs in this action, to the end that the entire matter should be settled and determined in one action. In *Gorrell v. Water Supply Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, it was held, after careful consideration and full discussion, that the beneficiary of a contract, though not a party or privy thereto, can maintain an action thereon. In that case the beneficiaries, the citizens of the town, were ascertained by reference to the nature of the contract, but in this case

the contract is more specific, and points out those who shall furnish labor or material as specially designated to be protected. The contract requires surety for such stipulation, and provides that the town cannot be called upon for settlement by the engineering company until receipts for such claims are furnished by the company. It was a wise, thoughtful, and considerate provision, inserted by the town, requiring the engineering company, a nonresident corporation, to pay the labor and material men, who are usually residents of the town or vicinity, before it could claim any balance due on the work. This is just to such parties, whose amounts claimed for labor and material are usually small, and who should not be forced to attachment or other legal proceedings, when the town, whose funds are raised by taxation, can protect its own people by such a stipulation as this, requiring payment of these just claims before receiving the town funds to be carried off where they cannot be reached. It would be well if every municipality which has public works executed should insert a similar provision in its contract for the protection of labor and material men, who are usually its own citizens. Indeed, in this contract it is further provided that all labor employed shall be "home labor," except as to such skilled labor as could not be found there; thus showing throughout that the labor and material men are beneficiaries, in contemplation of the contracting parties.

The proposition laid down, with citation of authority, in *Gorrell v. Water Supply Co.*, supra, had been intimated, without actual decision, in *Hann v. Burrell*, 119 N. C. 548, 28 S. E. 111, and *Sams v. Price*, 119 N. C. 578, 28 S. E. 170. It has since been expressly held in *Shoaf v. Insurance Co.*, 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804, which holds that a policy holder in an insurance company can maintain an action for a loss on property covered by his policy against another company, in which the first company reinsured its risks. In that case it was expressly stipulated that the contract was only effective between the two companies, and that no holder of a policy in the first company should be entitled to enforce the reinsurance against the reinsuring company. But this court held that, notwithstanding that stipulation, the policy holder was entitled to recover against the second company. In the present case the contract expressly stipulates who the beneficiaries are,—the labor and material men. It is provided, as one of the considerations of the contract, that they shall be paid, and their receipts delivered to the town, the other contracting party; and the surety company stipulates for the performance of that condition. The contract requires this and some other matters absolutely, and the provision to save harmless the town is merely thrown in at the end as a careful saving clause, to cover anything that may have been omitted, not to restrict or repeal any stipulations expressly made. *Gorrell v. Water Supply Co.*, supra, has been cited as authority in

Lacy v. Webb, 130 N. C. 548, 41 S. E. 549. It is amply sustained elsewhere. *Gorrell v. Water Supply Co.* (N. C.) 70 Am. St. Rep., at page 605 (s. c. 32 S. E. 720, 46 L. R. A. 513); 7 Am. & Eng. Enc. Law (2d Ed.) 104-110. Though there is some conflict of authority elsewhere, there is none in our decisions. This is necessarily the true doctrine wherever the statute, as in this state, requires the real party in interest to bring suit, and is the rule in equity, also. 7 Am. & Eng. Enc. Law (2d Ed.) 110, notes 1, 3. In *Lyman v. City of Lincoln*, 38 Neb. 794, 57 N. W. 531, the court expressly held, citing authorities, in a case on all fours with the case at bar, that "the promise they [the contractor and surety] made to the city of Lincoln was for the benefit of all persons who furnished labor and materials used under said contract, and such persons could sue on said bond, and that an express statute was not necessary to give the city authority to require such a bond of the contractor, and that awarding the contract was sufficient consideration to support such promise, both by the contractor and his surety." This case has been repeatedly affirmed by the same court,—notably in *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Morton v. Harvey*, 57 Neb. 304, 77 N. W. 808. The same principle has been enforced by the supreme court of Missouri in *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *School District v. Livers*, 147 Mo. 580, 49 S. W. 507; *City of St. Louis v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695, which says the town owes this duty to laborers to protect them. To like effect have been the decisions in the appellate court of Indiana (*Williams v. Markland*, 15 Ind. App. 660, 44 N. E. 562; *Young v. Young*, 21 Ind. App. 509, 52 N. E. 776; *King v. Downey*, 24 Ind. App. 262, 56 N. E. 689); in Iowa (*Baker v. Bryan*, 64 Iowa, 561, 21 N. W. 83); and in California (*Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41). A leading case upon this subject is *City of Philadelphia v. Stewart*, 195 Pa. 309, 45 Atl. 1056, which is reaffirmed in cases between the same parties (198 Pa. 422, 48 Atl. 275, and 201 Pa. 526, 51 Atl. 349). The additional reason is given in these last cases that the subcontractors for labor and material not being able to file any lien against a city, and having no security beyond the doubtful solvency of the contractor, it is public policy that the city should, as in our case, stipulate for payment of the labor and material men, to prevent the work being "scamped," or done by unworthy or unfit men. All of the above hold that such beneficiaries can maintain an action on the contract.

The former decisions of this court (*Morehead v. Wriston*, 73 N. C. 398; *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550; and *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362) have not been overruled, and are readily distinguishable, in that there was no indication in the facts of those cases that the third party had a right to any benefit under the contract. As to them, the contract was res

inter alios acta. In *Gorrell v. Water Supply Co.*, supra, from the nature of the contract,—public waterworks, paid for by public money,—it was apparent that the property of the citizens was to be protected. From the nature of the transaction in *Lacy v. Webb and Shoaf v. Insurance Co.*, supra, it was apparent that those not parties to the contract were beneficiaries, though in the latter case there was a stipulation which attempted to bar the policy holder from bringing an action. In the present case, as we have said, the third party, the material and labor men, are especially referred to in the contract as beneficiaries thereof, and for their protection surety is required, and their payment by the engineering company is made a condition precedent before said company can call upon the town for payment.

His honor properly gave judgment in favor of the material and labor men, plaintiffs herein, against the defendants, the engineering company and its surety, for the undisputed amount of their claims, after first applying thereto the balance due said engineering company by the town. The judgment should be reformed, however, by striking out the credit of \$150 allowed the town for counsel fees expended in defending actions brought by the Post Glover Electric Company and the Illinois Insulated Wire Company to subject by garnishment the aforesaid balance of \$1,560.86 to payment of indebtedness due them by the engineering company. It was simply the misfortune of the town that said actions were brought, and there is no stipulation in the contract of the engineering company or of the American Surety Company covering responsibility for counsel fees in defending an action of that nature.

As thus modified, the judgment of the court below is affirmed.

[131 N. C. 402]

PHILLIPS v. WISEMAN et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

ADULTERY OF WIFE—FORFEITURE OF DOWER.

1. A wife who commits adultery, and is not living with her husband at the time of his death, is deprived of her dower rights by the express provisions of Code, § 2102, though the husband first abandoned her, and commenced to live with another woman; and such section is not affected by Acts 1893, c. 153, declaring the rights of both husband and wife, and defining what shall bar a wife of her right to dower.

Appeal from superior court, Mitchell county; Hoke, Judge.

Proceedings by M. A. Phillips against Blake Wiseman and Sarah A. Phillips and others to recover her dower in the lands of M. P. Phillips, deceased, as his widow.

From a judgment for plaintiff, defendant Sarah A. Phillips appeals. Reversed.

S. J. Ervin, for appellant. A. C. Avery, for appellees.

COOK, J. Some years after the marriage of plaintiff with M. P. Phillips he (M. P. Phillips) abandoned her, and took up with the defendant Sarah A. Phillips, alias McKinney, and continuously lived in adultery with her until his death. By his last will and testament he devised the land described in the petition to said Sarah, and his widow, the plaintiff, dissented therefrom, and instituted this special proceeding to recover her dower therein. The verdict of the jury establishes the fact to be that, after her husband had abandoned and separated himself from her, and while he was living in adultery with said Sarah, the plaintiff committed adultery. Defendant Sarah pleads such adultery in bar of plaintiff's right to dower in the husband's lands, under section 2102 of the Code, wherein it is provided that: "If any married woman shall commit adultery and shall not be living with her husband at his death, she shall thereby lose all right to dower; * * * and any such adultery may be pleaded in bar of any action or proceeding for the recovery of dower;" and insists that plaintiff is barred thereby. His honor rendered judgment in favor of plaintiff, and said Sarah appealed.

Applying the statute to the facts found, plaintiff is barred from recovering dower in her husband's lands, and his honor erred in rendering judgment for the plaintiff. She committed adultery during their marriage, and was not living with her husband at his death. It is not contended that there was any act of condonement. The fact that he did wrong can be no excuse for her to do likewise. His violation did not justify her in violating her marriage vow. So the statute creating dower rights is framed for the benefit of the guiltless, not those in *pari delicto*. We have carefully examined all of the statutes and amendments bearing upon this subject, including Acts 1893, c. 153, which is strongly relied upon by the learned counsel for plaintiff, to see if any exception is made expressly or by intendment in favor of the wife who, by reason of the fault or wrongdoing of her husband, or by reason of separation from him, has been led into evil ways; and can find none which can be so construed. It is a great hardship and a gross wrong for the adulteress to become the owner of his lands to the exclusion of her who "had been a faithful, true, and dutiful wife up to the time when he deserted her," and, but for his disreputable conduct, it is most probable that she would never have fallen. "Sed ita lex scripta est," and the judgment of the court below must be reversed.

¶ 1. See *Dower*, vol. 17, Cent. Dig. § 100.

(151 N. C. 446)

DUNN v. WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. Dec. 2, 1902.)**JURY — ACCEPTANCE — PEREMPTORY CHALLENGE—ERROR—PREJUDICIAL CHARACTER.**

1. After a jury has been accepted by the parties, it is error to permit the plaintiff to peremptorily challenge a juror.

2. Error in allowing a plaintiff to peremptorily challenge a juror after the jury has been accepted by the parties is prejudicial to the defendant, where he has previously exhausted his own peremptory challenges, since he can no longer challenge the substituted juror.

Douglas and Clark, JJ., dissenting.

Appeal from superior court, Duplin county; Moore, Judge.

Action by Joseph Dunn against the Wilmington & Weldon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Junius Davis and H. L. Stevens, for appellant. Allen & Dortch, A. D. Ward, and L. V. Grady, for appellee.

FURCHES, C. J. After the jury box was full, the plaintiff asked the general question if any juror had formed and expressed the opinion that plaintiff ought not to recover, whereupon one juror stated that from hearing the evidence in the former trial he had formed and expressed an opinion in favor of the defendant. He further stated that, "notwithstanding such expression of opinion, he could try the case impartially according to the evidence and charge of the court." His honor thereupon found him a competent juror. To this there was not, and could not be, any ground of exception. *State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771; *State v. Cockman*, 60 N. C. 484. But the court thereupon allowed the plaintiff to challenge said juror peremptorily. The defendant excepted. It is also found that the defendant had at that time exhausted his peremptory challenges.

In this there was error. After the jurors are passed by the parties, any further examination of them is not a matter of right, but of discretion in the court. If, on such examination, good challenge for cause is presented, the court may allow the juror to be challenged therefor. *State v. Cunningham*, 72 N. C. 469; *State v. Davis*, 80 N. C. 412; *State v. Adair*, 66 N. C. 298. But the reason of the thing and the precedents do not extend to the allowance of a peremptory challenge after a juror has been passed and accepted. When another juror has been called, the routine inquiry of the judge is, "Has the plaintiff (or defendant) any objection to the juror last called?" To allow a party to challenge peremptorily a juror after he has accepted him, or after he has accepted the twelve, would give the plaintiff the manifest advantage that, if doubtful of using his peremptory challenge, he can wait to see if the

other side will not challenge them peremptorily or for cause, and, if he fails to do so, the plaintiff will, if the court permit, challenge peremptorily such a one as he wishes, after the panel is made up. It is true, a party's right is not to select, but to reject, a juror, and therefore no exception will lie to the rejection of a juror by the other side, unless it is prejudicial to himself. But that appears here; for, the defendant having exhausted its peremptory challenges in perusing the jury, when the peremptory challenge of the plaintiff was thereafter allowed, the defendant was deprived of the right to challenge peremptorily the new juror put in his place. The defendant was not improvident in having exhausted its peremptory challenges in the perusal of the panel. It was not necessary for the defendant to show grounds of a challenge for cause to the new juror. It is enough that it could not challenge him peremptorily. It is to be regretted that this cause, which has been here three times before, should go off on a matter of this kind, but the rules governing the formation of juries are well settled and material. An innovation, such as the allowance of a peremptory challenge after the acceptance of a juror, is not only an impairment of the legal rights of the opposite party, but would lead to great uncertainty in trials in a matter which has long been settled and well understood.

New trial.

DOUGLAS, J. (dissenting). I am forced to dissent from an opinion which seems to me to be contrary to the letter and the spirit of the law. The court, in its opinion, cites neither statute nor precedent for its decision. The reason is obvious. The learned German professor who undertook to prepare a lecture upon the snakes in Ireland encountered the same difficulty. The opinion says: "But the reason of the thing and the precedents do not extend to the allowance of a peremptory challenge after a juror has been passed and accepted." The court entirely overlooks the case of *State v. Vestal*, 82 N. C. 563, where the state was permitted to peremptorily challenge a juror after the entire jury had been passed by both parties. We have no case whatever to the contrary. Again, the opinion says: "When another juror has been called, the routine inquiry of the judge is, 'Has the plaintiff (or defendant) any objection to the juror last called?'" This is scarcely consistent with what this court has said in *State v. Davis*, 80 N. C. 412, as follows: "And in conformity to this rule of practice is the ancient formula used by clerks both in England and in this country in their address to prisoners before the jurors are drawn: 'Those men that you shall have called and personally appear are to pass between our sovereign (or the state) and you upon your trial of life and death. If, therefore, you will challenge them, or any of

¶ 1. See *Jury*, vol. 21, Cent. Dig. §§ 620, 621, 622.

them, your time is to speak to them as they come to the book to be sworn, and before they are sworn." (The italics are by the court.) This case is cited by the court upon a point not in dispute, as are all its other citations.

The following, written tentatively, expresses my view of the case as presented to us:

This case is before us for the third time, having been reported in 124 N. C. 252, 82 S. E. 711, and 126 N. C. 848, 85 S. E. 606. The legal questions therein decided cannot now be reviewed. The exception upon which the defendant apparently mainly relies is that the court below, in its discretion, permitted the plaintiff to challenge a juror peremptorily after having been passed by the plaintiff. This exception seems to be based upon a misconception of the statute, which makes a wide distinction between peremptory challenges by the state, especially in capital cases, and those by an individual. Section 1200 of the Code provides that "in all capital cases, the prosecuting officer on behalf of the state shall have the right of challenging peremptorily four jurors: provided said challenge is made *before* the juror is *tendered* to the prisoner." This section is the only one requiring challenge before tender. Section 1199 relates to challenges by the defendant in criminal cases, and provides that, "to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel before the jury shall be *empaneled* to try the issues." Section 406, governing peremptory challenges in civil suits, is as follows: "The clerk, before a jury shall be *empaneled* to try the issue in any civil suit, shall read over the names of the jury upon the panel in the presence or the hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily four jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court." (The italics in these sections are our own.) The peremptory challenge under exception was made before the jury were impaneled, and therefore in strict accordance with the terms of the statute. There was no error in its allowance.

The only case from our Reports cited by the defendant in support of its contentions is *State v. Fuller*, 114 N. C. 885, 19 S. E. 797; but that case was expressly decided upon the construction of section 1200, as the prisoner was charged with murder. In *State v. Vestal*, 82 N. C. 563, wherein a misdemeanor was charged, the state was permitted to peremptorily challenge a juror after the entire jury had been passed by both parties, but before it was impaneled. The defendant also cites us to *Ward v. Railroad Co.*, 19 S. C. 521, 45 Am. Rep. 794, but, if outside decisions could be permitted to affect the plain words of our statute, we would find the general current of author-

ity against the defendant. *Abb. Civ. Issues*, p. 69, § 74. In 17 Am. & Eng. Enc. Law, 1185, it is said: "The right of peremptory challenge is one of the safeguards against possible injustice, and its freest exercise within the limits fixed by the legislature should be permitted." In 12 Enc. Pl. & Prac. 495, the principle governing peremptory challenges is thus stated: "Unless the time when or the order in which a challenge may be interposed is expressly restricted by statute, the absolute right to challenge a proposed juror peremptorily may be exercised at any time after his appearance and before he is sworn to try the issue or issues involved. The right of peremptory challenge ought to be held open to the last possible period, to wit, up to the actual swearing of the jury; and no circumstance can bring that right within the discretion of the court so long as it is confined to the number of challenges allowed by law. The allowance of a challenge of this nature after the acceptance of a juror, and after he has been sworn in the case, is not a strict matter of right, but in the discretion of the court, and for good cause such a challenge may be allowed either before or after the completion of the panel." In the case at bar the complaint of the defendant is, not that an objectionable juror was forced upon it, but that it was not permitted to retain a juror who was satisfactory. As was said by Henderson, J., in *State v. Lamon*, 10 N. C. 175: "Challenge is not given to the prisoner that he should have a particular individual upon his jury, but that he should not have one against whom he had an objection." In *State v. Smith*, 24 N. C. 402, it is said by Gaston, J., that "the right of challenge is a right to reject, not to select, jurors." *Perry v. Railroad Co.*, 129 N. C. 333, 40 S. E. 191; 17 Am. & Eng. Enc. Law, 1178.

The other exceptions are without merit, and cannot be sustained. In fact, as far as they are material, they appear to have been substantially decided on the former appeal, as they are all questions of law. As the jury found that the plaintiff was not guilty of contributory negligence, all instructions as to the issue of last clear chance became immaterial.

The defendant insists that it was not guilty of negligence "if the engine was kept standing upon the side track under steam for use in shifting cars." This is not the law. The fact that the engine was kept there for a lawful purpose, even if it were more convenient to keep it there, does not justify the obstruction of a public highway. Upon the former appeal—124 N. C. 252, 82 S. E. 711—it was held that "the use of the highway belongs to the public by common right, and no one may obstruct it without paramount necessity." The rule laid down in *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 413, 14 L. R. A. 556, quoted in *Tinker v. Railway Co.* (N. Y.) 51 N. E. 1032, meets our approval. It is as follows: "Two facts, however, must exist to render the encroachment lawful: (1) The obstruction must be reason-

ably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public." The plea of necessity is one of avoidance.

I am not prepared to say as a matter of law that the plaintiff was guilty of contributory negligence in travelling upon the highway, or that the defendant can relieve itself of all liability for its own negligence simply by making the highway too dangerous for a prudent man to travel. I think there was evidence to go to the jury, and, as the question of negligence was submitted to them under proper instructions, I see no reason to disturb their verdict.

The judgment should be affirmed upon the express wording of the statute, supported by precedent and authority.

CLARK, J., concurs in the dissenting opinion.

(116 Ga. 439)

ATLANTA, K. & N. RY. CO. v. STRICKLAND et al.

(Supreme Court of Georgia. Oct. 30, 1902.)

OPINION EVIDENCE—WITNESS—CORROBORATION.

1. Questions as to the passage of time and the speed of trains usually involve opinions, and therefore testimony to the effect that a period was but a short time, or that, in the opinion of the witness, a train was running at a rate of four or five miles per hour, is competent.

2. It is not competent, for the purpose of sustaining a witness and showing that he was present and saw an occurrence, to prove that he afterwards told different persons that he was present and did witness the occurrence.

3. Except as stated in the headnote last preceding, no error is found in the rulings of the trial court.

(Syllabus by the Court.)

Error from superior court, Pickens county; Geo. F. Gober, Judge.

Action by Roy Strickland and others, by their next friend, against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Smith, Hammond & Smith, for plaintiff in error. F. C. Tate, N. A. Morris, and E. P. Green, for defendants in error.

ADAMS, J. The defendants in error, as the minor children of a deceased employé of the plaintiff in error, obtained a verdict based upon a claim of his negligent homicide. A motion for a new trial was made by the defendant company upon the general grounds, and upon the further ground that the court below erred in certain rulings as to the admissibility of evidence, and in refusing to grant a new trial on the ground of newly discovered evidence which it is claimed shows that the principal witness for the plaintiff be-

low was guilty of perjury in testifying that he was present at the time of the homicide, and witnessed it.

The error that we find in the rulings of the court below, and which is covered by several grounds of the motion for a new trial, is the admission of testimony by this witness, and by others in corroboration of him, to the effect that on the day after the occurrence he said that he was present and saw the homicide. This was admitted because the railroad company had claimed and had endeavored to show that the witness was not present, but had manufactured his testimony. We do not think that a witness can be "bolstered up" in this way. The error seems to us to have been material, because we can readily conceive how such testimony would probably have a strong influence upon the minds of the jury in passing upon the credibility of the witness. We know of no authority which sustains this ruling. We think the principle of the decision of this court in the case of *Middleton v. State*, 52 Ga. 530, is against it. In that case, in order to sustain an accomplice, the state was permitted to show that immediately after his arrest, which was soon after the murder, he gave substantially the same account of the homicide that he had given on the stand. This was held to be illegal testimony. It would, we think, be unfortunate to permit testimony of this character. A designing and unscrupulous witness might, in anticipation of a trial, mention to different credible witnesses that he was present and saw an occurrence; and these witnesses, in the event that the other side took the position that the account was untrue or fabricated, might be sworn in corroboration, and much time be consumed in the investigation of a purely collateral issue. It might be that the witness would claim that a number of parties were present, and these parties might disagree among themselves, and a large part of valuable time be consumed in determining what a witness said out of court, and not under oath. If the defendant company had claimed that the witness had stated after the homicide, at a particular time and place, and in the hearing of various parties, that he was not present at the time of the homicide, it would, of course, be perfectly competent to meet that testimony by proof that the witness had, on the contrary, claimed at this time and place that he was present, and that other parties had heard him so assert. No reason of this character, however, appears in the record for the entertainment of this testimony.

In view of the evidence in its entirety, we think the error noticed was sufficiently material to require the grant of a new trial in this case, and the judgment of the court below is accordingly reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 2269, 2270.

(100 Va. 360)

ANDERSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—EVIDENCE—ATTEMPT TO ESCAPE—VENUE.

1. Where the record on appeal in a criminal prosecution shows that defendant was allowed 30 days to tender his bill of exceptions, and that he was sentenced at the same term, but it nowhere appears that he took the 30 days, but each bill of exceptions, under the signature of the judge, recites that it is made a part of the record, and the clerk certifies the whole as the record at the trial, the record will be taken as importing absolute verity, and an objection that the bills of exceptions were not tendered at the term cannot be considered.

2. Evidence that 6 weeks after the homicide with which defendant was charged, and 12 days before the term at which defendant was to be tried, he attempted to escape, is admissible as a circumstance to be considered by the jury with the other facts tending to establish guilt.

3. Defendant was charged with having committed a murder in C. county. The evidence showed that it took place at Anderson's Store, about a quarter of a mile from Lynch's Station, but there was no evidence that either was located in C. county. *Held*, that the court will not take judicial notice of the fact that a point at a given distance from Lynch's Station, an unincorporated village, was in the county of C.

4. The burden is on the commonwealth to prove that the offense was committed within the jurisdiction of the trial court.

Error to circuit court, Campbell county.

Thomas Anderson was convicted of murder, and brings error. Reversed.

Howell C. Featherstone and A. S. Hester, for plaintiff in error. The Attorney General and W. A. Anderson, for the Commonwealth.

CARDWELL, J. This is a writ of error to a judgment of the circuit court of Campbell county affirming the judgment of the county court of that county sentencing plaintiff in error to the penitentiary for a term of eight years for murder.

It is argued on behalf of the commonwealth that the bills of exceptions taken by plaintiff in error at his trial are not properly a part of the record here, because not tendered and signed during the term at which he was tried.

All that can be alleged in support of this contention is that the record shows that the defendant (plaintiff in error) was allowed 30 days in which to tender his bills of exceptions, and that he was sentenced at the same term, but that he took the 30 days or any part thereof nowhere appears. On the contrary, it appears from each bill of exceptions, under the signature and seal of the presiding judge, that it is "made a part of the record," and the clerk certifies the whole, including the bills of exceptions, as the record of the proceedings at the trial.

Nothing affirmatively appearing in the record to show irregularity in the proceedings, it is to be taken as importing absolute verity, and presumptions of irregularity are not permitted. *Gilligan's Case*, 99 Va. 822, 37 S. E. 962; *Reed's Case*, 98 Va. 817, 36 S. E. 399; *Dove's Case*, 82 Va. 305. Of the assignments of error, two of them only require our consideration, as the others are not likely to arise upon another trial of the cause.

Exception is taken to the ruling of the trial court permitting the introduction of evidence showing that plaintiff in error, 6 weeks after the homicide with which he is charged, and 12 days before the term of the court at which he was tried began, attempted to break jail and escape.

This ruling is not erroneous. When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from consciousness of guilt; and, though the inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred. An attempt to escape or evade prosecution is not to be regarded as a part of the *res gestæ*, but only as a circumstance to be considered by the jury, along with the other facts and circumstances tending to establish the guilt of the accused. The nearer, however, to the commission of the crime committed, the more cogent would be the circumstance that the suspected person attempted to escape or to evade prosecution; but it should be cautiously considered, because it may be attributable to a number of other reasons than consciousness of guilt. *Whart. Cr. Ev.* §§ 750, 751.

The remaining assignment of error is the refusal of the court to set aside the verdict on the ground that it is contrary to the law and the evidence.

The indictment charges that the murder for which plaintiff in error was tried and convicted, took place in the county of Campbell, but there is not the slightest proof in the record that such is a fact. The only proof as to the location of the crime is that it took place at Anderson's Store, about a quarter of a mile, or more from Lynch's, or Lynch's Station; but neither Lynch's Station nor Anderson's Store is shown to be located in Campbell county.

It is contended, however, that the court should take judicial notice that Lynch's Station is in Campbell county, and deduce from that fact that Anderson's Store is also in that county.

"When a crime is committed in an incorporated town, the court will notice in what county the town is situated." *State v. Reader*, 60 Iowa, 527, 15 N. W. 423. It was therefore held in *Sullivan v. People*, 122 Ill. 385, 13 N. E. 248, that proof that a crime was committed in Chicago is proof that it was committed in Cook county, judi-

¶1. See Criminal Law, vol. 14, Cent. Dig. § 732, 1267.

cial notice being taken that Chicago is in Cook county. But courts will not take judicial notice that a particular locality is within a county, nor of the local situation and distances in a county. Note to *Olive v. State*, (Ala.) 5 South. 653, 4 L. R. A. 33, and authorities cited.

We have been cited no authority, and we have been unable to find any, for taking judicial cognizance of the fact that a point a given distance from Lynch's Station, an unincorporated hamlet or village, is in the county of Campbell.

All crimes are local, and must be tried in the court which has jurisdiction over the locality where they are committed. The burden is just as great on the commonwealth to prove that the offense was committed within the jurisdiction of the trial court as it is to prove the commission of the offense itself. *Fitch's Case*, 92 Va. 824, 24 S. E. 272, and authorities cited; also *Butler's Case*, 81 Va. 163, and *Savage's Case*, 84 Va. 585, 5 S. E. 563.

There being no proof in this case of the jurisdiction of the county court of Campbell to try it, the circuit court erred in affirming the judgment of the county court; therefore its judgment must be reversed and annulled, the verdict of the jury set aside, and a new trial awarded.

(100 Va. 660)

NICHOLAS v. NICHOLAS.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

APPEAL—FAILURE TO FILE BRIEFS.

1. Where a cause has been submitted with leave to file additional briefs before a certain date, and the briefs are not filed, it will be decided upon the arguments made.

On petitions to rehear. Denied.

For former opinion, see 42 S. E. 669.

PER CURIAM. Upon petitions to rehear the decree of November 20, 1902. Counsel for F. L. Nicholas has fallen into error in saying that this case was disposed of without an opportunity upon his part to present his views. The case was called on the 9th of September, 1902, at Staunton, and was submitted upon the petition of appellants, who were represented by Mr. Liggett, and upon the brief of Messrs. Sipe & Harris, on behalf of J. J. Nicholas, and that of Gen. John E. Roller, of counsel for F. L. Nicholas, with leave to file additional briefs on or before September 30th. Some time about the 20th of October, no additional briefs having been filed in accordance with the stipulation, the case was considered fully upon the record and briefs already filed, and the opinion was prepared. Very soon thereafter a letter was received from counsel, calling attention to the leave reserved to file additional briefs,

and asking that the cause be removed to Richmond and set down for oral argument. To this letter the reply was at once made that the time within which, under the leave reserved, additional briefs could be filed, had expired, and it was therefore supposed that counsel had abandoned the idea of filing them; that the opinion had been written, and the case was ready to be disposed of. It appears, then, that the views of all parties were presented to the court,—those of appellants in a full petition for appeal, and those of appellees upon briefs which set forth in a very sufficient manner the law and facts relied upon by them, and certainly it was not the fault of the court that additional briefs were not filed within the stipulated time.

We are of opinion that there is no error in the decree heretofore entered, and the petitions to rehear are denied.

(100 Va. 770)

ADAMS, Treasurer, v. WALKER et al.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

REAL ESTATE AUCTIONEERS—TAX ON SALES—ASSESSMENT.

1. Under the direct provision of Acts 1889-90, c. 244, § 50, a real estate auctioneer, in addition to a specific tax, must pay an additional tax of one-fourth of 1 per centum upon the amount of sale.

2. Acts 1889-90, c. 244, § 50, provides that the per centum tax of real estate auctioneers shall be ascertained "as is provided in the case of liquor merchants." Section 44 provides that an auctioneer shall keep an account of his sales, and shall render an account on oath for assessment whenever properly required so to do. Since 1884 there has been no per centum tax on liquor merchants, and therefore no method of ascertaining the same. *Held*, that the tax could be ascertained and assessed by the method provided in section 44.

Appeal from corporation court of Lynchburg.

Action by Walker & Co. against Adams, treasurer. From a decree in favor of plaintiffs, defendant appeals. Reversed.

R. D. Yancy, Atty. Gen., and W. A. Anderson, for appellant. Wilson & Manson, for appellees.

BUCHANAN, J. The questions involved in this case are:

(1) Whether, at the time the tax complained of was assessed, the revenue laws of the state imposed a tax of one-fourth of 1 per cent. on the amount of sales of real estate auctioneers; and

(2) if imposed, whether these laws provided a method for its assessment.

Section 50, c. 244, Acts 1889-90, provides that "a real estate auctioneer shall pay for the privilege the sum of fifty dollars; and if the place of business is in a city of more than five thousand inhabitants, one hundred dollars; and he shall pay an additional sum of one fourth of one per centum upon the

amount of sales to be ascertained and charged as is provided in the case of liquor merchants."

Language imposing the tax could not be clearer and more emphatic. It declares that for the privilege of doing the business of a real estate auctioneer he shall pay a specific tax, and "he shall pay an additional tax of one fourth of one per centum upon the amount of sales," etc. Neither is there anything in section 49, or any other part of the chapter, which leaves in doubt the intention of the legislature, as declared in section 50, to impose the tax in question.

The next question is, was the requisite machinery provided by law for its assessment?

Section 50 provides that such auctioneer "shall pay the per centum tax upon the amount of sales to be ascertained and charged as is provided in the case of liquor merchants." It seems that for some years prior to the Acts of 1883-84, a per centum tax had been imposed upon the sales of liquor merchants, and a method provided for ascertaining and charging that tax. Since the Acts of 1883-84 went into effect, it seems that no per centum tax has been imposed upon liquor merchants, and, of course, no method for ascertaining and charging such tax was provided. But notwithstanding this change in the law, the subsequent statutes imposing a per centum tax upon general auctioneers and real estate auctioneers continue to refer to that nonexistent method of ascertaining and charging a per centum tax on the sales of liquor merchants as if it were still in force. If that were the only method provided for assessing the tax in question, it could not be collected, however clearly imposed. But section 44 of the chapter imposing the tax provides that: "An auctioneer shall keep an account of sales made by him other than those made under section forty three, showing the aggregate amount thereof and whenever required by a commissioner of the revenue, shall render an account for assessment of all his sales for the period required by law to be stated and shall sign and answer all such interrogatories respecting such sales as may be propounded to him in pursuance of law. Such accounts, statements and answers shall always be on oath." From the character of the duties imposed upon an auctioneer by this section it is manifest that it was a means provided by law by which the commissioner of the revenue could ascertain the facts necessary to assess the tax in question. Not only is this so, but the section expressly declares that such auctioneer "shall render an account for assessment of his sales." If it were not enacted for the purpose of enabling the commissioner of the revenue to make the assessment, for what purpose was it enacted, and of what value or use is it in the chapter? That section must, if possible, be given some effect in the construction and enforcement

of our revenue laws. The construction placed upon it is clearly justified by its language. If that construction is not placed upon it, the per centum tax clearly imposed fails, the section is given no effect, and the manifest intention of the legislature is defeated.

We are of opinion that the tax complained of was imposed by law, and ample machinery provided for its assessment, and that the corporation court erred in not so decreeing.

Its decree will therefore be reversed, and this court will enter such decree as it ought to have entered.

(100 Va. 741)

TIDBALL'S EX'RS et al. v. SHENANDOAH NAT. BANK et al.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

NOTES — INDORSERS — LIABILITY — LACHES — APPEAL — LAW OF THE CASE — PLEADING — AMENDMENT — NEW CAUSE OF ACTION — INTEREST.

1. A decision of the supreme court of appeals is conclusive on it in any subsequent appeal in the same cause.

2. An original bill to subject the estate of an indorser to the payment of negotiable notes did not aver all the facts necessary to show the indorser's liability; the amended bill made the necessary averments, and also made as new parties to the bill the personal representatives of the makers of the notes indorsed. *Held*, that the amendment did not make a new case, and was allowable.

3. A suit to subject the estate of an indorser to the payment of negotiable notes was commenced January, 1881, within five years after their maturity, and within five years after the indorser's death. No order was made until November, 1882, when the bill was taken as confessed, and the commissioner directed to settle the accounts of the personal representatives of the indorser, and report the debts due from his estate. Report was made in 1883, and confirmed in November of that year. Nothing further was done in the case until December, 1896, when complainant petitioned to be permitted to enforce collection of the balance due on the notes, which had not been reported by the commissioner. For years after the suit was brought collections were being made on the notes from those primarily liable, and applied to their satisfaction, etc. There was no uncertainty as to the amount due. A benefit to the estate had resulted from the delay. *Held* not such laches as to preclude relief.

4. In contracts for the payment of money, interest is not given as damages at the discretion of the court or jury, but as an incident to the debt, which the court has no discretion to refuse.

Appeal from circuit court, Frederick county.

Bill by the Shenandoah National Bank and others against Tidballs' executors and others. Decree for complainants, and defendants appeal. Affirmed.

Holmes Conrad, for appellants. R. E. Byrd, for appellees.

BUCHANAN, J. This is the second time this case has been before this court. The opinion of the court on the former appeal

(Tidball v. Bank, 98 Va. 769, 37 S. E. 318) contains a statement of the case and a history of the proceedings had therein prior to that time. Upon that appeal the court held that the original bill was demurrable upon two grounds:

(1) Because it did not allege that the indorser whose estate was sought to be held liable for the negotiable notes sued on had notice of their dishonor; and,

(2) Because it failed to make the original debtors, the makers of the notes, parties to the suit.

It further held that the decree of the November term, 1883, as construed by this court, and the decree of May 12, 1897, ought not to be interfered with; that the decree of the March term, 1900, should be set aside, and the cause remanded; that after the bill had been amended each party should be allowed to file exceptions to the report of Commissioner Steck, and to take further evidence, if desired; but declined to express any opinion on the defense of laches, then and now relied on by the appellants. When the case went back to the circuit court an amended and supplemental bill was filed, in which it was alleged that due notice had been given the executor of the indorser of the dishonor and protest of the negotiable notes sued on, and the notaries' certificates thereof were filed and made a part of the amended and supplemental bill. To this amended and supplemental bill the personal representatives of Marshall and Burgess, the makers, respectively, of two of the notes, were made parties defendant. The maker of the other note was not made a party, it being alleged that that note had been fully paid off and discharged by the maker and prior indorser since the institution of the original suit.

The appellants, the defendants in the court below, appeared and made defense to the amended and supplemental bill on the ground that it came too late, and also upon the ground that it set up and seeks to enforce an entirely new cause of action from that set up in the original bill. They demurred to the bill, assigning six different grounds of demurrer, pleaded the statute of limitations, and filed an answer in which, among other things, they set up the defense of laches. They also filed exceptions to Commissioner Steck's report ascertaining the balance due on the notes sued on.

Upon a hearing of the cause the court rendered a decree in favor of the complainant for the balance found due by the commissioner's report. From that decree this appeal was taken.

One of the assignments of error is that the amended bill was filed too late.

The propriety of filing an amended bill was considered upon the former appeal. The conclusion then reached was that it was a proper case for an amended bill. As to the correctness of that conclusion we have no doubt, but if we were satisfied now that it

was erroneous we have no power to correct it. The decision of this court upon the former appeal is as conclusive upon us as it was upon the circuit court. It is the law of this case. *Stuart's Ex'r v. Peyton*, 97 Va. 796, 34 S. E. 696, and cases cited.

Another assignment of error is that the circuit court erred in allowing the amended bill to be filed upon the ground that it made a new case.

By the original bill it was sought to subject the estate of an indorser to the payment of certain negotiable notes. That bill did not aver all the facts necessary to show the indorser's liability. The amended bill made the necessary averments, and also made as new parties to the bill the personal representatives of the makers of the notes indorsed. The amendments did not make a new case.

The rule as to what amendments may be made after appearance and what amendments may not constitute a new cause of action was laid down in *Mineral Co. v. Painter*, 100 Va. —, 42 S. E. 300, as follows:

"The rule generally prevailing seems to be that such amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action, different from that declared on and different from that which the plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action."

That was a case at law, but the rule as to amendments is certainly not less liberal in equity than at law.

If the contention of appellant's counsel were correct, a pleading which omitted some essential allegation could never be amended. This is clearly not the law. It is the settled practice in this state that such amendments can be made, and it would be a reproach to the administration of justice if they could not. See 1 Bart. Ch. Prac. (2d Ed.) 344, and following, where many cases are cited.

The amendments made by the amended bill were authorized by this court upon the former appeal, and, having been made in accordance therewith, the propriety of filing the amended bill is no longer an open question.

The action of the circuit court in overruling the demurrer to the amended bill is assigned as error.

Without discussing in detail the six grounds of demurrer insisted on, some of which are disposed of by what has been said, it is sufficient to say that the amended bill

and supplemental bill, which includes the exhibits filed therewith and made a part thereof, do aver facts which show that the complainant bank was the holder and owner of the negotiable notes in question; that upon their maturity they were presented for payment, payment demanded and refused, and the notes duly protested; and that the executor of the indorser on the notes had due notice of the demand, nonpayment, protest, and dishonor of the said notes, that the estates of the makers were insolvent, and that the indorser's estate was liable for the payment of the unpaid balances thereof.

The next assignment of error is that the appellee bank was guilty of such laches in the prosecution of its rights that it should be denied relief.

If the appellee bank has been guilty of laches, it has been in the prosecution of its suit after it was brought. The suit was brought within less than five years after the maturity of the notes sued on, and within five years after Tidball's (the indorser's) death. The suit was brought in January, 1881. No order was made in the cause until November, 1882, when the bill was taken for confessed, and the commissioner directed to settle the accounts of the personal representative of the indorser, and report the debts due from his estate which might be produced before him. The commissioner made his report some time during the year 1883, and it was confirmed without exception in November of that year. Nothing further was done in the case until December, 1896, when the complainant in that suit filed his petition asking to be permitted to set up and enforce the collection of the balance due on the notes, which had not been reported by the commissioner directed to report the indebtedness of the estate.

That there has been delay in the prosecution of the appellees' suit there can be no question. But delay alone in the prosecution of his suit does not prevent a party from recovery. Length of time alone is not a test of staleness of a demand, and mere lapse of time, unaccompanied by some circumstances affording evidence of a presumption that the right has been abandoned, is not laches. *Cole's Adm'r v. Ballard*, 78 Va. 139; *Wissler v. Craig's Adm'r*, 80 Va. 22; *Whitlock v. Johnson*, 87 Va. 333, 12 S. E. 614; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504. Generally, if the sum sought to be recovered is certain, the transaction has not become obscure, and there has been no such loss of evidence as will be likely to produce injustice, a court of equity will not refuse relief merely because there has been delay in asserting the claim. *Bell v. Wood*, *supra*. The circumstances surrounding the case do not show an abandonment of its claim by the bank. For years after this suit was brought collections were being made from those primarily liable, or their estates, and applied to the satisfaction of the notes sued on. The McGill note was

entirely discharged by the maker during the pendency of this suit. The Burgess note has been reduced by payments made on it amounting to more than \$1,000, since the suit was instituted, out of the proceeds of collateral held by the bank. That note and the Marshall note have been in suit against those primarily bound, and in each suit Tidball's executor was a party, and in one of them he himself filed the bill and set up the liability of his testator's estate on the note and secured the payments by which it was credited.

There is no uncertainty about the amount of the bank's demand, nor the credits to which it is subject. The transaction has not become obscure by the lapse of time or loss of evidence. The demand was evidenced by notes. The only sources from which payments could be made were the chancery suits to which Tidball's executor was a party. Those suits were against the representatives of dead men whose estates were administered in chancery causes which show all that was applicable to the payment of their debts and the application made. The decrees in those cases fix the amount of the debts and the amount of credits. There is no uncertainty as to either. There is no doubt that the balance unpaid and due from Tidball's estate is correctly ascertained by the report of the commissioner. Nor are we able to see that any injury has resulted to Tidball's estate from the bank's delay in enforcing its demands and subjecting the assets to their payment. By delay the collateral securities held by the bank or acquired by Tidball's executor for the indemnification of his testator's estate were made available and applied to the payment of the bank's debt. Ordinarily the court will not subject the surety's estate to the payment of the principal's debt, where both are being administered by the court, until the principal's estate has been exhausted. But if the court had made an exception to that rule in this case, and the bank had vigorously pressed its suit and subjected the estate of Tidball before the estates of those primarily liable had been made available, it would have been compelled to pay a much greater sum than it now has to pay, and to have paid it would have been necessary to have sold the farm, which it appears has since greatly increased in value. Instead, therefore, of being injured, the estate of Tidball has really been benefited by the delay.

The remaining assignment of error to be considered is that the circuit court erred in allowing interest on the principal sum decreed the bank since the order of reference at the November term, 1882.

The general rule is that, if no valid ground of defense is shown, the judgment or decree is rendered for the interest as well as for the principal. In contracts like those sued on, the interest is not given as damages at the discretion of the court or jury, but as an incident to the debt, which the court has no discretion to refuse. *Chapman's Adm'r v.*

Shepherd's Adm'r, 24 Grat. 384; Roberts' Adm'r v. Cocke, 28 Grat. 207. But in our view, even if it were in the discretion of the court to refuse or to allow interest, according to the circumstances of the particular case, the facts of this case do not furnish any ground for refusing interest. The money of the legatees has not been withheld from them during any part of the time in question. They have had the benefit and use of the farm during all that period, and the bank has been deprived of the use of the money which the testator contracted to pay in 1877. It is as much entitled to the interest as it is to the principal.

We are of opinion that there is no error in the decree complained of, and that it should be affirmed.

(100 Va. 728)

DUDLEY et al. v. MINOR'S EX'R.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

**SALES—FRAUD—REPRESENTATION—NOTES
—SUIT—DECREE.**

1. A misrepresentation, the falsity of which will afford a ground of action for damages or a bill for the rescission of a contract, must be as to an existing fact in contradistinction to a mere expression of opinion; the statement must have been made for the purpose of procuring the contract; it must be material; it must be untrue; and the party to whom it was made must have relied upon it, and been induced by it to enter into the contract.

2. Where notes given for land were pledged as collateral, and the holder sued the makers of certain of them, it was not error to direct a decree for the amount of the notes, without directing an account of the sum due the pledgee, it appearing that the sum due from the makers was not enough to satisfy the pledgee's claim.

3. Notes given for land were pledged as security and secured by a mortgage, and in a suit on certain of them defendants contended that the full amount of their notes should not have been decreed to be paid until sale of the land mortgaged. *Held* of no merit, there being no equity between the makers.

Appeal from circuit court, Roanoke county.

Action by Minor's executor against O. W. Dudley and others. From a decree for plaintiff, defendants appeal. Affirmed.

Berryman Green, for appellants. Moomaw & Woods, for appellee.

HARRISON, J. It appears from this record that the Salem Development Company, like many other such enterprises of its day, was engaged, among other things, in buying real estate in and about the town of Salem, Va., and laying the same off into streets, avenues, and lots, for which at the time there appears to have been an unprecedented demand. On the 12th day of September, 1890, the company made its second sale of lots at public auction, when the appellants, O. W. Dudley, J. A. Cradock, G. W. Bethel, and Eugene Withers, became the

purchasers of eight lots at the aggregate price of \$9,492.50, one-third of which was to be paid in cash, and the residue in two installments at one and two years. The deferred payments were evidenced by negotiable notes executed by the purchasers to the Salem Development Company, and payable at the Farmers' National Bank of Salem, Va. The notes of the appellants, payable two years after date, aggregating \$3,164.14, passed finally, for full value, into the hands of A. W. Minor, of the state of New York, who held them at the time of his death, when they passed into the hands of his executor, the appellee, A. Minor Wellman. The appellee brought suit at law in the circuit court of Roanoke against the makers to enforce payment of these notes that had come to his hands as executor, and thereupon the bill in this case was filed by the appellants, praying for an injunction to restrain the appellee from proceeding to judgment against them upon the notes upon the ground that they were induced to buy the lots from the Salem Development Company and to execute the notes for the deferred payments thereon by fraudulent representations made to them by the company before and at the time of their purchase. A temporary injunction was granted, which was subsequently dissolved by decree of October, 1899. From this last-mentioned decree the cause was brought by appeal to this court.

The representations relied on by the appellants are set forth in the petition for appeal as follows: That at the sale of lots on the 12th of September, 1890, A. M. Bowman, the president of the Salem Development Company, speaking for it, "proclaimed to the assembled bidders, among whom were petitioners, the following distinct representations of fact:

"(1) That he had a letter from Mr. Fries, president of the Southern Construction Company, assuring him that the Roanoke & Southern Railroad would enter Salem through the lands of the Salem Development Company; that the construction of said railroad would begin at once, and that its building was an assured fact.

"(2) That a hotel would be constructed by the Salem Development Company on a certain block of lots at the cost of \$50,000.

"(3) That an electric railway would be built through the company's property, and that bond had been given to complete it within two years;" and

"(4) That certain other manufactories had been secured to be located on the property, and would be constructed at once."

It is further stated that, in order to encourage petitioners to bid on the lots, President Bowman declared that, unless these representations were carried out, purchasers of lot would not be required to pay their deferred installments of purchase money.

This court has so repeatedly, in recent years, laid down the rules of law by which it

¶ 1. See *Fraud*, vol. 22, Cent. Dig. §§ 2, 3, 12, 16, 17.

must be governed in disposing of this class of cases, that it hardly seems necessary to do more than cite a few of the cases bearing upon, and, in our view, conclusive of, the questions raised by this appeal.

The doctrine is well settled that a misrepresentation, the falsity of which will afford a ground of action for damages or a bill for the rescission of a contract must be as to an existing fact. It must be an affirmative statement or affirmation of some fact, in contradistinction to a mere expression of opinion which ordinarily is not presumed to deceive or mislead. The statements must have been made for the purpose of procuring the contract. They must be material. They must be untrue, and the party to whom they were made must have relied upon them, and been induced by them to enter into the contract. *Wilson v. Carpenter's Adm'r*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *Watkins v. Improvement Co.*, 92 Va. 1, 22 S. E. 554; *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Grosh v. Improvement Co.*, 95 Va. 161, 27 S. E. 841; *Owens v. Land Co.*, 95 Va. 560, 28 S. E. 950. In the light of these authorities we will now proceed to a consideration of the evidence touching the several representations relied on as furnishing ground for affording appellants relief from their obligations as purchasers of the lots in question.

The first is that A. M. Bowman stated that he had a letter from Mr. Fries assuring him that the Roanoke & Southern Railroad would enter Salem through the lands of the company, and that its building was an assured fact. The evidence does not sustain this contention. The letter referred to from Fries to Bowman is as follows: "I write to say hurriedly that the contract arranged to-day with the Railway and Construction Company to build to Roanoke does not affect our coming to your place as contemplated in the proposition which was fully discussed. I am empowered to take the matter up with you. Can you come to Salem, N. C., and confer with me at once? I will be at home next week." There is nothing in this letter to justify the assumption that the building of the road in question was an assured fact, and the decided weight of evidence is that Bowman read the letter to the crowd of bidders for their information, and made no statement inconsistent with its terms. Mr. Withers, the only one of the appellants who has testified in the case, says that he is unwilling to say positively that Bowman did not have the letter in his hand while speaking, because there was a great crowd where Bowman was standing that often shut him off partially from view. Bowman himself (and his evidence is corroborated by others) says that he read the letter, and stated that a committee would go to North Carolina to confer with Mr. Fries on the subject, and that he hoped the branch road would be brought from Roanoke to Salem, and that

its depot would be located on the lands of the development company.

The second representation relied on is the alleged statement that a hotel would be built on the lands of the company at a cost of \$50,000. The evidence upon this subject, as well as the language of the alleged statement itself, clearly show that it was not the assertion of an existing fact, but the mere expression of an opinion that the company would build a hotel; and no doubt it would have done so if its hopes and expectations, like those of appellants, had not so soon turned to ashes.

The third representation relied on is the alleged statement that an electric railway would be built through the company's property, and that bond had been given to complete it within two years. As a matter of fact, a company had been organized, a charter obtained, and other steps taken toward building the road in question. The evidence is very conflicting, but tends strongly to support the view that Bowman did not say that bond had been given to complete the road in two years. It further appears that appellants could hardly have been affected or influenced to make their purchase by this alleged statement, because long before the expiration of the two years they had given notice of their intended defenses, and determination to refuse payment of their notes, for causes that existed anterior to the time at which it is alleged the road was to be completed under the bond. Under such circumstances it can hardly be said that appellants are entitled to be released from the obligation of their purchase-money notes.

The fourth representation relied on is the alleged statement that certain other manufacturing had been secured to be located on the property, and would be constructed at once. To the extent that this statement is shown to have been made, it is sustained by the facts appearing of record.

In regard to the allegation that Bowman declared that, unless the alleged representations were carried out, purchasers would not be required to pay the deferred installments, it clearly appears that this statement was made in connection, alone, with certain paying that was contemplated,—that, if that paying was not done, purchasers need not pay their deferred payments. The paving was done as promised, and all obligations of the company on that account fulfilled.

Upon this branch of the case we are of opinion that no such misrepresentations of fact are proven as would, under the principles of law adverted to, entitle the appellants to the relief sought.

The notes involved in this controversy, together with the notes of a large number of other purchasers, were indorsed by the Salem Development Company to the Farmers' National Bank of Salem, Va., to secure about \$21,000 of debt due to the Olean Cart Company. The appellants contend that it was

error to decree the payment of the full amount of their notes without directing an account of the amount that was due to the appellee, A. Minor Wellman, executor, whose testator was assignee of the Olean Cart Company; and, further, that the lots embraced in the deeds of trust to secure the notes of appellants and those of the other lot purchasers should have been sold before decreeing a money payment by only four of the large number of debtors jointly liable.

The decree appealed from states that it appears from the record that the amount due by the appellants is not sufficient to satisfy the debt due from the Salem Development Company to the appellees. The whole of the record is not before this court, and there is nothing in that portion of it which is before us to show the statement of the decree to be incorrect. The appellants owe their purchase money. If it is not all due to the appellee, any residue would be due to the Salem Development Company; and, as the parties are all before the court, appellants could not be benefited by an account, or prejudiced by a decree for the full amount due from them. Nor was there any reason to delay appellee in his money decree against appellants until the lots were sold. No equity exists between appellants and the other purchasers of lots. Each of the appellants was liable to judgment for the amount of their joint notes, irrespective of the course pursued as to others who had bought lots. The appellee might release his claim against other purchasers, and appellants would not be prejudiced thereby, and could not complain.

Upon the whole case, we are of opinion that there is no error in the decree complained of, and it must be affirmed.

(100 Va. 709)

KINZIE et al. v. RIELY'S EX'R.
(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

VENDOR AND PURCHASER—ACTION FOR PRICE—SEALED INSTRUMENTS—PRINCIPAL AND SURETY—WARRANTY OF TITLE—BREACH—SET-OFF—COUNTERCLAIM—RECOURPMENT—RIGHTS OF SURETIES—ABATEMENT AND REVIVAL—CONTINUANCE.

1. Code, § 3303, declares that a defendant who files a plea or account of set-off shall be deemed to have brought an action against the plaintiff, and that the plaintiff shall not, after such plea or account is filed, dismiss his cause without defendant's consent. *Held*, that the filing of a plea of set-off under such section did not make the party filing the plea the plaintiff, and the original plaintiff the defendant, so as to deprive the original plaintiff's personal representatives on his death pendente lite from reviving the action by motion, as authorized by Code, § 3308.

2. Code, § 3299, provides that in any action on contract the defendant may file a plea, if the contract be by deed, alleging any matter arising after execution which would entitle him to relief in equity; also alleging the amount to which he is entitled by reason of the matters contained in the plea. *Held* to authorize a grantee to file a plea in an action to recover

the purchase price of land, alleging breach of the grantor's covenant of warranty of title, where such plea did not ask for a rescission of the contract.

3. Code, § 3298, providing that, though the plaintiff's claim be joint against several persons, a debt due to only a part of the defendants may be set off against plaintiff's demand if the persons against whom such claim exists stand in the relation of principal and surety, and the person entitled to the set-off is principal, applies only where the set-off is a liquidated demand, and does not authorize sureties to set-off a claim of their principal for breach of warranty in an action for the price of the land sold.

4. Where plaintiff sued to recover on a sealed instrument the price of land sold, the obligors were not entitled to set off unliquidated damages for breach of warranty as a common-law counterclaim in the nature of recoupment.

5. Code, § 3299, providing that in an action on contract the defendant may file a plea of set-off to recover damages at law from the plaintiff against the obligation of the contract sued on, did not authorize sureties jointly sued with the principal on a bond for the purchase price of land to plead as a set-off damages suffered by the principal by reason of plaintiff's breach of warranty of title, the sureties having no interest in such cause of action.

6. Where a case was continued at a former term on a plea of payment, which was the only plea when the motion to continue was made, and defendants had no evidence to introduce on such plea, and there was no ground for a further continuance to enable defendants to file further pleas, the court's refusal to further continue the cause was proper.

Error to circuit court, Botetourt county.

Action by George Riely, revived in the name of his executor, against Henry Garst, Jr., and others. From a judgment in favor of plaintiff, defendants Joseph C. Kinzie and John H. Garst, Jr., bring error. Affirmed.

R. C. Stearnes and Hoge & Hoge, for plaintiffs in error. C. M. Lunsford, for defendant in error.

BUCHANAN, J. George Riely instituted his action of debt upon a bond for the payment of money executed by Henry Garst, Jr., John H. Garst, Jr., and Joseph C. Kinzie, making as defendants thereto the two last-named obligors and the personal representative of Henry Garst, Jr.

By leave of the court the action was dismissed as to the personal representative of the deceased obligor. The defendants, the surviving obligors, filed a general plea of payment and a special plea under section 3299 of the Code, to which latter plea the plaintiff filed his demurrer, and the cause was continued.

At the next term of the court, the plaintiff having in the meantime departed this life, the action was revived upon the motion and in the name of his personal representatives. At a subsequent day of the term the defendants moved the court to set aside the order of revival, which motion was overruled. This action of the court is the first error assigned.

It is contended that the effect of filing the plea of set-off was, as to matters contained in the plea, to make the original defendants

plaintiffs and the original plaintiff a defendant, under the provisions of section 3303 of the Code, and that, being such defendant at the time of his death, the action could not be revived by motion in the name of his personal representatives, under the provisions of section 3308 of the Code.

Whilst section 3303 of the Code provides that a defendant who files a plea or account of set-off under chapter 160 of the Code shall be deemed to have brought an action against the plaintiff, and that the latter shall not, after such plea or account is filed, dismiss his case without the defendant's consent, it does not make the party bringing the action a defendant, or the party filing the plea of set-off a plaintiff, within the meaning of section 3308 of the Code, or deprive the personal representatives of the party bringing the action of the right to have it revived in their names by motion.

The next assignment of error is to the action of the court sustaining the demurrer to the special plea of set-off filed by the defendants.

It was averred in that plea that the bond sued on was executed by John H. Garst, as principal, and by the other obligors therein, as sureties, for the purchase price of a tract of land sold and conveyed to John H. Garst by the plaintiff by a deed in which the grantor covenanted, among other things, that he had the right to convey the land; that the plaintiff had not kept and performed the covenants in his deed, in this: that he did not have title to or the right to convey, but, on the contrary, the devisees of Dr. John H. Griffin, deceased, had at the date of the conveyance, and still have, the lawful title to a one-half interest in all the stone, coal mines, and mineral springs in and upon the land; that there are valuable deposits of stone and coal and valuable mines and mineral springs upon the land; and that by reason of the premises the said John H. Garst had sustained great loss and damage, amounting to the sum of \$500, which was still due and owing to the said John H. Garst, and which he was willing to allow and asked to have set off against the plaintiff's demand.

One of the objections made to the plea was that it undertook to set up a breach of warranty of title to real estate, and that this cannot be done as a set-off in a court of law.

The people of this commonwealth at a very early day showed their disapproval of that rule of the common law which did not allow cross-demands to be settled in the same action, and as early as 1644 or 1645—some years, it seems, before either England or any of her other colonies had enacted any statute upon the subject—the legislature of the colony of Virginia passed an act modifying the common-law rule, and authorizing pleas of set-off in certain cases. 1 Hen. St. pp. 296, 314; 5 Rob. Prac. 958; Rawle, Cov. Tit. (5th Ed.) § 324. That statute has been amended from time to time until we now have the very

comprehensive provisions contained in chapter 160 of the Code.

In the case of *Watkins v. Hopkins' Ex'r*, 13 Grat. 743, 747, some doubt was expressed in the opinion of the court as to whether section 5, c. 172, Code 1849, extended to a case of breach of warranty of the title to real estate; but that section, as amended by the act of March 22, 1873 (Acts 1872-73, p. 196), and found in section 3299 of the present Code, is clearly sufficiently broad to authorize the grantee to file a special plea for breach of warranty or covenant for title in an action brought by the grantor to recover the purchase price of the land conveyed, unless the defense set up would require the contract to be rescinded, and the grantor to be reinvested with the title conveyed. See 4 Minor, Inst. (3d Ed.) 795, 796; *Sheffey's Ex'r v. Gardner*, 79 Va. 313; *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457; *Watkins v. Improvement Co.*, 92 Va. 1, 9, 22 S. E. 554; *Mangus v. McClelland*, 93 Va. 786, 789, 22 S. E. 364.

The special plea of set-off having been held insufficient on demurrer, the case was submitted to the court for decision, and a judgment was rendered in favor of the plaintiffs. From that judgment the defendant Kinzie, the surety on the bond, obtained this writ of error.

The principal in the bond is not a party to the writ, and is not complaining of the ruling of the court rejecting the special plea.

Can the surety (the plaintiff in error) raise the question as to the propriety of the trial court's action in rejecting the special plea of set-off?

The principal, by failing or refusing to become a party to the writ of error, cannot, of course, deprive his surety of the right to have the action of the trial court reversed for improperly rejecting any plea which the surety had the right to file; but it is equally true, we apprehend, that a surety cannot complain of the rejection of a plea which his principal alone had the right to file, and who had the right to file it or not, as he saw proper, although the defense set up by it would redound, if successfully made, to the benefit of the surety.

Section 3298 of the Code provides that, although the plaintiff's claim be jointly against several persons, a debt due to only a part of the defendants may be set off against the plaintiff's demand, if it appear that the persons against whom such claim is made stand in the relation of principal and surety and the person entitled to the set-off is principal. The provisions of that section apply only where the set-off is a debt or liquidated demand. 4 Minor, Inst. (3d Ed.) 787; 5 Rob. Prac. 964; *Webster v. Couch*, 6 Rand. 519; *Christian v. Miller*, 3 Leigh, 78, 23 Am. Dec. 251; *Harrison v. Wortham*, 8 Leigh, 296.

The damages claimed in this case could not be relied on as a set-off under that section of the Code, because they are unliquidated. Neither could they be relied on as a

common-law counterclaim in the nature of recoupment, since the plaintiff's demand is under seal. *Association v. Rockey*, 93 Va. 678, 685, 25 S. E. 1009, and authorities cited.

The claim was asserted, and could only be asserted, under the provisions of section 3299 of the Code, and in the manner prescribed by that section. The only party by that section authorized to file the special plea in question is a defendant who is entitled to recover damages at law from the plaintiff, or the person under whom the principal claims, or to relief in equity against the obligation of the contract sued on. This is clear, not only from the language of that section, but from the provisions of sections 3300 and 3304; especially the provisions of the latter section. By the first subdivision of that section it is provided that, if the plaintiff be a person with whom the contract sued on was originally made, or the personal representative of such person in the trial of the case, the jury shall ascertain the amount to which the defendant is entitled, and apply it as a set-off against the plaintiff's demand; and, if the said amount be more than the plaintiff is entitled to, shall ascertain the excess, and fix the time from which interest is to be computed on the same or any part thereof; and judgment in such case shall be for the defendant against the plaintiff for said excess and interest.

By the second subdivision of the section it is provided that, if the plaintiff claim as assignee or transferee under a person with whom the contract sued on was originally made, and the defendant's claim exceeds the plaintiff's demand, the defendant may waive the benefit of his claim to any excess beyond the plaintiff's claim; or, instead of such waiver, it is provided by the third subdivision of the section that the defendant may, by rule issued by the court, or, on his application, issued by the clerk in vacation, or by reasonable notice in writing, such rule or notice substantially stating the defendant's claim, make the person under whom the plaintiff claims a party to the suit; and on the trial of the case the jury shall ascertain and apply, as provided in the first subdivision of the section, the amount and interest to which the defendant is entitled, and for any excess beyond the plaintiff's demand for which such person under whom the plaintiff claims is liable, with such interest as the jury allows, judgment shall be rendered for the defendant against such person.

It is manifest that a surety on a bond for the purchase price of land, who is no party to the deed by which the land was sold and conveyed, has no claim for damages against the grantor in the deed for breach of his covenants for title. Having no interest in the damages, he cannot set them up against the plaintiff's demand, even to the extent of what his principal owes the plaintiff; for, if he could, then by the terms of the statute, if the damages due his principal

exceed the plaintiff's demand, he would be entitled to recover such excess from the plaintiff, or the party through whom he claims, as is provided by the first and third subdivisions of section 3304; or he could, under the second subdivision of the section, waive the benefit of his principal's claim as to excess of the plaintiff's demand. Even if the statute were ambiguous,—as it is not,—the court would not put such a construction upon it as would lead to the absurdity and injustice of enabling a surety to file a special plea by which he could recover judgment upon a claim for damages for which he had no cause of action, or on the trial of which he could waive rights in which he had no interest.

The principal obligor alone had the right to file the special plea which was rejected by the court. He was not compelled to avail himself of the privilege conferred by the statute, but could bring his independent action upon his cross-demand. 4 Minor, Inst. (3d Ed.) 787; 5 Rob. Prac. 960. Having the right to assert his demand for damages by special plea in this case or by an original action, he could, when his special plea was rejected, abide the action of the court, or have it reversed upon writ of error. The effect of his failure of refusal to unite in the writ of error was to elect not to set up his claim for damages in this case. The principal cannot be deprived of this right of election by the surety, or be compelled to litigate in this cause a claim which he may prefer to assert by an independent action.

It was said in *La Farge v. Halsey*, 1 Bosw. 171,—where sureties on a lease claimed the benefit of, and sought to set off in a suit against them for rent due, a claim of the lessee against the lessor for damages,—that: "If, by reason of any fact stated as part of this defense, Laura Keene [the principal in the lease] might have set up a counterclaim or recoupment, these defendants cannot. She assigned no such claim to them, and without that they have no right to use what is in her a distinct cause of action, nor to any part of it for their benefit. If they are compelled to pay the rent, they must seek reimbursement from her, and she will have her recourse to the plaintiff for any damages she has sustained."

Waterman on Set-Off says: "An accommodation indorser of the note of a vendee of goods cannot, when sued on his indorsement, set up damages resulting to the vendee by a breach of warranty of the goods sold, unless, perhaps, in case of the insolvency of the vendee, or upon some other equitable ground, he be permitted to do so. If the vendee set up the claim against the note, he might recover the whole damages sustained by him. The indorser would have no control of that right of action. The vendee might enforce, assign, or release it. He might not choose to permit the indorser to have the benefit of it. The indorser could

not, under any view of the subject, make it available to effect more than the extinguishment of the plaintiff's claim. He would not be at liberty to so limit the rights of the vendee, and possibly preclude his obtaining full compensation for his damages; for the plaintiff could not be required to litigate the matter twice. These considerations show that an indorser, in virtue of his relation to the parties as surety for the maker, cannot protect himself by such set-off." This statement of the law is sustained by the case of *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 855.

This must be so, otherwise the principal would be deprived of his election, and be compelled to assert his demand by way of set-off when he might prefer, and it would best subserve his interest, to bring his independent action for its recovery. This case is an excellent illustration of the wisdom of the rule which gives the principal the right of election. The claim asserted in the rejected plea is for damages resulting from a breach of covenant of the right to convey. The breach occurred, if at all, according to the weight of American authority, as soon as the deed was made; and the grantee could at once bring his action without averring eviction or special damage. *Rawle*, Cov. Tit. §§ 59, 62; 2 Lomax, Dig. side page 266; *Dickinson v. Homes' Adm'r*, 8 Grat. 397 (Judge Moncure's opinion); *Leroy v. Beard*, 8 How. 451, 465, 12 L. Ed. 1151. If there had been no eviction, and no special damage had resulted from the breach of the covenant when the plea of set-off was filed, only nominal damages could be allowed; and yet it is well settled that a recovery of nominal damages for the breach of covenant of seisin or of the right to convey can be pleaded in bar of any subsequent action on that covenant (*Rawle*, Cov. Tit. § 178), although he may afterwards be evicted of the land which his grantor had no right to convey. If his claim for damages was set up by way of set-off, a recovery of nominal damages would equally bar any future action for the breach. By filing the plea of set-off, he is deemed to have brought a separate action upon the covenant, and he cannot again present a demand for its breach. *Huff v. Broyles*, 26 Grat. 285, 288, 289; 4 Minor, Inst. 798. It is a matter of consequence, therefore, to the grantee, that he shall not be deprived of his right to assert his claim for damages at such time as will best protect him from loss by reason of the breach of the covenant.

We are of opinion, therefore, that the plaintiff in error, the surety upon the bond sued on, ought not to be permitted to question the action of the trial court in rejecting the plea of set-off, of which the principal is not complaining.

The refusal of the court to grant a continuance upon the defendants' motion is assigned as error.

A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case, and, although an appellate court will review the action of the trial court, it will not reverse its judgment upon such motion unless plainly erroneous. *Payne v. Zell*, 98 Va. 204, 36 S. E. 379.

The case had been continued at a former term of the court for the defendants. Upon the plea of payment, which was the only plea in the case when the motion to continue was made, it was conceded that the defendants had no evidence to introduce. No sufficient ground—indeed, no legal ground at all—was shown why the case should be continued in order that the defendants might have further time in which to file additional pleas. The court's refusal to continue, instead of being plainly erroneous, was manifestly right.

We are of opinion that there is no error in the action of the circuit court of which the plaintiffs in error can complain, and that its judgment must be affirmed.

(100 Va. 764)

LISKEY v. PAUL.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

LIMITATION OF ACTIONS—PROMISE TO PAY—OBSTRUCTION OF PROSECUTION—PLEADING—MOTION AND NOTICE—TECHNICAL DEFECT.

1. Where, in proceedings by way of notice on motion, in a strictly technical view, a plea of limitations may not have gone to all the demands relied on by plaintiff, but the parties and court treated the plea of limitations as applicable to all of the claims sued on, and all were in fact barred by the statute, and the court so held, its judgment will not be reversed on appeal, though it were technically erroneous.

2. Code, § 2922, provides that, when one indebted on contract promises in writing to pay, limitations shall be computed from such date. A debtor claimed that there were matters between him and plaintiff which should be settled before payment, and that, if plaintiff would not sue until settlement, he would make the settlement, and pay any sum due. *Held*, that there was no promise within the statute, but merely a promise to pay an unascertained balance.

3. The debtor's conduct was not an obstruction, etc., within Code, § 2933, providing that, if a debtor obstruct the prosecution of a claim, the time during the continuance of such obstruction shall not be computed in reckoning limitations.

Error to circuit court, Rockingham county.

Action by Robert Liskey against Abram Paul. From a judgment for plaintiff, defendant brings error. Affirmed.

T. N. Haas and Liggett & Lurty, for plaintiff in error. J. B. Stephenson, for defendant in error.

BUCHANAN, J. The plaintiff in error gave notice to the defendant in error that on a day named he would move the circuit court of Rockingham county to render judgment

for the sum of \$602.11, "being the aggregate amount of several obligations" due from the defendant to the plaintiff, and which were described in the notice as three negotiable notes and one bond. The defendant appeared, and filed the plea of the statute of limitation to the notes sued on, and a statement of set-offs claimed by him. To the plea of the statute of limitations the plaintiff filed a special replication, which was afterwards amended. The court sustained a demurrer to the amended replication, and gave judgment for the defendant, with costs. To this judgment this writ of error was awarded.

The first assignment of error is that the "court erred in entering judgment upon the demurrer against the plaintiff for his whole claim, for the reason that the statute of limitations was pleaded only as to the promissory notes, and no plea was offered at all as to the single bill of \$120, upon which the court should have entered judgment" in favor of the plaintiff.

It is clear from the plea, replication, and orders of the court that both the parties and the court treated the plea as going to all the demands sued on. The bond mentioned in the notice, as well as the negotiable notes, were barred by the statute of limitations.

The proceeding by way of motion on notice is very informal, and was intended to do away with the necessity of formal pleading, except in cases where provision is made by statute requiring formal pleadings, as under section 3299 of the Code. In a case like this, where it is clear that the parties and court treated the plea of the statute of limitations as applicable to all of the claims sued on, and all were in fact barred by the statute, and the court so held, its judgment will not be reversed, though it were technically erroneous. It is error without prejudice, and the effect of a reversal would be to send the case back for a new trial, in which the statute of limitations to the bond could be formally relied on, and the result would be the same.

The second assignment of error is to the action of the court in sustaining the demurrer to the special replication to the plea of the statute of limitations.

The facts relied on in the replication were that the plaintiff had placed the claims sued on in the hands of his attorney for collection before any of them had become barred; that his attorney immediately notified the defendant of that fact, and demanded payment thereof; that the defendant then claimed that there were matters of settlement between him and the plaintiff, and requested the plaintiff's attorney not to bring suit upon the claim, and promised that he would in a reasonable time come, and make the settlement necessary to adjust the matters between the plaintiff and the defendant so as to ascertain the balance due, and that he would then pay the same; that the plaintiff, relying upon the request and promise of the

defendant to make such settlement, adjustment, and payment, agreed with the defendant that no suit should or would be brought upon the claims until such adjustment and settlement could be had between them; that those requests, promises, and agreements were repeated from time to time, and continued up to a few weeks prior to the institution of this proceeding; that, relying upon such requests, promises, and the agreement that no suit should be brought, the plaintiff did not bring suit upon the claims; and, although a reasonable time had elapsed before the institution of this proceeding after said requests, promises, and agreements were last renewed, yet the defendant did not make, or offer to make, the proposed settlements and adjustment, and the plaintiff was, by reason of the promises, obstructed in the prosecution of the said claims by suit until within one month prior to the institution of this proceeding.

The facts averred in the replication are insufficient to avoid the bar of the statute of limitations. They do not amount to a fraud, even if fraud could be relied on (and it is said it cannot) in a court of law to repel the bar of the statute of limitations. 4 Minor, Inst. (3d Ed.) 623, and cases cited.

Conceding that the promise or agreement set up in the plea were evidenced by a writing, as required by section 2922 of the Code, it would not be sufficient to take the demands sued on out of the operation of the statute of limitations. The defendant did not agree to pay the plaintiff's demands. He claimed that there were matters of settlement between the plaintiff and himself which should be settled before payment could be made, and that, if the plaintiff would not bring suit until such settlement could be made, he would come, and make the settlement within a reasonable time, and pay the balance ascertained to be due. This was at most only a promise to pay an unascertained balance, and is not sufficient under our decisions.

In *Sutton v. Burruss*, 9 Leigh, 881, 33 Am. Dec. 246, the facts relied on to take the case out of the operation of the statute were as follows, as stated by Judge Cabell in his opinion:

The original justice of the plaintiff's demand was admitted, but the defendant insisted that he had offsets against it, the nature and amount of which he did not specify. He said, however, he would settle fairly, and would not plead the statute of limitations. "The utmost," said the judge, "that even a jury could infer from all this is a promise to pay an unascertained balance. The balance might be one cent only, or it might be within one cent of the original amount of the plaintiff's demand. What it really was depended on testimony aliunde. This promise, then, certainly left the defendant exposed to all the inconveniences arising from the loss of testimony in relation to his offsets, and we cannot, therefore, give effect

to it, without frustrating the great object of the statute. This very case shows the evils of such a course; for here the promise relied upon was a promise to pay a part only of the demand, and yet the jury have given the whole." See *Aylett's Ex'r v. Robinson*, 9 Leigh, 45, 47-52; *Bell v. Crawford*, 8 Grat. 110; 4 Minor, Inst. (3d Ed.) 616.

Neither are the facts alleged in the replication sufficient to repel the bar of the statute under section 2933 of the Code, which provides that where any such right as is mentioned in chapter 139 of the Code (limitation of suits) "shall accrue against any person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

It is not averred that the defendant departed from the state, or absconded, or concealed himself, or by any indirect ways or means obstructed the plaintiff in the prosecution of his right. It is an everyday occurrence for a creditor to give his debtor further time upon his request and promise that he will pay the demand, or come to a settlement and pay the balance due. Such agreements cannot be said in any proper sense to be an obstruction of the plaintiff's right within the meaning of section 2933 of the Code.

Section 2922 of the Code provides within what period demands like those sued on must be brought. If they are not brought within that period, it would be frittering away the statute to allow the action to be brought after the time prescribed, unless the plaintiff can show that his case is one which the legislature has declared shall be excepted. *Troup v. Smith's Ex'rs*, 20 Johns. 33; *Morris v. Lyon*, 84 Va. 331, 333, 4 S. E. 734; 4 Minor, Inst. 615; *Angel, Lim.* § 485, etc.

We are of opinion that there is no error in the judgment complained of to the prejudice of the plaintiff, and that it should be affirmed.

(100 Va. 735)

BOUSH v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—INSTRUCTIONS—IGNORING EVIDENCE—BURDEN OF PROOF.

1. In an action for malicious prosecution, the question whether certain facts, if proven, constitute probable cause, is a question of law, but the question whether the evidence proves those facts is for the jury.

2. In an action for malicious prosecution for embezzlement, the jury were instructed that

if the defendant surety company had acted in the prosecution against plaintiff on the possession of certain information (detailing it) showing embezzlement by the plaintiff, then it acted with probable cause, and was not liable. There was other evidence, ignored in the instruction, tending to show that the company caused plaintiff's arrest after notice of an agreement between the plaintiff and his employer whereby, as to the sums alleged to have been embezzled, the plaintiff had 90 days to pay the sum alleged to have been embezzled, which time had not expired at the time of the arrest. *Held*, that the instruction was erroneous, as taking material evidence from the jury.

3. In an action for malicious prosecution the burden of proving absence of probable cause for the prosecution is on plaintiff.

Error to chancery court of Norfolk.

Action by James T. Boush against the Fidelity & Deposit Company of Maryland. Judgment in favor of defendant, and plaintiff brings error. Reversed.

D. Tucker Brooke, for plaintiff in error.
Walke & Old, for defendant in error.

WHITTLE, J. This action was brought by the plaintiff in error against the defendant in error to recover damages for an alleged malicious prosecution, charging the plaintiff, as agent, at Norfolk, Va., of the Fidelity & Casualty Insurance Company of New York, with the embezzlement of certain moneys, the property of his principal.

There was a verdict for the defendant, which the plaintiff moved the court to set aside upon the ground that it was contrary to the law and evidence, and also for misdirection of the jury by the court.

Both motions were overruled, and the plaintiff excepted.

The view taken by this court of the questions involved renders it necessary to consider only the last assignment of error.

At the trial, after a number of instructions had been given to which no exception was taken, the court, on motion of the defendant, and over the objection of the plaintiff, instructed the jury as follows:

"The court instructs the jury that if they believe from the evidence that the Fidelity & Deposit Company (the defendant) was notified in writing by the Fidelity & Casualty Company on April 21, 1898, that the plaintiff, under bond No. 28,701, was short in his accounts to that company, and that it would send to the Fidelity & Deposit Company a detailed statement as soon as possible, and that the bond No. 28,701 was the bond on which the Fidelity & Deposit Company was surety for the plaintiff, and that on April 28, 1898, the Fidelity & Casualty Company did send a detailed or itemized statement of its claim, showing the date and number of each policy, the name of the assured, and the premium misappropriated, or alleged to be misappropriated, making a total shortage, of a total shortage as alleged, of \$1,474.12, and that the Fidelity and Deposit Company on April 29, 1898, replied as follows:

"We are in receipt of your letter of April

¶ 1. See *Malicious Prosecution*, vol. 33, Cent. Dig. 161.

28th, inclosing to us what purports to be an itemized statement of an alleged shortage in the accounts of Jas. T. Boush, bonded by us under our form D, 28,701.

"We return this statement herewith, and would ask you, in accordance with the terms of our said bond, to have the proper officer of your company make affidavit to the statement in the following manner, viz.: That the annexed statement is true and correct in every respect, and that the moneys represented by the several items were collected from the respective persons upon the respective dates, and were misappropriated by the said Boush to his own use, and not paid over or accounted for by him, notwithstanding due and legal demand had been made upon him by the said Fidelity and Casualty Co.'s authorized officer.

"As soon as the affidavit is completed,—please return the statement, with the affidavit attached, to this office, and we will take up same, through the proper channel, for investigation."

"And that on May 3, 1898, the Fidelity & Casualty Company replied to the Fidelity & Deposit Company, returning the itemized statement, verified by one of the officers of said company, in accordance with the request of the Fidelity & Deposit Company, and that upon further inquiry or investigation made by the said Fidelity & Deposit Company the said amount of \$1,474.12 for premiums collected by the plaintiff for January, February, and March, 1898, was confirmed, and that at the time of the prosecution the time which had been allowed by the Fidelity & Casualty Company to the said plaintiff on the payment of the premiums collected by him had expired, as to an amount of the said sum of \$1,474.12 as great or greater than the amount of \$384.34 charged in the warrant, and upon which the prosecution was based,—then the said Fidelity & Deposit Company had probable cause for believing the plaintiff guilty of the charge made against him in the prosecution, and is not liable to the said plaintiff in this action."

Whereupon "counsel for plaintiff asked the court whether, in view of the granting of said instruction, counsel for the plaintiff might argue to the jury any other facts not recited in the said instruction as to which there was testimony before the jury as showing want of probable cause, and especially whether he might argue to the jury to show want of probable cause for said prosecution; the testimony tending to show that a credit had been given by the Fidelity & Casualty Company of New York to the plaintiff of 90 days upon premiums he might collect for the said company, and that when the warrant for the arrest of the said Jas. T. Boush upon the charge of embezzlement in the declaration mentioned was about to be issued by the police justice at the instance and upon the information of the said defendant by W. B. Lyons, its agent, a question of a 90-day credit arose, and the said

police justice asked the said W. B. Lyons if he had not better see his counsel. To which said question of counsel the court replied that the meaning of the instruction aforesaid was that the facts therein recited, if they were true, constituted probable cause on the part of the defendant for instituting the said prosecution, irrespective of the existence, if they did exist, of the facts alluded to by counsel for the plaintiff in formulating his said question to the court, and that the said counsel could not argue to the jury that the existence of those facts constituted want of probable cause for the prosecution, if the facts stated in the said instruction were proved."

The question of probable cause embraces a mixed proposition of law and fact. Whether the evidence relied on, if true, establishes facts which amount to probable cause, is a question of law for the court; but whether such evidence is true is a question of fact, for the jury. It is permissible, therefore, for a court to instruct the jury that certain facts and circumstances, if they exist, are sufficient to constitute probable cause. But it is not permissible for a court to submit the question of the existence or nonexistence of such facts and circumstances to the jury, either upon a partial enumeration of them, or upon a part only of the evidence relevant to that issue.

To illustrate, an instruction which tells the jury that certain evidence adduced by the defendant, if true, establishes facts and circumstances which amount to probable cause, omitting other material elements entering into that question, and ignoring the countervailing evidence of the plaintiff relevant to that issue, is erroneous. The proposition is obvious, and does not require elaboration. Such an instruction comes within the proscription of that line of decisions which hold that an instruction must not call special attention to a part only of the evidence, and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue. *Railroad Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593; *Montgomery's Case*, 98 Va. 852, 37 S. E. 1.

There was evidence tending to show that the defendant, before the institution of the prosecution against the plaintiff, knew of the existence of a convention between the Fidelity & Casualty Insurance Company of New York and the plaintiff by which the relations between them, in respect to the premiums alleged to have been embezzled, were changed from those of principal and agent to those of creditor and debtor; and that circumstance had an important bearing upon the question of probable cause, and ought not to have been excluded from the instruction, and (with the evidence tending to establish it) from the consideration of the jury.

In an action for malicious prosecution the burden rests upon the plaintiff to prove affir-

matively the absence of probable cause,—a burden impossible to be borne unless the court takes cognizance of plaintiff's theory of that question, if material, and the jury are permitted to consider the evidence upon which it is based.

The instruction complained of, regarded, as it must be, in the light of the interpretation and subject to the limitations placed upon it by the trial court, violates the principles referred to, and is therefore erroneous.

As a new trial has to be awarded, no opinion is expressed as to the weight of the evidence.

The judgment complained of will be reversed and annulled, the verdict of the jury set aside and the case remanded for a new trial to be had not in conflict with the views herein expressed.

BUCHANAN, J., absent.

(100 Va. 719)

CONSUMERS' ICE CO. v. JENNINGS.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

WRITTEN CONTRACTS — INTERLINEATION — BURDEN OF PROOF—PLEADING—SURPLUSAGE — TRIAL—EXCLUSION OF ANSWERED QUESTION—DAMAGES—PROSPECTIVE PROFITS.

1. Where the declaration stated that plaintiff sued for the use and benefit of himself as trustee, and the action was based on a written contract between plaintiff and defendant, there was no variance between the pleadings and the instrument sued on, inasmuch as the statement that suit was for the benefit of plaintiff as trustee was surplusage.

2. Testimony that interlineations in a written contract were made before it was signed and delivered is sufficient foundation for the introduction of the writing in evidence.

3. Exceptions to refusal to allow a witness to answer certain questions cannot be considered where it does not appear what was proposed to be shown by the witness.

4. Where, on objection, a question which had been answered was ruled out, but it did not appear from the bill of exceptions that the answer was ruled out, also, the answer cannot be considered as having gone to the jury; the ruling out of the question carrying the answer with it.

5. A custom of trade cannot change the intrinsic character of the contract of parties who are ignorant of such custom.

6. In an action on a written contract, parol evidence is not admissible to show that an entirely different contract was intended by the parties.

7. By written contract, defendant agreed to furnish plaintiff ice, and plaintiff agreed that the ice was to be sold from his ice box, and not from his wagons on the street. The word "his" was interlined. The court instructed that any material alteration after delivery would render the contract void, unless subsequently ratified; that, if the jury believed that the alteration was made before delivery, they should find for plaintiff, but if after delivery, for defendant. The charge further stated that, if the word "his" was interlined before delivery, the plaintiff had a right, under the contract, to sell ice to any one, though he might expect the purchasers to peddle the ice from their own wagons. *Held*, that the instructions were correct.

8. Defendant agreed to sell plaintiff ice, and plaintiff contracted with others to sell the ice to them at a profit. Plaintiff sued for defendant's failure to deliver the ice. The prospective purchasers from plaintiff testified as to the amount of ice they could expect, from their past experience, to dispose of. *Held*, that the plaintiff's loss of profits was shown with sufficient certainty to afford a basis for damages.

9. In an action on a written contract, where it was a vital question whether or not a certain interlineation, materially altering the contract in plaintiff's favor, was made before or after signing and delivery, the burden of proof was on plaintiff to show, by a preponderance of the evidence, that alterations were made before the signing and delivery.

Error to law and equity court of the city of Richmond.

Action by R. T. Jennings against the Consumers' Ice Company. From a judgment for plaintiff, defendant brings error. Reversed.

Henry R. & Jno. G. Pollard, for plaintiff in error. A. B. Dickenson and C. V. Meredith, for defendant in error.

HARRISON, J. This suit was instituted by R. T. Jennings, suing for the benefit and at the risk and cost of himself, as trustee, against the Consumers' Ice Company, to recover damages for a breach of the following contract, dated April 3, 1900:

"I hereby agree to furnish Mr. R. T. Jennings what ice he needs, at \$5.00 per ton of 2,000 pounds, in quantities of one ton or more, one year from the above date. The said ice is to be sold from his ice box, and not from his wagons on the street. Jos. S. Montgomery, for Consumers' Ice Company."

Two of the words appearing in this contract were interlined, viz., the word "ice," the eleventh word in the contract, and the word "his," immediately preceding the word "wagons," in the last line of the contract. The result of the trial was a verdict and judgment for \$1,500 in favor of the plaintiff, to which judgment a writ of error was awarded, bringing the case, for review, to this court.

The demurrer to the declaration was properly overruled. The contention made in its support is that the suit should have been brought in the name of R. T. Jennings alone, and not in his name for the benefit of himself as trustee; that R. T. Jennings, trustee, being the beneficial plaintiff, and the contract of which profit is made being with R. T. Jennings, constitutes a fatal variance between the declaration and the instrument sued on.

The beneficial interest under the contract was vested in R. T. Jennings as trustee, and, as such trustee, he was the real plaintiff in the suit. The contract being with R. T. Jennings, in him was vested the legal title to the benefit of the contract; and therefore the suit was properly brought in his name, for the use of the beneficial plaintiff.

¶ 9. See *Alteration of Instruments*, vol. 2, Cent. Dig. § 244.

The declaration contains a full and accurate description of the contract sued on. The insertion therein of the clause that the suit was for the benefit of R. T. Jennings, trustee, was not necessary. It is no part of the pleading, and therefore cannot be objected to as a variance. *Clarksons v. Doddridge*, 14 Grat. 42; *Faddeley's Adm'r v. Williams' Adm'r*, 96 Va. 397, 31 S. E. 515.

In the latter case, Judge Buchanan says: "It is usual, when an action is brought in the name of one person for the benefit of another, to state that fact in the body of the declaration, or to indorse it thereon, or on the writ. It is useful and convenient to do so, to give notice to the defendant of the rights of the beneficial plaintiff, and to enable the court to protect him by its orders, but this is not necessary. The statement is no material part of the pleading. The cause of action is complete without it, because he is not a party on the record."

Objection is further made to the action of the court in allowing the introduction of the paper without sufficient evidence to remove the suspicion attaching to the interlineations therein.

The court required the interlineations to be explained by the plaintiff, who testified that they were made before the paper was signed and delivered. This is usually regarded as sufficient foundation for the introduction of an interlined paper; the final issue, where the time of interlineation is controverted, being for the jury.

Bills of exception Nos. 2 and 4, which are taken to the action of the court in refusing to allow the witness Montgomery to answer certain questions propounded by the defendant, cannot be considered, because what was proposed to be shown by the witness is not given, and therefore the court cannot judge of its materiality. *Insurance Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Driver v. Hartman*, 96 Va. 518, 31 S. E. 899.

It appears from bill of exceptions No. 3 that the witness Montgomery, introduced on behalf of the defendant, was asked the following question: "You say you have known contracts containing clauses similar to this one, —'to sell from ice box.' What is the custom of trade as to their understanding of that?" To which question the witness answered as follows: "It means that the purchaser may sell ice from his ice box only, and at retail only,—say, from two pounds up to one hundred pounds,—and a man who runs an ice box is never supposed to use more than a ton a day." The court ruled out the question, but the bill of exception fails to show that the answer was ruled out, as well, and it is contended that the answer must be considered as having gone to the jury. This is a technical view, and cannot be sustained. The question being ruled out, the answer went with it. The jury could hardly be pre-

sumed to have considered the answer to a question that was ruled out by the court in its presence.

It appears from the evidence that during the month of March, 1900, the ice companies of Richmond entered into an agreement not to sell ice to persons who would peddle the same on the streets. This agreement went into effect for the first time on the 1st day of April, 1900. Prior thereto they had sold without such restriction or limitation. The contract sued on bears date April 3, 1900, leaving but one intervening day. It is not likely that in so short a time a custom of trade would spring up, and become so general and well established as to have any legal effect upon the contract under consideration. But apart from this, a custom of trade cannot change the intrinsic character of the contract of the parties, who are ignorant of such custom. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234. In the case cited, it is said to be an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. There is no evidence that the plaintiff knew of the custom mentioned. The witness Montgomery, who signed and delivered the paper on behalf of the defendant, does not, in his answer, say that there was such a custom as that suggested by the question, but proceeds to interpret the paper, and to show that an entirely different contract was intended from that which was reduced to writing by the parties and offered in evidence. This was not permissible, and the question and answer were properly ruled out.

Bill of exception No. 5 is to the action of the court in giving and refusing certain instructions.

Two instructions were given for the plaintiff, marked, respectively, Nos. 1 and 4, both of which were objected to by the defendant. No. 1 must be read in connection with instruction "f," which was given for the defendant. These two instructions, taken together, told the jury that any material alteration in the terms of a written contract, after it has once been made and delivered, will render the contract void as to any party who did not know of and consent to the alteration at the time it was made, unless such person has in some manner subsequently ratified the act; that they must determine from the evidence whether the word "his," interlined in the contract, was put there by J. S. Montgomery before the plaintiff finally accepted the contract, or whether such interlineation was made after the paper was signed by the defendant, and without his knowledge or consent; that, if they believed that the interlineation was made before the signing and delivery, they must find for the plaintiff, but, if they believed it was made after the execution and delivery, they must find for the defendant.

The jury are further told that, if they believe the word "his" was interlined before the signing and delivery, then, under the contract, with the word "his" as part thereof, the plaintiff had the right to sell ice to any one he might desire, although he might know and expect the purchasers to peddle the ice from their own wagons, and that the defendant was not justified, because the plaintiff made such sales, in refusing to deliver under the contract such ice as the plaintiff might order, and that, if the defendant did refuse to deliver any more ice to the plaintiff because he sold to persons who would peddle the same from their wagons, it was a breach of the contract by the defendant, and they must find for the plaintiff.

Taking the language of the contract, and the usual and ordinary import of the words used, the construction given by the lower court appears to be free from objection, and there was no error to the prejudice of the defendant in instruction No. 1 given for the plaintiff.

Instruction No. 4 for the plaintiff, which is objected to, and instructions "b," "c," and "d" offered by the defendant, and refused, are all addressed to the measure of damages recoverable in the event the jury should find for the plaintiff. It appears from the evidence that, after entering into the contract here involved, the plaintiff made contracts with several parties in the ice business to sell them ice at a profit of \$1 per ton on its cost price, as fixed by the contract. Among those contracted with by the plaintiff were Ford, Burley, and Crabbins, each of whom agreed to take ice at \$6 per ton. Instruction No. 4 limits the recovery to the loss sustained by the failure of Jennings to fill his contract with these three parties, each of whom testified to the amount of ice which he could reasonably expect, from his past experience in the ice business, to dispose of. It thus appears that the profits were certain, and the amount thereof a matter of simple calculation.

In *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4, it is said that: "In ascertaining damages where there is an interference with or a withholding of property, or a breach of contract, the gain prevented, if provable, may be recovered. Profits which are the difference between the agreed price of something contracted for, and its ascertainable value or cost, are recoverable." See *Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525; and *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723.

In the light of these authorities, instruction No. 4 correctly stated the law applicable to the case; and instructions "b," "c," and "d," which told the jury, in varying form, that the plaintiff could not recover as damages any profits which he should have received from his resale of the ice to other parties, were properly rejected.

The remaining assignment of error to be

considered is the action of the court in refusing instruction "a" asked for by the defendant, and modifying instruction "g."

Instruction "a" was as follows: "The court instructs the jury that the alteration on the face of the instrument offered in evidence by the plaintiff detracts from its credit and makes it suspicious, and this suspicion the plaintiff was bound to remove by a preponderance of evidence."

The modification of instruction "g" was "that there is no extra burden on the plaintiff to show that the contract was not altered by the insertion of the words 'ice' and 'his,' for on that question the burden of proof is equal."

The contract in question was executed and delivered to the plaintiff on the 3d day of April, 1900, and remained in his possession until produced on the trial. The interlineation of the word "ice" does not appear to have been material, but the interlineation of the word "his" changes the whole meaning of the contract. Without the word "his," the plaintiff was limited to selling by retail from his ice box. With the word "his" interlined, he was only excluded from selling from his own wagons on the street, but his right to sell by wholesale to other wagons, to be peddled on the street, was without restriction. It was therefore a vital question whether or not the interlineation of the word "his" was made before or after the contract was signed and delivered.

The burden is always upon the plaintiff to make out his case, and to establish by a preponderance of evidence every fact necessary to a recovery by him. The case at bar forms no exception to the general rule. In the case of an altered paper, if objected to on that ground, it cannot be introduced at all until sufficient foundation therefor has been laid to satisfy the court as to the propriety of letting it go before the jury. As already stated, the introduction of the paper is usually allowed upon the statement of the plaintiff that the interlineation was made before it was signed and delivered. But this action of the court in admitting the paper does not affect or shift the burden of proof when the fact is controverted, and there is a contest before the jury. In such case the burden is upon the party having possession of the instrument, and claiming under it, to satisfy the jury by a preponderance of evidence that the alteration was made under such circumstances as not to affect his right to recover. *Priest v. Whitacre*, 78 Va. 151; *Elgin v. Hall*, 82 Va. 680; *Hodnett's Adm'r v. Pace's Adm'r*, 84 Va. 873, 6 S. E. 217; *Slater v. Moore*, 86 Va. 26, 9 S. E. 419. Instruction "a" asked for by the defendant should have been given, and it was error to make the addendum mentioned to instruction "g." Instruction "e" touching the same subject, asked for by the defendant, was properly refused.

For the error in refusing instruction "a"

and adding to instruction "g," the judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial.

BUCHANAN, J., absent.

(100 Va. 749)

HUMPHREYS' ADM'X v. VALLEY R. CO.
(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

RAILROADS — PERSONAL INJURIES — PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY.

1. Where the verdict of the jury in favor of plaintiff was set aside, and a new trial granted, plaintiff taking a bill of exceptions to such action of the court, and on the second trial plaintiff introduced no evidence, and judgment was entered against him, a writ of error to the judgment raised only the question of the propriety of the setting aside of the first verdict.

2. Regardless of whether a trespasser on a railroad track has been guilty of contributory negligence, the company is bound to do all it consistently can, after discovering his peril, to avoid injuring him.

3. A railroad engineer has a right to presume, until the contrary is indicated, that a pedestrian on the track will take the ordinary precautions for his own safety.

4. Plaintiff's intestate negligently attempted to walk upon and across a railroad track, with full knowledge that a train was approaching. There was nothing in his appearance to indicate to the engineer that he would not take due precautions for his safety, and, as soon as the engineer discovered that he was likely to be in danger he reversed the engine, sanded the track, and put on full air. He testified that he could not do all these things, and at the same time sound the alarm whistle, and that the means he took were far better calculated to save the deceased than to have sounded the whistle, though on this point there was some dispute. *Held*, that there was nothing in the evidence to warrant a conclusion that the engineer, after discovering the peril of deceased, negligently failed to do all he could to avoid the accident which followed.

Error to circuit court, Augusta county.

Action by Emma J. Humphreys, as administratrix, against the Valley Railroad Company. Judgment in favor of defendant, and plaintiff brings error. Affirmed.

Curry & Glenn and A. C. Braxton, for plaintiff in error. J. J. L. & R. Baumgardner, for defendant in error.

CARDWELL, J. Emma J. Humphreys, administratrix, brought her action in the circuit court of Augusta county against the Valley Railroad Company for the recovery of damages by reason of the death of her intestate, William A. Humphreys, which she alleges was caused by the negligence of the defendant company.

At the November term, 1900, the case was tried by a jury, which rendered a verdict in favor of the plaintiff for \$4,600, and upon motion of the defendant the verdict was set aside, as being contrary to the law and the evidence. At the May term, 1901, the case was again tried, and, no evidence being offered by the plaintiff, a verdict was rendered

in favor of the defendant, upon which the court entered judgment. At the first trial the plaintiff took only one bill of exceptions, and that was to the action of the court in setting aside the verdict and awarding a new trial. Therefore the only question for our consideration now is the propriety of the court's action in setting aside the first verdict. *Marshall's Adm'x v. Railroad Co.*, 99 Va. 798, 34 S. E. 455; *Chapman v. Investment Co.*, 96 Va. 177, 31 S. E. 74.

The deceased was a man 67 years of age, active, energetic, in good health, of ordinary intelligence, in possession of the senses of sight and hearing,—“a little deaf, but could hear an ordinary conversation.” For three years prior to the accident out of which this suit arises, and which resulted in injuries to him from which he died in a few days, the deceased had lived within about 300 yards of the place where the accident occurred, in full view of the railroad and of the surroundings of the place of the accident.

The train which struck the deceased was a scheduled freight train with passenger coach attached, made up with the engine and tender, 12 loaded cars, 1 empty, and the passenger coach, and reached Verona station, where the accident occurred, about 15 minutes behind its scheduled time. On the afternoon of the day of the accident, October 17, 1899, a bright, clear day, the deceased left Staunton, and drove in an open one-horse surrey, with his wife, along the Valley turnpike, which for a considerable distance south and towards Staunton from Verona station is near to, and nearly parallel with, the Valley Railroad. On reaching the point where the road upon which the dwelling of the deceased is situated, and which crosses the railroad at Verona station, intersects the turnpike, he turned into the road leading to his dwelling. From the point where the turnpike and the road from the turnpike to decedent's dwelling intersect, the Valley Railroad is in plain view, and the view of it is unobstructed from every point on the road into which the deceased turned, from its intersection with the turnpike to its intersection with the railroad, except a partial obstruction for a short distance by a house standing on the corner at the intersection, and a small stable near the railroad. The deceased drove from the turnpike across the railroad, stopped just beyond or east of the railroad track at a point where the rear end of his surrey was about 19 feet from the center of the railroad track. While he was driving from the turnpike to the railroad crossing, William Harris, in a two-horse wagon, was driving the same road, meeting him, and in plain view of him, “whipping his horses crossing the track.” Harris stopped immediately at the corner of the depot, very near the track and the crossing, and just as he “stopped and was tying his lines in order to get out and stand at his horses' heads,” the deceased drove by towards the

railroad, "hurrying his horse up." At that time the train was approaching in full view of Harris, and necessarily so to the deceased if he looked at all for an approaching train. After stopping on the east side of the railroad track, 19 feet from it, as stated, the deceased got out of his surrey on the right or south side, in the direction from which the train was approaching, and, according to plaintiff's witnesses, walked back to the railroad track at a point a few feet from the crossing, turned down the track toward the depot, walking on the ends of the ties a short distance, and then stepped over inside of the track, and, after taking five or six steps, was struck by the engine; but, according to defendant's witnesses, after getting out of his surrey to the right, facing the approaching train, the deceased walked diagonally to the railroad track, as if he was going directly across the track to the door of the store in the depot, and had gotten but one foot on the track when he was struck by the engine. The distance from the surrey to where deceased was struck—the nearest diagonal route—is about 60 feet, and from the crossing to where he was struck is about 45 feet. When he got upon the ends of the ties nearer the crossing (if the plaintiff's view that he got on the railroad at that point be correct), the train was 40 or 50 yards, only, from him. There were a number of persons at and around the depot when the accident occurred, and all of them saw the approaching train for some distance before it got near the crossing, the track being straight, and the view of it being unobstructed for 700 or 800 yards. One or more of these persons, seeing his danger, threw up their hands, and yelled to deceased to warn him of the approach of the train. His wife, whom he had just left, seeing that he was continuing on the railroad track, or about to step upon it in front of the approaching train, attempted to warn him of his peril by "screaming" to him, but he either did not hear or see any of these warnings, or, disregarding them, continued toward the store door in the depot for the purpose of getting his mail.

With the exception as to the route taken by the deceased from his surrey to the point at which he was struck by the engine, the foregoing facts are not controverted.

Verona station was not a regular stopping point for the train in question, but it stopped there only on signal to put off or to take on passengers or freight; and, according to the evidence given by all of the defendant's employes on the train, the whistle was blown at the whistling post a few hundred yards south of the station, and the signal for stopping the train at the station, given by the conductor from the passenger coach through the two brakemen on the train and the fireman to the engineman, was answered by two short blasts of the whistle; and this is corroborated by other witnesses in the vicinity, in full view of the train, and but a short

distance away, one of them watching the train from a window. On the other hand, some of the plaintiff's witnesses say they did not hear the whistle, while others say that the whistle was not blown, nor was the bell rung.

The plaintiff, the wife of the deceased, rested her case upon her own evidence; that of her daughter, Mrs. Dunsmore, who was about 300 yards from the railroad, and one Faidley, who was standing at the store door, facing the depot platform.

It is too well settled to require citation of authority that, if the proximate cause of the plaintiff's intestate's death was his own negligence concurring with the negligence of the defendant, there can be no recovery; and in the able argument of her case here it is frankly said: "It is fully conceded by the plaintiff that Humphreys was negligent by being on the track without looking and listening for the train." This would have been true if the deceased had been struck at the crossing, but, as we have seen, he was struck at a point on the defendant's track where he had no right to be, whether he got on the track near the crossing and walked down it or stepped on it in front of the engine, and was there without taking any precautions for his own safety; for it is conclusively shown that, if he had looked or listened for an approaching train, as it was his imperative duty to do, he would have known of the approach of the train which struck him in ample time to have kept out of all danger of being struck by it. He was, therefore, a naked trespasser; and the defendant, notwithstanding it may have failed to give warning of the approach of the train, owed him no duty, save and except to do all that could be done, consistently with its higher duty to others, to save him from the consequences of his own negligent act, after his peril was discovered, regardless of whether he was guilty of contributory negligence or not. *Railroad Co. v. Joener's Adm'r*, 92 Va. 354, 23 S. E. 773, and authorities cited. See, also, *Wood's Case*, 99 Va. 156, 37 S. E. 846, and authorities cited.

In considering the question whether or not the defendant has been guilty of such negligence, in this respect, as to render it liable for damages, it is to be borne in mind that the case is not before us as upon a demurrer to evidence, since the trial judge set aside the verdict, and some latitude must be allowed to his discretion. It is also true that the verdict of the jury is entitled to great respect, and should not be disturbed, even by the trial court, unless plainly against the weight of evidence. *Marshall v. Railroad Co.*, *supra*.

The contributory negligence of the deceased having been established,—in fact conceded,—the burden of proof was immediately placed upon the plaintiff to establish that the defendant, by the exercise of ordinary care and diligence, could have avoided injuring

nim after it discovered his peril. *Railway Co. v. Bruce's Adm'r*, 97 Va. 93, 33 S. E. 548, and authorities cited; *Railway Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Railroad Co. v. Joyner*, supra.

Very shortly after the deceased left his surrey, he was concealed from the view of Mrs. Dunsmore by a pile of ties on the side of the railroad, and, the horse to the surrey in which the plaintiff was sitting having taken fright at the train, and run off, Faidley is the only witness examined for the plaintiff who claims to have seen the whole occurrence.

Faidley, a stranger in that locality, by occupation a painter, happened to be in the neighborhood on the occasion of this accident, and drove to Verona station in a buggy, hitched at the back porch to the west of the railroad track, and walked through the store to the door facing the railroad. His statement is: "I seen this train coming, but, in the first place, I saw the old man get out of the buggy, come behind the buggy, between the buggy and the track, and walk to the track, and step on the track. It looked to me like he was going to cross over, about three feet the other side of the crane, between the crane and the crossing. He stepped upon the end of the ties, walked down about even with the crane, I suppose, and stepped over inside the track, half bent over, looking down neither to the right nor to the left; and I seen the train coming. I reckon * * * it was 40 or 50 yards from the old man when he stepped upon the ties,—when he first stepped upon the ties." He further says that Humphreys, after taking three or four steps upon the ties, then stepped over on the inside of the rail, the east rail, "looked like he sorter blundered, walked stiff; that the train was approaching very close then, and, after taking five or six steps, the train struck him; and that he [witness] did not think that Humphreys was in any danger when the train was 40 yards from him,"—that is, when he stepped upon the end of the ties, about 3 feet from the crane, which is 23 feet from the point where he was struck. So that, when the witness thought the deceased was in any danger, the train was necessarily nearer to him than 40 yards, running on a downgrade of not less than 4 or 5 feet to the mile, and at a speed of at least 8 or 10 miles per hour, according to the weight of the evidence.

The engineman in charge of the train, shown to be a competent and efficient employé, upon seeing the deceased leave his surrey and start towards the track, was entitled to presume that he was a person of sound mind, in possession of the ordinary human faculties, would exercise reasonable care and prudence in avoiding danger, and would not get on the track, or go so near to it as to be in danger from the passing train, without looking or listening to see that he could safely do so, and, if actually on

the track, would get off of it in time to avoid injury. He (the engineman) was entitled to act upon this presumption until it became apparent to him, as a man exercising ordinary prudence, that the deceased was about to get upon the track, or dangerously near to it, or would keep on the track, without taking the precautions required of him for his own safety. This is conceded to be the general rule, with the qualification that, "if there is anything about the appearance of the person, or other circumstances, indicating to the engineman that such person is not conscious of the danger," the rule does not apply.

While this qualification is, in the abstract, proper, there is nothing whatever in the evidence to show that the appearance of the deceased was such as to indicate to the engineman that he was not conscious of his danger. Faidley says that he was walking "tolerably quick," or "going along at a pretty good lick." True, some of the witnesses say that "he was limping; walking all bent up with his head down"; that he seemed "to be bewildered"; "It looked like something was wrong"; and that the railroad hands who were at the depot in front of the deceased waived their hands and shouted to him. But none of them say that these things were apparent to the engineman. These witnesses being within a short distance only of the deceased, it cannot be assumed that what was apparent to them was also apparent to the engineman on the train. Besides, the throwing up of hands and "shouting" to the deceased necessarily did not take place until it was apparent to the witnesses that he was in danger, and, according to Faidley's view, he was in no danger until the train was near to him,—certainly much less than 40 yards; and, in fact, to use the witness' own words, "the train was approaching very close." Therefore these circumstances do not warrant the application of the qualification of the rule of law just stated.

With the view of stopping the train at the depot to put off passengers, the air brakes had already been applied, and the speed of the train reduced, according to plaintiff's witnesses, to 8 or 10 miles per hour.

The statement of the engineman is that, when approaching the crossing, he realized that the deceased was getting in danger, and reversed his engine, put the air on full, put sand on the track, and gave the engine steam to resist the speed of the train. The train was on a downgrade, and, the appliances for stopping it having been put in use, it was drifting. He then explains that, the air brakes having been applied for the stop at the depot as was intended, the emergency brake could not be applied with as much effect; that he could not reverse his engine, put the air on full, and sand the track, and at the same time sound the alarm whistle. According to his view, the means he used were far better calculated to give the de-

ceased a chance to escape injury than sounding the alarm whistle. This statement of the engineman as to his efforts to stop the train is corroborated by all the employes on the train. The only variance between their statement and his is, the fireman says that the engine was reversed, and the sand put on at the cattle guard, a little south of the crossing. The four expert enginemen examined, two of whom were called by the plaintiff, concur in stating, in substance and effect, that, after it became apparent that the deceased was, or likely to be, in danger, it was impossible to stop the train before it struck him, and the only criticism they make of the action of the engineman was his failure to sound the alarm whistle; but none of them undertake to say that that would have had the effect of causing the deceased to keep off the track, or to get off if he was already on it. Some of them do say that it usually has that effect, but this is entitled to little or no weight, since the plaintiff's witness Faidley, who saw the whole occurrence, says "that, if he [deceased] could have seen at all, he would have seen the train." Therefore he knew the train was coming; and if it was his purpose, as would seem to have been the case, to continue on the track until he reached the point where he intended to get off, or to cross over the track before the train reached him, it is not at all probable that the alarm whistle would have changed his purpose.

The statement of the engineman, corroborated as before stated, that he did everything in his power to stop the train when he realized that the deceased was in danger, or about to get in danger, is alone controverted by the statement of the witness Faidley, who was standing at the store door, in front of which deceased was struck, watching at the same time the deceased and the train approaching, directly in line of his vision; and he undertakes to say that the engine was not reversed, the air put on, nor the track sanded until deceased was struck. In that position it was impossible for Faidley to know from observation what was being done on the engine, and the only grounds upon which he could claim to be an expert were that years ago, before air brakes were used on a train like this, he worked five years as brakeman on a freight train and three as fireman. Moreover, circumstances to which he and others testify do not bear out this theory of his. The deceased was struck in front of the store door, where Faidley was standing, and carried a few feet, only, on the cowcatcher, when he rolled off to the right. Only 5 or 6 of the 14 cars in the train passed Faidley before the train stopped; and when it stopped, he, as well as others, walked over from the depot platform on the narrow platform between the freight cars, and looked down at deceased, lying but a few feet nearer the engine than they were; and, although the train was to stop

to put off passengers, the passenger coach was standing, when it stopped, south of the platform, which shows unmistakably that the efforts made by the engineman to stop the train were made before it struck deceased, notwithstanding the opinion of the witness Faidley to the contrary.

It is claimed, however, that defendant's witness, Peters, says that the train did not stop "a bit quicker than it would have stopped anyhow"; that, if the deceased had reached the point of collision "a second earlier or the train a second later," the accident would not have happened. Conceding that the witness is correctly quoted, what he says is to be interpreted in the light of all that he says, and it is to be borne in mind that he was testifying from the point of view of himself and eight or nine other witnesses, that the deceased approached the track diagonally from his surrey, bent on crossing it before the train reached him; and therefore the witness meant that, if the deceased had been a second earlier, or the train a second later, he would have accomplished his purpose. What the witness says is directly opposed to the statement of the witness Faidley that the efforts to stop the train were made after the deceased was struck, and corroborates the engineman in his statement that he was doing all he could to stop it.

In no view that can be taken, even of the plaintiff's evidence alone, aided by just inferences to be drawn therefrom, can it be reasonably claimed that the deceased should have been regarded by the engineman as being in a position of danger, until he stepped over between the rails, and continued to walk down the track. Then the train was not over 30 yards from him, and, according to the witness Faidley, claiming experience in such matters, it required 50 yards by sanding the track to stop it.

Stress is laid upon the statements of Barrett and Denton, expert enginemen, introduced in rebuttal by the plaintiff, as to what effect upon the deceased the sounding of the whistle would have had. The sum and substance of what the second-named witness says is in answer to the question: "In your opinion, if the whistle had been sounded, what would have been the result?" and his answer is: "Well, sir, I could not say. I am no prophet, but it naturally would call the man's attention, if he is not deaf and dumb, and would cause him to step off to one side or the other. I don't know what would have been the circumstances in this case. That is a very natural thing to suppose. That is what the whistle is there for."

The witness Barrett, after stating that his experience had been that when a person was on the track, and the whistle was sounded, he would jump to one side of the track, was asked: "Do you think that on that occasion, under those circumstances, if the whistle had been sounded, the man would have jumped

off?" and his answer was: "I am not a prophet, but I think he would." It is manifest that these answers of the witnesses are predicated upon the deceased being upon the track, and not knowing of the approach of the train. But, as we have seen, all the witnesses agree that the deceased was bound to have seen the train, if his thoughts were not fixed upon some other subject than that of his own safety or the danger of his surrounding. Faldley says, "If he could have heard at all, he would have heard or seen the train." And again, "If he could have seen at all, he could have seen the train."

The witness Barreft also says: "In the case that gentleman was in (I mean the engineer), I believe he did everything he could to stop. I believe that he gave a fair, square statement, and that he did everything that he could do, except sounding the alarm whistle." The utmost to which this witness goes as to whether the train could have been stopped before it reached deceased is that if the train at the crossing was going at 4 or 5 miles an hour, and the engine in perfect condition, "it would have stopped about where it struck the man," but, "if it was going at 8 miles, it would have gone much farther."

From the uncontradicted proof the conclusion cannot be escaped that the deceased knew that the train was approaching, and, under these circumstances, even if the expert witnesses had said that the sounding of the alarm whistle would have caused him to have gotten off the track, it would have been nothing more than conjecture. The omission to sound the alarm whistle does not constitute such negligence on the part of the defendant as to justify a recovery in this case, unless it is shown that such omission was the proximate cause of the injury complained of.

"In an action to recover damages for an injury inflicted through the negligence of the defendant the burden is on the plaintiff to prove the negligence alleged, and the evidence must show more than a mere probability of negligence. It is not sufficient that the evidence is consistent equally with the existence or nonexistence of negligence. There must be affirmative and preponderating proof of the defendant's negligence." *Railway Co. v. Cromer's Adm'r*, 99 Va. 765, 40 S. E. 54. In that case, it was held that the trial court erred in refusing an instruction which told the jury "that the burden of proof is on the plaintiff to prove negligence, and that the proof must amount to more than a probability of a negligent act; that the verdict cannot be founded upon conjecture."

In *Railroad Co. v. Bruce's Adm'r*, 97 Va. 92, 33 S. E. 548, Bruce, the deceased, was a licensee walking upon the track of the defendant company, and it was contended, as in this case, that the failure to sound the alarm whistle after the deceased had been seen, or ought to have been seen, by the en-

gineman in charge of the train, to be in a perilous position, rendered the defendant company liable in damages; but the contrary view was taken. It was said in that case that the deceased, having "neither looked nor listened for the train," remained "so engrossed in thought upon other matters that he was oblivious of what was going on around him, and that, too, when he had needlessly placed himself in a position of danger by walking upon the railroad track, when he could just as well have walked in the open space by it, where he would have been safe. The track itself warned him of danger." Being "conversant with the railroad track and its surroundings," yet "pursuing his journey upon the railroad track, with his thoughts evidently fixed upon some other subject than that of his own safety or the danger of his surroundings," he so contributed to his injury as to preclude a recovery therefor, even if there was negligence on the part of the defendant company.

What was said in that case applies with equal force to the case at bar. See, also, *Railway Co. v. Wilson*, 90 Va. 263, 18 S. E. 35; *Marks' Adm'r v. Railroad Co.*, 88 Va. 1, 13 S. E. 299; *Hogan v. Tyler*, 90 Va. 19, 17 S. E. 723.

Upon a careful consideration of the evidence in this case, the conclusion cannot be escaped that the deceased, going to the store in the depot for his mail, "walking tolerably quick," or "going at a pretty good lick," as plaintiff's witness states it, knew the train was coming, and intended to get off the track or to cross it before the train reached him, and simply made a miscalculation as to his ability to accomplish his purpose; and that it was not within the power of the defendant's employes to avoid injury to him after his peril was discovered. And this conclusion must inevitably be reached, though there is left entirely out of view the testimony of a number of witnesses as to declarations made by the deceased, shortly after he was injured, to the effect that he knew the train was coming, but did not know it was so near to him; that he would have gotten across if his foot had not slipped, etc.; and also the statement of the plaintiff herself, made that evening or the next morning, that she begged him not to try to cross the track, or not to go upon it. She does not deny having made such a statement, but attributes the declaration to nervousness or excitement, and she is only certain that she did not urge her husband not to go upon the track when approaching it in his surrey from the west. Her statement is that, after she got home, she said that she tried to keep him off the track, but it was when he was going back there after the mail. "I tried to keep him off the track after he started back to go after the mail."

The deceased, by his own negligence and recklessness, directly and proximately contributed to the act which resulted in his death,

and we see nothing in the evidence to warrant the conclusion that the employes of the defendant, after his peril was discovered, negligently failed to do all that could be done to avoid the injury to him.

It follows that we are of opinion that there is no error in the judgment of the circuit court, and it is therefore affirmed.

(131 N. C. 425)

RATLIFF et al. v. RATLIFF et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

ISSUES SUBMITTED—DEEDS—CONTRACTS—RECORDS—PROBATE—DECLARATIONS—EXCEPTIONS—HANDWRITING—EVIDENCE.

1. The issues submitted to the jury are sufficient, where every ground of contention can be presented by appropriate evidence on them.

2. By express provision of Code, § 1251, the registry or record of a deed or other instrument required or allowed to be registered or recorded is admissible as proof of it, unless by a rule of court on affidavit the party entitled to possession of the original shall have been previously required to produce the original.

3. The registry of an agreement is admissible as proof of it, though it does not appear from the registration that there was any revenue stamp on it.

4. The parties and subscribing witnesses to an instrument being dead, testimony of one that he was well acquainted with the handwriting of the subscribing witness, and had had numerous business dealings with him, and that, to his best knowledge and belief, the signature was in his true handwriting, satisfies Code, § 1246 (10), providing that in case of probate of an instrument required or allowed to be registered, having a subscribing witness who is dead, satisfactory proof of his handwriting, or that of the maker, when there is no subscribing witness, is sufficient proof to allow registration.

5. Declarations of a grantee in possession of land that he had received it under an agreement to hold it for his life, it then to go to certain others, and that he paid nothing for it, and had declined to sell it because of this trust, are admissible against him and one claiming through a voluntary deed from him.

6. Exception to refusal of nonsuit at close of plaintiff's evidence is waived by defendant thereafter introducing evidence.

7. A deed having been pleaded in the complaint and admitted in the answer, and the registration admitted in evidence without suggestion of incorrectness therein, or rule of court to produce the original, the original is properly rejected as irrelevant.

8. An original deed being irrelevant, the deed having been pleaded in the complaint and admitted in the answer, and its registration admitted in evidence, and plaintiffs refusing to admit that the signature of the witness on it was genuine, it is not admissible, that defendants may compare with it the signature of the witness as witness to an agreement, which plaintiffs claim is a forgery; and defendants cannot have the deed admitted for such purpose by evidence that the probate ordering it to registration was in the handwriting of one formerly judge of probate.

9. In a suit by deceased's children by his first wife against his children by his second wife to recover land conveyed by him, without consideration, to defendants,—plaintiffs' contention being that it was conveyed to deceased in trust to hold for life, and then for plaintiffs,—evidence offered by defendants that after deceased's

death all his realty, except this and one small tract, was allotted to his wife as dower, and deeds expressed on their face to be in consideration of love and affection, executed by deceased and wife to defendants, are irrelevant.

10. A witness may testify to a certain signature being that of the person it purported to be, though he was not acquainted with the person's handwriting till four years after the signature was made; the weight of his testimony being for the jury.

11. Declarations of one in his own favor, tending to show he had a fee-simple title to land, are inadmissible, though declarations of his to the contrary had been admitted.

12. Testimony of witness that he had made statements to others of the same matters testified to by him on the trial was competent to corroborate him.

Appeal from superior court, Anson county; McNeill, Judge.

Action by W. U. Ratliff and others against J. H. Ratliff and others. Judgment for plaintiffs, and defendants appeal. Reversed.

H. H. McLendon, for appellants. J. A. Lockhart, Robinson & Caudle, and Bennett & Bennett, for appellees.

CLARK, J. There is no valid objection to the issues, as every ground of contention could be presented by appropriate evidence upon the issues submitted by the court. *Patterson v. Mills*, 121 N. C. 266, 28 S. E. 368; *Coley v. City of Statesville*, 121 N. C. 315, 28 S. E. 482.

There was no error in admitting the records from the register of deeds showing the deed, as there recorded, from Horne and wife to Ratliff, dated September 11, 1869, and in not requiring the introduction of the original deed. Code, § 1251, provides: "The registry, or duly certified copy of the record, of any deed, power of attorney or other instrument required or allowed to be registered, or recorded, may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, power of attorney or other instrument, although the party offering the same shall be entitled to the possession of the original and shall not account for the non-production thereof, unless by a rule or order of the court made upon affidavit suggesting some material variance from the original in such registry, or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for, according to the course and practice of the courts." Here there was no affidavit, nor suggestion, even, that the registration was not correct, and no rule of court requiring the introduction of the original deed. The production of the original at the trial cannot be required when such rule of court has not been previously obtained. *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

This disposes, also, of the exception to the introduction of the registration of the agreement of September 10, 1869, if the probate is legal. As to this, the defendants except

on the grounds: (1) That it does not appear from the registration that there was any revenue stamp on said agreement. This need not appear. *Haight v. Just*, 64 N. C. 739; *Sellers v. Johnson*, 65 N. C. 104. (2) That the proof of the handwriting of the subscribing witness was insufficient. This instrument was not recorded till March 22, 1901. It appears from the probate that the parties and the subscribing witnesses were then all dead, and the probating witness testified that he "was well acquainted with the handwriting of M. V. Horne [the subscribing witness to said agreement], and had numerous business dealings with him during his lifetime; that, to affiant's best knowledge and belief, the signature of the name 'M. V. Horne' to the aforesaid agreement, as witness to the same, is in said Horne's true handwriting, and no one else's." This is a compliance with Code, § 1246 (10).

The plaintiffs' contention is that the above deed to the defendants' father was a voluntary deed, without valuable consideration, and is to be taken in connection with said agreement, making one transaction, and that said agreement is an acknowledgment of a trust to hold said land for life, and then for his children by his first wife, who are the plaintiffs, which first wife was the daughter of the grantor in said deed. The grantee in 1893 conveyed the land, without valuable consideration, to the defendants, his children by his second wife, and has since died. The defendants contend that the agreement was not executed by their father, but is a forgery. There are several exceptions (4 to 8, inclusive) to the admission of evidence that Watt Ratliff, the grantee in said deed, and alleged signer of said "agreement," admitted that he had received the land under an agreement to hold for his life, and then for the land to go to the plaintiffs, his children by the first wife; that he paid nothing for it, and had declined to sell it because of this trust upon it. Those exceptions are without merit. The rule is thus stated in *Shaffer v. Gaynor*, 117 N. C. 24, 23 S. E. 156: "Declarations made by one in possession of land, characterizing or explaining his claim to ownership, or in disparagement of his own title, are competent, not only as evidence against the declarant, but against all claiming under him." The evidence of these witnesses is of a declaration tending to disparage and qualify the title of Watt Ratliff in the land, and an admission of a trust. It is competent against him, and against the defendants, who claim through a voluntary deed from him. *Nelson v. Whitfield*, 82 N. C. 51; *Roberts v. Roberts*, Id. 32; *Melvin v. Bullard*, Id. 37; *Yates v. Yates*, 76 N. C. 142; 1 Greenl. Ev. § 109.

The ninth exception, for refusal of nonsuit at the close of the plaintiffs' evidence, is without merit, both because there was evidence to go to the jury, and because the exception is waived by the defendant himself

thereafter introducing evidence. *Means v. Railroad Co.*, 126 N. C. 428, 35 S. E. 813; *Parlier v. Railway Co.*, 129 N. C. 268, 39 S. E. 961.

Nor did the court err (tenth exception) in refusing defendants leave to introduce what they claimed was the original deed of September 11, 1869, from Horne and wife to Watt Ratliff. Evidence is irrelevant, even when not incompetent, and is properly rejected, unless it tends to prove some controverted fact. Here the said deed of September 11, 1869, had been pleaded in the complaint and admitted in the answer; and, besides, its registration was in evidence without any suggestion of incorrectness therein, and there was no rule of court to produce the original. But the defendants contend that they wished to introduce it for the purpose of comparing the handwriting of Martin V. Horne, the subscribing witness thereto, with the handwriting of M. V. Horne, the subscribing witness to the alleged agreement; but this is not the proper method to attack the genuineness of his signature. That should be done by the evidence of witnesses who are familiar with his handwriting. If there is a paper in evidence, the signature to which is proved or admitted to be genuine, another signature whose genuineness is in issue can be compared with it; but here this paper was not in evidence, and the plaintiffs refused to admit that it was genuine. *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28, and cases there cited. The defendants then offered to prove that the probate offering said paper to registration was in the handwriting of James M. Covington, formerly judge of probate of that county. But as the deed was irrelevant, this could not make it so, and to admit it for the purpose of handwriting would add to the controversy the dispute as to genuineness of Covington's handwriting. All this has been so fully discussed in *Tunstall v. Cobb*, supra, that no further consideration is needed.

The evidence offered by the defendants to show that after Watt Ratliff's death all his realty, except this and one small tract, was allotted to his widow for dower, was properly excluded as irrelevant, as were the deeds, expressed in their face to be in consideration of love and affection, executed by Watt Ratliff and wife to the defendants, the children of the second marriage.

The defendants then offered to prove the handwriting of Martin V. Horne, the subscribing witness to the agreement, by John C. McLaughlin, the clerk of the court. He stated that he did not know the handwriting of Horne in 1869, but became familiar with it in 1873, and thence up to his death, but did not know it prior to that time. The defendants then proposed to ask the witness if the name "M. V. Horne," purporting to be signed to the agreement dated February 10, 1869, was in M. V. Horne's proper handwriting. The plaintiffs objected to his testi-

lying unless he could state that he was acquainted with Martin V. Horne's handwriting at that time (1869). The witness stated that he did not know what his handwriting was at that time, whereupon the evidence was excluded, and the defendants excepted. In this there was error. *Keith v. Lothrop*, 10 Cush. 453; 1 Greenl. Ev. § 577; *Lawson*, Exp. Ev. rule 47, p. 332. There was no presumption that the handwriting had so changed from 1869 to 1873 as to be unrecognizable. That lapse of time and the possibility of change were matters for the consideration of the jury, but did not make the testimony incompetent. In like manner, it has been held that the greater or less remoteness of time, as to which the witness was acquainted with the character of one impeached, was a matter for the jury, not for the court. The genuineness of the agreement is a vital point for the defense, and the exclusion of this evidence is a material error, which entitles the defendants to a new trial.

There are several exceptions for the exclusion of instruments, as administration bonds, constable bonds, and the like, alleged to be signed by M. V. Horne, which the defendants wished to introduce for purposes of comparison, but these were properly excluded. *Tunstall v. Cobb*, supra; *State v. De Graff*, 113 N. C. 693, 18 S. E. 507; *Jarvis v. Vanderford*, 116 N. C. 147, 21 S. E. 302; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *State v. Noe*, 119 N. C. 849, 25 S. E. 812.

The judge also properly excluded evidence offered to show declarations of Watt Ratliff in his own favor, tending to show he held a fee-simple title. *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991; *Shaffer v. Gaynor*, supra.

The testimony of George Ratliff that he had made statements to others of the same matters testified to by him on the trial were competent to corroborate him. *Burnett v. Railway Co.*, 120 N. C. 517, 26 S. E. 819, where the numerous cases to that point have been collected; and there have been several since.

The other exceptions are either covered by what we have herein decided, or are matters, like exceptions to the charge, which may not arise on another trial.

For the error as to the fourteenth exception, there must be a new trial.

FURCHES, C. J., and DOUGLAS, J., concur in this opinion. But they think the court erred in refusing to allow the introduction of the original deed.

(131 N. C. 404)

CITY OF WINSTON v. TOWN OF SALEM.
(Supreme Court of North Carolina. Dec. 2, 1902.)

TAXATION—PERSONAL PROPERTY—SITUS—CONSTITUTIONAL LAW.

1. Laws 1899, c. 15, § 14, providing that all personal property, except certain classes, shall

be listed for taxation in the township in which the person charged with the tax resides, and the residence of a corporation or partnership shall be deemed to be in the township in which its principal office or place of business is situated, does not contravene Const. art. 8, § 9, requiring that "all taxes levied by any county, city, town or township, shall be uniform and ad valorem on all property in the same"; this not restricting the legislature from prescribing regulations as to the situs of personal property.

Cook, J., dissenting.

Appeal from superior court, Forsyth county; Shaw, Judge.

Action by the city of Winston against the town of Salem. Judgment for defendant. Plaintiff appeals. Reversed.

Watson, Buxton & Watson, for appellant. **A. H. Eller**, for appellee.

CLARK, J. The Reynolds Tobacco Company (a corporation) and Hanes & Co. (a partnership) are tobacco manufacturers, each having its principal office and factory building in Winston, and each using warehouses just across the street in Salem (the towns being divided only by a street), in which they temporarily store leaf tobacco, as bought from time to time, until it is removed to the factory in Winston for manufacture. The question is whether the leaf tobacco thus stored on June 1, 1900, was taxable in Winston or Salem. The said parties have paid the taxes thereon in Winston, under an agreement that said taxes will be paid over by said city to the town of Salem if the courts shall adjudge that the latter is entitled to the same. If this action is properly constituted in court, which we do not wish to be understood as deciding, for no recovery is asked by the plaintiff, who has the fund in possession, the question is settled in favor of the power of taxation of said tobacco by the city of Winston by the very terms of the statute then in force. Laws 1899, c. 15. Section 14 thereof provides that: "All personal property, except such shares of capital stock and other property as are directed to be listed otherwise in this act, shall be listed in the township in which the person so charged resides on the 1st day of June. The residence of a corporation, partnership or joint stock association shall be deemed to be in the township in which its principal office or place of business is situated." Const. art. 7, § 9, requires that "all taxes levied by any county, city, town or township, shall be uniform and ad valorem upon all property in the same." The towns of Winston and Salem are in the same township, and the characters of both, in conformity to the above constitutional provision, grant them power to levy and collect taxes upon "all real and personal property within its corporate limits." Priv. Laws 1891, c. 40, § 41 (1), and chapter 307, § 50. As to the situs of realty there can be no doubt, but the situs of personalty for purposes of taxation from time immemorial has been a matter for the law-

making power, which has provided different rules for different kinds of personalty, and has changed them from time to time. There is nothing in the above-cited section of the constitution which indicates an intention to restrict legislation as to the situs of personal property, which at common law always followed the person,—hence its designation,—and no decision has so construed that section. It seems to us that sound public policy requires that the legislature be left free, as always heretofore, to prescribe regulations as to the situs of personal property, and, unless the constitutional provision were plain and explicit to the contrary, we cannot hold the statute to be unconstitutional. As the above-cited section (section 14, c. 15, Laws 1899) located the situs of this property, which is not "property directed to be otherwise listed in the act," in the place where the corporation or partnership has "its principal office or place of business," it follows that by the terms of the respective charters this tobacco was taxable in the town of Winston. This is the general rule. "Where a corporation had its place of business in one town, with a part of the personal property stored in another town, such property is only taxable in the town where its place of business is located." *Middletown Ferry Co. v. Town of Middletown*, 40 Conn. 65; *Orange & A. R. Co. v. City Council of Alexandria*, 17 Grat. 176. See, also, note 5, p. 136, *Burroughs, Tax'n*, with a large number of cases cited, holding the same doctrine.

Error.

FURCHES, C. J. I concur in the opinion of the court, because I believe that it states the law as it is written, and not because I think the law is right. If I considered that I had the power to do so, I would change it, and agree with the dissenting opinion of my Brother COOK. But personal property is supposed to attend the person of the owner, and upon that idea is taxable where the owner resides, and in most cases this is proper and convenient, as, where a taxpayer has small amounts of personal property in different townships or in different counties, it would be inconvenient for him to list such property in the township or county where it happened to be on the 1st day of June. And the uniform rule has been to list personal property for taxation in the county, township, or town where the owner resides. While this is the rule under this presumption, that such property attends the person of the owner, it has for a long time, if not always, been held that this presumption, or "fiction" as it is sometimes called, is subject to be changed by legislative enactment, as has been done by providing that guardians should list their ward's estate in the township where the ward resides, and by providing that stock on a farm should be listed where the farm is listed. But none of these legislative acts

provide for the case at bar. It is governed by the general law that personal property must be listed in the town or township where the owner resides. Indeed, it seems to me that the legislature, in making the exceptions it has, construed the general act to be that it must be listed where the owner resides, in all cases not so excepted from the general rule, under the doctrine of "*expressio unius est exclusio alterius*." And while I think it is the law as now written, to my mind it may work great hardship and wrong. As I understand the law, as it is now, a man may own or have rented a storehouse in town, in which he has \$50,000 worth of goods which receive the protection of the town government under its police authority, and the benefits of the town trade; and yet, if he happens to live outside of the corporate limits, his \$50,000 worth of property escapes the payment of one cent of taxes to support the town government. This I think should be remedied, but I cannot do it. It seems to me that the legislature might do it by providing that property in or connected with the use of a house should be listed for taxation where the house is listed, as it is provided that stock on a farm shall be listed where the farm is listed.

DOUGLAS, J. (dubitante). I am very much impressed with the strength and consistency of the reasoning in the dissenting opinion of Justice COOK. If it is not the law, it should be the law. Suppose that a man should have a large warehouse or factory in the city of Winston, where he was actively engaged in the regular transaction of his business, and where he kept stored large amounts of tobacco; he would not be liable for any municipal tax whatever, except, perhaps, a license tax, if he happened to live a few feet beyond the corporate limits. The fact that he lived in another city would make no difference in the principle. A cotton broker in Raleigh, similarly situated, would be equally exempt. He would have all the benefits of a city, with practically none of its burdens. He would have all its facilities for transacting business, buying, selling, shipping, and banking, with police and fire protection, for the price of his license. If he had a thousand bales of cotton stored in the city, every bale would, in contemplation of law, be located at his home. It can hardly be said that such a system of taxation results in the practical uniformity contemplated by the constitution, whatever may be its theoretical nature. And yet it may be that the situs of personal property is within the control of the legislature. If so, we must await legislative action.

COOK, J. (dissenting) By section 14, c. 15, Laws 1899, cited and sustained in the opinion of the court, the legislature undertakes to fix the situs of personal property

(that which is tangible, substantial, and valuable by reason of its corpus) for taxation in the township in which the owner resides, or where the corporation, partnership, or joint-stock association has its principal office or place of business. So that, in this view, a person owning personal property of very great value, situate and in use in a township or city, which may be in debt, and required to levy taxes to meet its obligations, might move his residence out of that township or city into township or city which owed no debt, and thus escape taxation therein, and yet receive all the benefits and protection inuring and resulting from such township or city indebtedness. So, likewise, could a corporation, partnership, or joint-stock association obtain a like advantage by the removal or location of the principal office or principal place of business. If this be so, then the nonresidents of the township or city would receive equal benefit and protection with the residents, and pay nothing for it; leaving the burden of paying for the same upon the residents, based upon the fancied idea that the personal property follows the person. To my mind it is clear that this fiction was exploded, and so intended, by our constitution, in ordaining that all taxes levied shall be uniform and ad valorem upon all the property in the same,—in the county, city, town, or township where it may abide, remain, be kept, or placed by the owner,—to the end that each article of value should there bear its proportionate part of the burden of taxation in consideration of the advantages, benefits, and protection which it there has and enjoys.

Plaintiff and defendant are two separate and distinct municipalities, situated in the same (Winston) township, in Forsyth county, existing under separate charters. They adjoin each other, and are separated by a street (First street), which runs east and west, and which is owned and maintained by plaintiff. The B. J. Reynolds Tobacco Company, a corporation having its principal office and factory building in Winston, and P. H. Hanes & Co., a copartnership, the several members of which reside in Winston, and also having its principal office and factory situate therein, are engaged in the manufacture of plug tobacco, and in buying, storing, and preparing leaf tobacco for manufacture. On June 1, 1900, and for several years prior thereto, they had in buildings, leased for a term of years for such purpose, leaf tobacco, kept therein for storage until ready to be removed to the factories in Winston for manufacture. As both of the owners of the leaf tobacco so kept for storage in Salem have their principal office and factory in Winston, and the individual members of the copartnership reside therein, plaintiff claimed that the tobacco so stored and kept in Salem was a subject of taxation for municipal purposes by it, and listed the same for taxation, and insists that the taxes are due

to it, while defendant claims that said leaf tobacco, being kept and stored within its corporate limits, was liable to taxation by it, and accordingly listed the same for taxation for its municipal purposes, and claims the taxes due thereon. So the question presented in this appeal is, do the taxes assessed upon the leaf tobacco so stored and so kept in Salem belong to plaintiff, under its assessment, because the owners reside in, and have their principal office and factory in, Winston? Or to state it in a different way, should the tobacco so stored and kept in Salem be listed for taxation for municipal purposes by the city of Winston, where the owners, corporation and copartnership, had their principal office, or by Salem, where the property was stored and kept until ready and needed for use at the factory?

As all personal property is movable, it cannot be said to be permanently located anywhere. Therefore it cannot have a fixed or unchangeable abode. While movable at the owner's will, it does not in fact necessarily accompany its owner, but must be and exist where it is placed in the service or use for which he has designed it. Where the same is placed for an indefinite time, awaiting the use for which it is designed, or being used in the service of its owner while there in carrying on his business of a permanent nature, or for an indeterminate period, its presence there must be generally considered to have such an actual situs as would draw to it that legal protection for which it should be liable for taxation, if not otherwise prescribed by law. But the situs of property subject to taxation by the county, city, town, or township is expressly fixed by article 7, § 9, of the constitution, which requires the levy to be "upon all the property in the same," and that it shall be uniform and ad valorem. The section is as follows: "All taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same, except property exempted by this constitution." So, it is necessary to determine what is meant by all property "in the same." When is property "in the same" (city here), within the meaning of that section? This being determined, there can be no question as to the situs as fixed by the constitution. Real property being permanently located, there can be no question as to its situs; but on account of the movability of personal property, in its use, and service of its owner, there is some difficulty in determining when it is "in the same" (county, city or township), as a subject of taxation. It is clear to us that it is not contemplated by the constitution that it is "in the same" while in transit; otherwise it would be taxable in each and every municipality through which it might pass on the 1st day of June. Nor can it be held that it would be exempt from taxation by the municipality of its usual situs or abode if temporarily in its use it be removed therefrom

shortly before June 1st, or should such temporary removal be made for the purpose of evading taxation by the municipality from which it is removed. The meaning of the language of the constitution does not admit of a doubt, or allow a question to be raised concerning the situs of property for taxation, after it is determined where the owner has located it for his use or in his service. Its situs is fixed by the place where it is kept for use and service, and not by the residence of the owner. With this understanding of section 9, art. 7, of the constitution, as applied to that class of personal property which does not in fact accompany the person of its owner, the value of which grows out of its corpus or materiality, as distinguished from that class which is intangible, and is but the evidence of right or interest in the corpus or materials of value, which in fact does, or in fiction, of necessity, must, accompany its owner, we think the plaintiff had no right to tax the leaf tobacco stored and kept in Salem. Whether the owner be a corporation or a natural person, its situs for taxation is where it is kept by its owner,—where the owner allows it to abide, to remain. There it must, of necessity, be under the protection of the legal authority enforced, and should bear its proper part of the expenses, which I understand to be the principle underlying this section of our constitution. The charters of plaintiff and defendant are in conformity with article 7, § 9. Each is granted the power to levy and collect taxes upon "all real and personal property within the [its] corporate limits, including," etc. Priv. Laws 1891, ch. 40, § 41 (1); chapter 807, § 50.

The facts agreed in this case show that the buildings of the respective owners were leased for a term of years, and that leaf tobacco was continually and continuously stored therein, and there prepared for manufacture. They kept a stock of tobacco there, upon which they drew for the factory to manufacture, and, as they drew out, would replenish the stock. So the conclusion is irresistible that, the tobacco being put and kept in Salem by its owners for the purpose of storing and preparing for future use, it there acquired its situs for the purpose of taxation.

(131 N. C. 389)

TATE v. MUTUAL BENEFIT LIFE INS. CO.

(Supreme Court of North Carolina. Dec. 2, 1902.)

INSURANCE POLICY—FORFEITURE FOR NON-PAYMENT OF PREMIUMS—APPLICATION OF ACCUMULATED PROFITS—QUANTUM OF EXTENSION.

1. Insured held a participating policy in a mutual benefit association, under which, when forfeiture was incurred for nonpayment of premiums, his proportion of accumulated profits was to be applied to the extension of the insurance. The policy had been taken out by a 70

per cent. cash payment, and a 30 per cent. payment represented by a certificate of indebtedness. The policy provided that only "the net reserve, less any indebtedness to the company on the policy," should be applied to its extension, and that the certificate of indebtedness should be a lien on the policy. *Held*, that the amount of the certificate must be deducted from the accumulated profits before they could be applied in the extension of the policy.

Douglas, J., dissenting.

Appeal from superior court, Rutherford county; Winston, Judge.

Action by Sarah A. Tate against the Mutual Benefit Life Insurance Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

McBrayer & Justice and E. J. Justice, for appellant. Burwell, Walker & Cansler, for appellee.

FURCHES, C. J. This action is prosecuted to enforce the collection of an insurance policy issued to C. L. Tate on the 16th of December, 1890, for the benefit of the plaintiff. The annual premium on this policy was \$24.42, to be paid on the 16th day of December of each succeeding year, which payment continued the policy for one year from the date of said payment, at which time the policy became void if the premium was not paid. But it was a mutual beneficiary association, in which the assured participated in the profits; and, when a policy became forfeited for the nonpayment of premiums, if there were accumulated profits belonging to the assured, they were applied to the payment of such premiums, and gave the assured the benefit of an extension of the policy for such time as the accumulated profits paid for. But it gave him no right to participate in the accumulations after the forfeiture for nonpayment. The last payment of premiums was on the 16th day of December, 1893, which continued the policy, with all its benefits, until the 16th of December, 1894, when the next premium became due. At that time there was due the assured from the accumulated profits (called the "reserve") the sum of \$41.36. This amount, if applied to the payment of premiums, would have extended the policy until after the death of the assured. But the policy contained other terms and conditions, which have to be considered. It allowed a party to insure by payment in cash 70 per cent. of the premium, and the other 30 per cent. in a certificate of indebtedness to the company, and this policy was taken out upon that plan. It is claimed by the defendant that these certificates of indebtedness should be deducted from the \$41.36 of accumulations, and only the balance, after deducting this indebtedness (and some other expenses, which we do not discuss, lest it might produce confusion), should be applied to extending the policy. And it is admitted that, if this is done, the time of extension had expired before the death of the assured. So this is the question, and forms

the contention between the parties, and makes it a question of law depending upon the construction of the policy.

It has been held in *Insurance Co. v. Dutcher*, 95 U. S. 269, 24 L. Ed. 410, in an action on a policy very much like the one under consideration in that respect, that the notes or certificates of indebtedness to the company for the 30 per cent. of the premium were payments to the company, and so we hold in this case. And if the policy in other respects was like the one involved in *Insurance Co. v. Dutcher*, we would hold that the plaintiff should recover, and reverse the judgment appealed from. In that case, as the defendant does in this case, the insurance company sought to have the surplus applied first to the payment of the premium notes due it, and only the balance applied to the extension of the policy. But the court in that case refused to allow that to be done, for the reason that it was not provided for in the policy. But the insurance company, since that decision, and before the policy sued on was taken out, had changed the wording of its policies, and, as it seems to us, the provisions of its policies (this policy), so as to meet the difficulty pointed out in the case of *Insurance Co. v. Dutcher*, supra. It is provided in this policy that these notes or certificates of indebtedness, given in part payment of premiums, shall be a lien on the policy, and only "the net reserve, less any indebtedness to the company on the policy," shall be applied to the purchase of a non-participating policy; that is, to the extension of the policy. This, it seems to us, distinguishes it from *Insurance Co. v. Dutcher*, and this view is fully sustained in *Omaha Nat. Bank v. Mutual Ben. Life Ins. Co.*, 28 C. C. A. 300, 84 Fed. 122.

The defendant in this case being the same defendant as in that case, and the policy there sued on being the same as the one sued on in this case, the court below so held, and, as we fail to see the error complained of, the judgment is affirmed.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court, because I am not certain that the facts have been understood. It is true the policy provides that any indebtedness of the assured to the company shall be a lien on the policy, and may be deducted from the reserve. But are the deferred premium notes an actual indebtedness? I doubt it. All old-line companies stipulate for premiums largely in excess of what is reasonable or necessary with a view to their reduction by so-called dividends. These dividends are no part of the surplus or reserve, but are payable annually to the assured, either in cash or by allowance in reduction of premiums. For instance, the stipulated annual premium on one of my life policies is \$198.90, while this year's dividend amounted to \$54.40, reducing the net amount of premium I was compelled to pay to \$144.

50. The reserve is entirely distinct, and is kept intact until the payment or expiration of the policy. In the latter event, it may be used under certain conditions for paid-up or extended insurance. I am under the impression that in the case at bar the assured was permitted to give his note for 30 per cent. of his premium in lieu of dividends with the expectation on both sides that the accruing dividends would pay the notes without recourse upon the assured. If this is true, and the notes have been or should have been paid by the accruing dividends, they are no longer an indebtedness, and cannot be deducted from the reserve. This would leave the entire reserve belonging to the policy in a condition to be used for its extension. The defendant is said to be a mutual company, but the policy in dispute is apparently based upon "old line" methods. It is certainly not upon the assessment plan. If these facts are true,—and I am free to say they are by no means clear,—it would be a gross imposition upon the assured to permit the defendant to charge up against the surplus notes wholly or partially paid from the dividends, and thus defeat the entire policy of insurance.

(131 N. C. 386)

BRISCOE et al. v. YOUNG.

(Supreme Court of North Carolina. Dec. 2, 1902.)

DIVERTING WATER—DAMAGES—EVIDENCE.

1. Where one diverts water from a stream by cutting a channel from it, and then at a lower point turning it back into the old channel, so that by its own momentum it is carried onto the land of others, he is liable for damages.

2. One who, by cutting a channel from a stream, obstructs the old channel, and then turns the water back into the channel without removing the obstruction, is liable for damages resulting therefrom.

3. On the question of damages to land from diversion of water, testimony as to the difference in value of the land before and after the injury is admissible. The difference in productiveness is but one of the elements affecting its value.

Appeal from superior court, Rutherford county; Winston, Judge.

Action by Alice Briscoe and others against N. Young. Judgment for plaintiffs, and defendant appeals. Affirmed.

S. Gallert and Busbee & Busbee, for appellant.

DOUGLAS, J. We are compelled to say that we find great difficulty in understanding this case from the pleadings and the evidence. The map that was used on the trial below has not been sent up. Whether it would have enlightened us or not we do not know. Here and below the defendant demurred ore tenus to the complaint as not setting forth a cause of action. Although some parts of the complaint are somewhat unintelligible, we think that as a whole it

does state facts constituting a cause of action, and perhaps more than one. Section 4 of the complaint is as follows: "That the defendant, in the early part of the year 1901, negligently and wrongfully proceeded to cut a canal from one-fourth to one-half mile in length, commencing at a point about — yards above where plaintiff's and defendant's lands join, and emptying into the old channel of the creek at a point about — yards below the upper line of plaintiff's land, and by reason of said canal did wrongfully divert the water from plaintiff's land, and did cause the old channel or creek run to fill up with mud, sand, brush, and other obstructions, and did thereby greatly damage the plaintiff's land by sobbing and rendering totally unfit for cultivation some 20 or 25 acres of the most productive part of the plaintiff's bottom land." We do not see how diverting water from a man's land would tend to flood it, nor how such diversion would fill up the old channel with mud, sand, and brush. How did the sand and brush get there, if there was no water to carry them? Such a condition would more likely be the result of a freshet, for which the defendant might not be responsible. We must bear in mind that the defendant is responsible only for the damages resulting from his unlawful diversion of water, and not for such as are caused by a freshet, or other circumstances beyond his control, except to the extent to which his unlawful act may have contributed thereto. The clearing up of our lands is constantly increasing the number and violence of freshets in two ways,—by permitting the water to run off the land more rapidly, and by filling up the stream with sand. Occasionally freshets are so great as to cover the entire bottom lands, and under such circumstances ditches, whether lawful or unlawful, add nothing to the result. In fact, they are usually filled up unless their direction and fall are such as to enable them to clean themselves with the receding waters. Water may be diverted in two ways, which are somewhat different in their results and in the legal principles by which they are governed. The first—which has been more frequently before this court—is where a ridge or natural watershed has been cut through so as to change the entire direction of the waters beyond, and bring them where nature never intended them to go. *Mullen v. Water Co.*, 130 N. C. 496, 41 S. E. 1027, and cases therein cited. The other form of diversion is where the current of the stream is changed without turning into it any waters that would not naturally have gone there. Where both the natural and the artificial channels are on the defendant's own land, we do not see how he would be liable. *Mizell v. McGowan*, 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705. But where the natural channel is the boundary line between adjacent proprietors, different questions arise, some of which are not necessarily involved in this case. If,

under the circumstances, the defendant cut the new channel into the old at a right angle, so that the water would be carried by its own momentum across the channel and onto the plaintiff's land, he would be liable for the resulting damage. If the cutting of the new channel did in fact cause the obstruction of the old, and the defendant turned the water back into the old channel without removing such obstructions, we see no reason why he should not be liable for the damage resulting from his own neglect. We think such facts are sufficiently alleged in the complaint, and that there was evidence tending to sustain them. The demurrer to the complaint and the motions to nonsuit were properly refused.

The exceptions to the evidence cannot be sustained. There is no reason why the witnesses should not testify to the difference in value of the land before and after the injury. The difference in productiveness is merely one of the elements affecting its value. There is an exception to the introduction of a letter from G. C. Briscoe to Young, but, as neither the letter nor its essential purport appears in record, we are unable to say there was error.

Nearly all the defendant's special prayers were given, and there is nothing in his honor's charge to which he can rightfully except.

As we see no error in the trial of the action, the judgment is affirmed.

(131 N. C. 798)

STATE v. McCALL et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

ARSON—ACCESSORIES BEFORE THE FACT—DEFENDANT'S PREVIOUS CRIME—CRIME OF PRINCIPAL—ADMISSIBILITY OF EVIDENCE—INSTRUCTION.

1. Defendants were indicted as accessories before the fact to the burning of a church, the state's theory being that they had procured that to be done in order to cover up their own previous crime of burning a mill. The principal, who had pleaded guilty to burning the church, was permitted to testify to various incriminating facts tending to show defendants' guilt in the matter of the mill. Defendants were already under arrest for burning the mill before they procured the burning of the church. *Held*, that the admission of the evidence was error.

2. Two witnesses were permitted to testify to admissions made by the principal showing his guilt, and that the defendants had induced him to burn the church. *Held* that, as this evidence was admissible merely to corroborate the principal, and not as substantive evidence of his guilt, which, though he had pleaded guilty, was an issue in the case, it was error to let it go to the jury without an instruction so limiting it.

Appeal from superior court, Burke county; Council, Judge.

Alexander McCall and Samuel McCall were convicted of being accessories before the fact to arson, and appeal. Reversed.

Locke Craig, R. S. McCall, and J. L. C. Bird, for appellants. J. T. Perkins, with the Attorney General, for the State.

FURCHES, C. J. The defendants are indicted for burning Concord Methodist Church. The offense is alleged to have been committed in McDowell county by Jack Keaton, as principal, and the defendants, Alexander McCall and Samuel McCall, as accessories before the fact. The defendant Keaton pleaded guilty, and the McCalls pleaded not guilty, and the case was moved to Burke county for trial. Samuel is the son of Alexander McCall, and it was shown that some time before the church was burned a mill belonging to Rom Brown had been burned, and Alexander McCall was charged with burning the mill, and had been arrested on that charge before the church was burned; and it was admitted by the state on the trial that he had been tried and acquitted of burning the mill. The theory of the state was that Keaton burned the church, but was induced to do so by the defendants, the McCalls, to allay suspicions against Alexander McCall as to his being the party who burned the mill; and for the purpose of establishing the truth of this theory the state introduced Keaton as a witness. On his examination he was interrogated by the state as follows: "Was Alexander McCall arrested for burning the mill when the church was burned?" to which he answered, "Yes." "Where were you the night the mill was said to have been burned? Where did you stay that night? I stayed at Alexander McCall's." "Where was Alexander the forepart of that night? Was he at home or not?" "No, he was not at home." "Did you see him when he came in?" "No, I did not see him when he came in." "Saw him next morning?" "Yes." "You noticed his clothing next morning?" "Yes." "What was their condition?" "His clothing was wet, lying on a chair by his bed." "Do you know what Alexander McCall carried his matches in—do you happen to know that—on the night the mill was burned?" "Yes." "What did he say about Alexander McCall having matches?" "He had them in a match safe that belonged to his daddy." "Did he tell you what he used to set the mill on fire?" "He said he used oil." "Did he tell you how he carried the oil?" "In a bottle." The above questions and answers were allowed by the court over the objection of the defendants, and they excepted. The state also introduced M. L. Kaylor, who testified that he said to Keaton on the day of the preliminary examination, "Young man, you've got yourself into a pretty bad box." He just touched my arm, and turned me around, and said, "The McCalls had this thing done to cover up the burning of the mill." He said, "If I am put on the stand, I will tell the truth about it." Another witness, by the name of Perry, was put on the stand by the state, and testified, in answer to a question asked by the state, that Keaton said "he had burned the church, and that he

was hired to burn the church by Alexander McCall and Samuel McCall, one or together." The evidence was admitted by the court over the objection of the defendants, and they excepted. The defendants were not on trial for burning Brown's Mill, and any evidence as to that, not necessarily connected with the burning of the church, was incompetent, and should not have been allowed. And the evidence of Keaton as to the absence of the defendant Alexander McCall the night the mill was burned, as to his wet clothing the next morning, as to the use of matches and the box he carried them in, and the use of oil carried in a bottle, was incompetent, and should not have been allowed. *State v. Graham*, 121 N. C. 623, 28 S. E. 409; *State v. Shuford*, 69 N. C. 486; *State v. Frazier*, 118 N. C. 1257, 24 S. E. 520; *State v. Jeffries*, 117 N. C. 727, 23 S. E. 163; *State v. Alston*, 94 N. C. 930. The mill was burned some time before the church was burned, and before Keaton said the defendants induced him to burn the church; and the statements he made as to the absence from home of Alexander McCall, his wet clothing, the matches and oil, have no connection with burning the church, nor with the conversation he detailed as to their inducing him to burn the church. It was not necessary to support the state's theory, as Alexander had already been charged with burning the mill, and had been arrested on that charge, before it was alleged that the McCalls induced Keaton to burn the church, according to his own testimony. The evidence of Kaylor and Perry is of the same character, and is treated together, and was competent, although Keaton had submitted, and was not on trial. But as to the defendants, the McCalls, his guilt was still involved, and was an issue in the trial, for the reason that he was charged as principal and the McCalls as accessories before the fact of burning the church; and, if he was not guilty, the McCalls could not be guilty. It became in this way necessary for the jury to pass upon the guilt of Keaton, and, this being so, the evidence of Kaylor and Perry was substantive evidence as to Keaton's guilt, but was only corroborative evidence as to the guilt of the McCalls. It could only be used for the purpose of corroborating the evidence of Keaton given on the trial of the case, and the jury was the judge of that,—whether it did or not, and to what extent, if at all. But it seems to have been treated as substantive evidence by the court in its charge to the jury, whereas it was the duty of the court to have instructed the jury as to its character, and to have explained to them in what respect it was substantive evidence, and in what respect it could only be considered as corroborating Keaton, if they should find that it did corroborate him. And then it could not be used as establishing the truth of the statements made by Keaton, but only for the purpose of giving credit to his testimony. *State v. Parrish*, 79 N. C. 610. These errors, we think, were calculated to seriously preju-

dice the defendants on the trial, and entitle them to a new trial.

New trial.

(131 N. C. 413)

SOUTHERN LOAN & TRUST CO. v. BENBOW et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

EVIDENCE—STATEMENTS ON SUPPLEMENTARY PROCEEDINGS—LETTERS—RECOLLECTION OF WITNESS—RES ADJUDICATA—INSTRUCTIONS.

1. Where it was in issue whether a certain note had been transferred by a husband to his wife without consideration, it was error not to receive certain evidence of the husband and wife bearing on such issue, previously given in supplementary proceedings, though it was only a part of their evidence in such proceedings.

2. Where a witness stated, in regard to a letter purporting to have been written by him, that he had no recollection independent of the letter, no recollection of writing it or of the matters referred to, but stated that about the date of the letter he had a great many conversations on the matter to which it related, it was admissible.

3. Where a receiver appointed in supplementary proceedings sues to recover a note, claiming it as the property of the debtor, the judgment against him is not binding on any creditor save the one who carried on the proceedings, for his own benefit.

4. The issue was whether a note transferred by a husband to his wife was without consideration, and they claimed it was transferred as a payment on a prior note from the husband to the wife, given to enable the wife to purchase a home. The wife testified that prior to the giving of the note he had agreed to give her a home if she would join him in certain mortgages. The court charged that, if the note of the husband was not given to the wife in consideration of any former promise to give her a home if she would sign the mortgage deed, or if there was no agreement at the time of the execution of the mortgages that, if she would sign them, he would give her a home, or if the mortgage deeds were never signed by the wife, then there was no consideration for the transfer of the note. *Held*, that the charge was error, there being no evidence that the wife signed any mortgage deeds.

Douglas, J., dissenting.

Appeal from superior court, Guilford county; Shaw, Judge.

Action by the Southern Loan & Trust Company against D. W. C. Benbow and others. From a judgment for defendants, plaintiff appeals. Reversed.

J. N. Wilson and E. K. Bryan, for appellant. J. T. Morehead and King & Kimball, for appellees.

MONTGOMERY, J. The following named judgment creditors of D. W. C. Benbow, viz., the National Bank of Greensboro and Rowe Wiggins, the Atlantic National Bank of Wilmington, the People's National Bank of Lynchburg, Va., and the National Bank of Greensboro and others, and the Wilmington Savings & Trust Company of Wilmington, N. C.,—the last-named being a creditor whose claim was not in judgment,—brought several actions against the defendant D. W. C. Benbow and J. S. Cox, his assignee, the

object of which several actions was to have a certain deed of trust executed by Benbow to Cox set aside for fraud, and to secure liens, claiming priority over every other creditor not suing before its suit was commenced, upon the property conveyed in the deed of trust to secure their several debts. The action of the first-named creditor was commenced on April 13, 1894; of the second, on May 1, 1894; of the fourth, on May 14, 1894; of the fifth, on May 25, 1895; and of the third, on May 1, 1894. These actions were not pressed, and nothing seems to have been done with them until the June term, 1899, of Guilford superior court, when it was agreed that the first mentioned should be tried, and the others to abide the result of the first case. An issue of fraud was submitted to the jury in that case, and found in favor of the plaintiffs, whereupon judgment was rendered that the Wilmington Savings & Trust Company recover of the defendant D. W. C. Benbow its debt, the principal, interest, and costs. It was further adjudged by the court that the deed of assignment from Benbow to Cox was executed with the intent to hinder, delay, and defraud his creditors, and was therefore void; and it was further adjudged that the plaintiffs in the several suits named, by reason of the bringing of said actions and the nature of the same, were entitled to and should have priority of lien on the property described in the deed of assignment over all other creditors. (The priorities of these several plaintiffs, as among themselves, were waived.) A commissioner was appointed in said judgment to advertise and sell the property mentioned in the deed for the payment of the judgment indebtedness. A few days before that judgment was rendered, to wit, at a special term of the superior court of Guilford county of May 22, 1899, in the case of W. H. Ragan, receiver of the property and estate of D. W. C. Benbow, against J. S. Cox, trustee, D. W. C. Benbow, Mary E. Benbow, and Chas. D. Benbow, a judgment was entered that the plaintiff was not entitled to recover possession of a certain note executed by B. J. Fisher to D. W. C. Benbow, and by him transferred to his wife, Mary E. Benbow, and that the note was the property of the executor of Mary E. Benbow, who had died after the commencement of the action. The last-mentioned suit of Ragan, receiver, against Cox, D. W. C. Benbow, and others, was commenced in May, 1894. The National Bank of Greensboro, at February term, 1894, had recovered two judgments against D. W. C. Benbow for large amounts, and in its effort to collect the money on its judgments supplementary proceedings were resorted to, and in those proceedings Ragan was appointed receiver of the estate and property of D. W. C. Benbow. In the present action the plaintiff, who was duly appointed trustee in bankruptcy of D. W. C. Benbow, brings this action as such trustee against the defend-

ants, alleging that the deed of trust made by Benbow to Cox was executed to hinder, delay, and defraud his creditors; that just before Benbow filed his petition to become a bankrupt he had purchased the judgments against him heretofore mentioned with his own money and effects, and procured the said judgments to be assigned to his son, the defendant Chas. D. Benbow, to defraud his creditors; and that in pursuance of this scheme he procured the judgment of June term, 1899, of the superior court of Guilford county, heretofore referred to, to be entered, by which the deed of assignment was declared void, and the property conveyed in the deed condemned to be sold to satisfy the judgment creditors named in the judgment. The prayer for relief was that Charles B. Benbow be declared to be the owner of the judgments in trust for the plaintiff, as trustee in bankruptcy of the creditors of D. W. C. Benbow, and that all the parties be restrained from selling or interfering with the property conveyed in the deed of assignment until the further order of the court, and for such other relief as the plaintiff may be entitled to. Afterwards the property was sold by the commissioner, and purchased by Chas. D. Benbow, and the sale was confirmed, the plaintiff making a special appearance in the action for the purpose of agreeing that the proceeds of the sale should stand in the place of the property sold, and be answerable to the plaintiff for any judgment that might be obtained by it in the action. The allegations of fraud in the complaint were denied in the answer, as was also the allegation that the defendant D. W. C. Benbow had purchased the judgments against himself with his own money and effects, and had them assigned to his son, Charles D. Benbow, in fraud of his creditors. The defendants also denied that D. W. C. Benbow caused the judgment of June term, 1899, to be entered, and it was denied that D. W. C. Benbow had fraudulently transferred the Fisher note to the defendant Mary E. Benbow.

The following issues were submitted to the jury: (1) Was the deed of assignment executed by D. W. C. Benbow to J. S. Cox, assignee, on the 23d day of January, 1894, executed for the purpose of hindering, delaying, or defrauding his creditors? (2) Was the Fisher note of \$17,235, transferred by D. W. C. Benbow to his wife at a time when he was insolvent, and without valuable consideration? (3) Was the Fisher note for \$17,235, transferred by D. W. C. Benbow to his wife with intent or purpose of hindering, delaying, or defrauding his creditors? (4) Were any of the judgments mentioned in the complaint, to wit, the People's National Bank of Lynchburg, the National Bank of Greensboro, J. Davenport, Jr., the First National Bank of Richmond, the Union Bank of Richmond, Miss Rowe Wiggins, the Atlantic National Bank of Wilmington, the Wilmington

Savings & Trust Company, of Wilmington, the Bank of Guilford, purchased with the money derived from the Fisher note, or any part thereof; and, if so, which judgment or judgments, naming them? (5) Did defendant D. W. C. Benbow purchase the judgments mentioned in the complaint, and have the same assigned to Chas. D. Benbow for the purpose of hindering, delaying, or defrauding his creditors? (6) Was the decree in the creditors' suits condemning the property of D. W. C. Benbow to the payment of the judgments taken after filing of the petition in bankruptcy by D. W. C. Benbow, without the trustee in bankruptcy having been made a party? (7) In an action heretofore tried in this court, wherein W. H. Ragan, receiver of the property of D. W. C. Benbow, appointed in supplementary proceedings instituted by the National Bank of Greensboro and the Bank of Guilford, creditors of Benbow, against J. S. Cox, trustee, Chas. D. Benbow, executor of Mary E. Benbow, deceased, D. W. C. Benbow, and others,—was it found as facts by the jury? First. That assignment and transfer of the duobill of B. J. Fisher by D. W. C. Benbow to Mary E. Benbow was not made to obstruct, hinder, and delay or defraud the creditors of said D. W. C. Benbow; second, that said transfer and assignment were not invalid for any other reason. And did the court, upon such verdict, adjudge that Chas. D. Benbow, as executor of Mary E. Benbow, was the legal owner of said note?

On the trial the plaintiff offered to read in evidence that part of the examination of D. W. C. Benbow in the supplementary proceedings which concerned the Fisher note for the purpose of showing that there was no valid consideration to support the transfer of that note from said Benbow to Mary E. Benbow, his wife; and he also offered to introduce and read that part of Mrs. Benbow's evidence in the supplementary proceedings. His honor refused to allow those parts of the evidence of Benbow and his wife to be read, the defendants objecting on the ground that those parts of the evidence were fragmentary, and that the entire record of all of their evidence had to be offered. We think that the evidence ought to have been admitted. We know that, to arrive at the true meaning of a person's declaration or admission, we must hear all and each part of that declaration or admission. We cannot arrive at the true meaning by taking detached parts of an admission or declaration unfavorable to the declarant, and leave out the part or parts which might be explanatory and favorable. Mr. Greenleaf, in his first volume on Evidence (16th Ed. § 201), says: "This general principle, however, raised two sorts of questions: First, whether the party offering the admission must, as a preliminary condition, put in the whole or other parts of the conversation, document, etc.; second, whether the party whose

statement it is may afterwards, by way of explanation, put in the other parts or other statements. It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desires to use, whether a speech or conversation or a writing." The same rule is laid down in *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33; *Roberts v. Roberts*, 85 N. C. 9. We have said that his honor was in error in excluding the evidence, even though it was only a part of the evidence of the defendants on the question of the consideration upon which the Fisher note was transferred to Mrs. Benbow. In looking at the entire evidence of the defendants given in the supplementary proceedings, the part offered was about all that was said on the subject. The plaintiff put the whole evidence in, after his honor refused to allow the parts which were offered to be read, reserving his exception. The evidence was lengthy, and covered many questions and many other matters of alleged fraud, and was calculated to mislead the jury. For the purpose of showing that the defendant D. W. C. Benbow purchased the judgments against himself with his own money and effects, the plaintiff offered to show by R. R. King that D. W. C. Benbow purchased these judgments. A letter signed by King was shown to him, in these words: "No. 7. Raleigh, N. C., January 30, 1899. Mr. Chas. U. Williams, Richmond, Va.: Just before leaving home this a. m., Dr. Benbow asked me to write and ask you to have the notes of the Union Bank and others on North State Improvement Co. sent to the Greensboro National Bank of Greensboro, to be delivered to him when he pays balance of suit on compromise. I suggest that you accompany these with a statement showing balance, and saying that all court costs must be arranged also. I expect to return home on next Thursday. (Benbow says he wants to pay you at once.) Am here getting legislature to repeal some repudiation legislation enacted at two last sessions. Yours truly, R. R. King." The witness said that he had no recollection of writing that letter, nor of what it contained, independent of the paper itself. He was further asked these questions: "After looking at that paper, can you state whether you wrote it or not?" He answered: "This paper says so, but, independent of that, I have no recollection." He was asked again: "Did you write that letter?" "I think that is my handwriting." There were four or five other letters of the same nature shown to the witness, and he made the same statement about them all. When asked about one of the letters, if any statement in that paper is true, he answered, "Yes, I need not repeat that." It is to-day generally understood that there are two sorts of recollection which are properly available for a witness, to wit, past recollection and present recol-

lection. In the latter, and usual sort, the witness either has a sufficiently clear recollection, or can summon it, and make it distinct and actual, if he can stimulate and refresh it; and the chief question is as to the propriety of certain means of stimulating it,—in particular of using written or printed notes, memoranda, or other things, as refreshing it. In the former sort the witness is totally lacking in present recollection, and cannot revive it by stimulation; but there was a time when he did have a sufficient recollection, and when it was recorded, so that he can adopt his record of his then existing recollection, and use it as sufficiently representing the tenor of his knowledge on the subject. First. The record, memorandum, note, entry, etc., must have been made at or about the time the event recorded. Whether, in a given case, it was made so near that the recollection may be assumed to have been then sufficiently fresh, must depend on the circumstances of the case. Second. The witness need not have made the record himself: The essential thing is that he should be able to guaranty that the record actually represented his recollection at the time, and this he may be able to do either by virtue of his general custom in making such records or by his assurance that he would not have made the record if he had not believed it correct. *Greenl. Ev.* §§ 439a, 439b. The witness said, in reference to the time and date of the letter: "I have no recollection independent of that, and I have no recollection of writing that letter, and have no recollection of any of the matters therein referred to. At about that period, and subsequent thereto, I had a great many conversations with Dr. Benbow about these matters, and with his counsel." Applying all these tests laid down by Mr. Greenleaf to the testimony of the witness, we think that it was competent, and ought to be received.

His honor instructed the jury that the plaintiff could bring his action, and have the questions involved therein determined and passed upon by the jury, and "that you will not permit the answer to the last issue, which relates to the decree of the court in the case of Ragan, receiver, against Cox, trustee, and others, to influence you in passing upon the second, third, and fourth issues, or any of the issues, so far as that is concerned." The defendants did not appeal from that instruction, but in the argument here it was contended that the court, which tried the case upon the pleadings, was without jurisdiction of the subject-matter of the action. It was argued that Ragan was a receiver appointed in supplementary proceedings, and therefore he represented the creditors of D. W. C. Benbow, and that in his suit to recover possession of the Fisher note there was a judgment against him and in favor of Mrs. Benbow, and therefore that the creditors were bound by that judgment.

But the supplementary proceedings in which Ragan was appointed were not in a general creditors' bill properly constituted, but in a single creditor's suit, in which the creditor was trying to enforce his own particular demand. The judgment, therefore, bound none of the creditors except that one who instituted the supplementary proceedings in his own behalf, and not for the other creditors.

It was argued also here that on the main branch of this suit the five judgment creditors named were proceeding in behalf of themselves and all other creditors of D. W. C. Benbow to set aside the deed of trust, and to subject the property conveyed therein to the payment of the debts due to all the creditors. But the fact is, as we have already seen, there was no general creditors' bill, but there were five separate suits, and they were never even consolidated. One was tried with an agreement on the part of the other four that they would abide the result of the trial. While the charge of his honor is, in the main, correct, we think in one serious particular there was an error which was excepted to by the plaintiff. It was on the question of the consideration for which the note of \$15,000, made in 1890, was given by Dr. Benbow to his wife, and which was afterwards alleged to have been credited with the Fisher note, which had been assigned by Dr. Benbow to his wife. The substance of Dr. Benbow's testimony was about this: "The Fisher note is in the National Bank of Greensboro. It was not delivered to Cox, assignee, because I had transferred it to my wife by indorsement on January 22d last, the day before my assignment. I made this transfer to her as a credit upon a note she held against me for a larger amount, leaving a balance of \$715 and accrued interest. The note held by my wife was dated September 1, 1893, and that was the true date, it being a renewal of one given a year previous, that was a renewal note, which was also given as a renewal note for one given in March or April, 1890, which was the first note. The amount of the first note was about \$15,000. The consideration of the note given in 1890 was a gift based upon a calculation of money belonging to her, given to her by her father. This money was not willed to her by her father, but given to her before her father's death. I was married in 1857. This money was the proceeds of sale of negroes, which her father sold, and amounted to \$2,500, and the money was given to her at different times before the war, and she gave it to me when her father gave it to her. I account for the difference between the \$2,500 and the \$15,000 by the addition of interest at 6 per cent. These notes to my wife were kept in my safe, and they were never out of my possession. When the transfer of the Fisher note was made, she immediately returned it to me. This Fisher note is a duebill." He was solvent when he executed the \$15,000

note, and he said that he gave it to her from the fact that she had asked him on several occasions to give her, in her own right, a home. He further said that before 1890 Mrs. Benbow repeatedly urged him, in consideration of her having furnished him the \$2,500, to purchase and settle upon her a home, and that he recognized the justice of her claim, but that he had no suitable property himself for the purpose, so he executed to her the note for \$15,000, and that that amount was made by the addition of interest from the time she let him have the money. Mrs. Benbow's evidence was, in substance, as follows: "I had, for several years before the spring of 1890, insisted upon Dr. Benbow's giving me property to be my own,—particularly a home and its appurtenances,—which he had from time to time promised to do, particularly when he asked me to join in two mortgages for \$25,000 each, to enable him to borrow money to use in his business as a stockholder in the North State Improvement Company. He promised me, as soon as that was paid off, he would comply with my request. In the early spring of 1890 he came to me at the head of the dining room, and told me he was now out of debt; that he had no real estate of his own that was suitable for a residence for me, and had concluded to give me the money with which to purchase me a home, and, in addition thereto, for such other purposes as I wished to use it. He handed me his note or duebill for, as near as I can remember, about \$15,000, which I took. Several times since he has told me that he renewed it at the end of each year, including the accrued interest. On the 22d of January last, as a payment on said note, Dr. Benbow transferred to me the note spoken of in his examination as the Fisher note, which payment he indorsed by way of credit on my note." As we have said, the note for \$15,000 was executed in 1890, when Dr. Benbow was solvent. The Fisher note was alleged to have been paid as a credit on it, when he was insolvent, and the day before he made his assignment. His honor properly told the jury that when Dr. Benbow received \$2,500 in money from his wife, before the war, it became his, and, if that was the only consideration for the execution of the \$15,000 bond, that the said note was not a valid debt of Dr. Benbow as against his creditors, and that, if the jury found from the evidence that the Fisher note was transferred to Mrs. Benbow as a payment upon the note, if based upon such consideration, the transfer was without a valuable consideration, and they should answer the second consideration "Yes." But he instructed the jury that, if they should find from the evidence that Mrs. Benbow joined with Dr. Benbow in the execution of two certain mortgage deeds for \$25,000 each, and that at the time it was agreed between her and Dr. Benbow that, if she would sign the same, he would give her a home, and that afterwards, in 1890, it was agreed be-

tween him and his wife that in place of a home he would give her his note for \$15,000, with which to purchase a home, and pursuant to that agreement he executed and delivered to her his note, and that he transferred to his wife the Fisher note as a payment on his note to his wife, and she had accepted it as such, then such a transfer of the Fisher note would be for a valuable consideration, and they should answer the second issue "No." And he further charged, "If you should find that the \$15,000 note was not given to her in consideration of any former promise to give her a home if she would sign the mortgage deed, or if the jury should find from the evidence that there was no agreement between Benbow and his wife, at the time of the execution of the mortgages before referred to, to the effect, that, if she would sign the mortgages, he would give her a home, or if they should find that the mortgage deeds were never signed by Mrs. Benbow, then there was no valuable consideration for the transfer of the Fisher note." There was error in that part of the charge. There is no evidence that the signing of the mortgage deeds by Mrs. Benbow was the consideration for the promise.

New trial.

DOUGLAS, J., dissents.

(131 N. C. 453)

RHEA v. RAWLS et al.

(Supreme Court of North Carolina. Dec. 2, 1902.)

DOWER—LAND DEEDED SUBJECT TO DEED OF TRUST.

1. An owner of land subject to a deed of trust to secure his notes to N. and B. conveyed it to R., subject to payment of the notes; R., as part of the same transaction, giving a trust deed as security for payment of the two notes, and giving his own notes in place of said notes, which were surrendered to the original owner of the land. Held that, the deed of trust having been foreclosed, R.'s wife had no right to dower in the land.

Appeal from superior court, Buncombe county; Justice, Judge.

Proceeding by Harriet E. Rhea against R. R. Rawls and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. J. Peele and G. A. Shuford, for appellant. Merrimon & Merrimon, for appellees.

FURCHES, C. J. This is a proceeding for dower, in which plaintiff seeks to have dower assigned her as the widow of H. K. Rhea, commenced before the clerk, and transferred to term for trial upon issues involving plaintiff's right to dower in an undivided half of the Swannanoa Hotel property. M. E. Carter was the owner of this property, subject to a deed of trust to I. G. Martin to se-

cure the payment of two notes,—one due Norcop of \$5,022, and one to Buchanan of \$700. And on the 1st day of September, 1883, he sold, and he and his wife conveyed, the one-half interest he owned, to the said H. K. Rhea, subject to the payment of the Norcop and Buchanan debts. This is expressly stipulated in the deed from Carter and wife to Rhea. And at the same time, and as a part of the same transaction, Martin, trustee, took a trust deed from Rhea as security for the payment of the two notes to Norcop and Buchanan, Rhea giving his own notes in place of the Carter notes, which Martin surrendered to Carter. These notes were not paid. Martin sold, and the defendant Rawls became the purchaser, paying a full fee-simple price; and Martin, the trustee, made him a deed.

The plaintiff cannot recover. The deed from Carter to H. K. Rhea conveyed the property subject to the payment of the two notes held by Martin as trustee, which constituted a trust on the property conveyed for their payment. This was expressly stipulated in the deed from Carter. It would have been necessary to enforce this trust by a decree of court, as there was no power of sale. But Rhea's deed to Martin contained a power of sale, and, we think, supplied the want of such power in the deed from Carter, as both deeds were made at the same time, and were a part of the same transaction. But at the time Carter conveyed to Rhea he only had the equity of redemption, the legal estate then being in the trustee, Martin. Parker v. Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231. Therefore Rhea never held the legal title to said property. It did not even pass through him, as it did in Bunting v. Jones, 78 N. C. 242. But it is said a widow may be endowed of an equitable estate. This is so where the husband has an equity that he could enforce if living. But in this case he had none that he could enforce, as he took the title subject to the payment of these debts of Norcop and Buchanan, which were paid by a sale under the deed of trust, with the defendant's money. And, as the husband would have had no equity, if living, the plaintiff has none, as it cannot be contended that the Carter debts to Norcop and Buchanan were paid by the substitution of Rhea's notes for those of Carter. Again, it appears that the deed from Carter and wife to Rhea, and the change of notes, and the new trust deed of Rhea to Martin for that of Carter, were all a part of the same transaction; that the notes of Norcop and Buchanan furnished the purchase money to Carter, and that Rhea never paid a dollar of it; so the case of Bunting v. Jones applies in full force, and the plaintiff cannot recover for the reasons given in that case.

Affirmed.

(131 N. C. 802)

STATE v. HAGAN.

(Supreme Court of North Carolina. Dec. 9, 1902.)

CRIMINAL LAW—DEMURRER TO STATE'S EVIDENCE—WAIVER—AID BY DEFENDANT'S EVIDENCE—ERROR CURED—DEGREE OF HOMICIDE—INSTRUCTION—PROPRIETY.

1. Where, in a prosecution for a murder, the accused demurs to the state's evidence as failing to show that deceased died from the wound inflicted, but, after the overruling of the demurrer, introduces evidence of his own which supplies this defect, any error in such ruling is thereby cured.

2. Where an accused, after demurring to the state's evidence, introduces testimony of his own which supplies a defect therein, he thereby waives his right to assign the overruling of the demurrer as error.

3. In a prosecution for homicide, the state's attorney having entered of record that he would not ask for a verdict of murder in the first degree, and not insisting in argument on the conviction for murder in the second degree, the court, after explaining the difference between murder and manslaughter, instructed that there was no evidence of self-defense, and that, if the jury believed the evidence, they should return a verdict of guilty of manslaughter, but, if they did not believe the evidence, one of not guilty. *Held*, as there was no evidence of self-defense that manslaughter was the lowest degree of crime of which the accused was guilty, and the accused had no ground of exception.

Appeal from superior court, Madison county; Council, Judge.

W. E. Hagan was convicted of manslaughter, and appeals. Affirmed.

The Attorney General, for the State.

MONTGOMERY, J. The indictment charged the prisoner with murder. After the evidence of the state was concluded, the prisoner demurred to the evidence on the ground that it did not tend to prove that Cody, the deceased, died from the wound inflicted upon him by the prisoner. The demurrer was overruled, and the prisoner excepted. The prisoner then introduced evidence, a part of which made it clear that Cody died from a gunshot wound given him by the prisoner. If the state had not introduced evidence sufficient to go to the jury that Cody died from the wound, and the judge was in error in overruling the demurrer,—a matter which we need not decide,—the error was cured by the course afterwards followed by the prisoner in offering evidence supplying that which the state lacked. The introduction of such

evidence was a waiver of the prisoner's right to rely on the ruling as error. 6 Enc. Pl. & Prac. p. 455. In *State v. Groves*, 119 N. C. 822, 25 S. E. 819, the trial judge overruled the demurrer, and this court said that in refusing to allow the prisoner to introduce evidence and charging the jury upon the evidence of the state, admitted to be true by the demurrer, his honor committed no error. The court further said in that case: "As stated in that opinion [*State v. Adams*, 115 N. C. 775, 784, 20 S. E. 722], if the defendant has evidence, he should give the jury the benefit of it, and (unless his own evidence proves the case against him) it will be still open to him to ask an instruction that there is not sufficient evidence to go to the jury. But if he demurs on that ground the court will not permit him to take 'two bites at a cherry' by fishing for the opinion of the court and afterwards introducing testimony if the demurrer is overruled." Acts 1897, c. 109, and Acts 1899, c. 131, apply to civil actions and special proceedings; but, if they could be applied to criminal actions, the same rule that we have laid down, viz., as to the first motion to dismiss (demurrer to the evidence) of the state, would be of no avail to the plaintiff unless at the conclusion of the whole evidence it was renewed, and then it would have to be heard upon the whole evidence. *Parlier v. Railway Co.*, 129 N. C. 262, 39 S. E. 961.

In the case before us the solicitor entered of record that he would not ask for a verdict of murder in the first degree, and on the argument did not insist on a conviction for murder in the second degree. At the conclusion of the evidence, his honor explained the difference between murder and manslaughter, and instructed the jury that there was no evidence that the prisoner fought in self-defense, and that, as the solicitor did not insist on a verdict for murder in the second degree, they should return a verdict of guilty of manslaughter if they believed the evidence, and, if they did not believe the evidence, they should return a verdict of not guilty. We cannot see how the prisoner could have reasonably excepted to that instruction. There was no evidence that he fought in self-defense. He was, therefore, guilty of murder in the first degree, or murder in the second degree, or of manslaughter. He escaped on a conviction for the lightest of the crimes.

No error.

(131 N. C. 463)

HOPKINS et al. v. NORFOLK & S. R. CO.
et al.(Supreme Court of North Carolina. Dec. 9,
1902.)**FISHERIES—DESTRUCTION OF NETS BY BOATS
—NONSUIT.**

1. On motion for nonsuit, plaintiff's evidence must be taken as true, and construed most favorably to him.

2. One who runs his boat unnecessarily and wantonly into fishing nets in a river outside of the regular channel, in which there is sufficient room for the boat, is liable for the damages.

Appeal from superior court, Tyrrell county; Jones, Judge.

Action by E. B. Hopkins and others against the Norfolk & Southern Railroad Company and another. Judgment for defendants, and plaintiffs appeal. Reversed.

W. M. Bond, for appellants. Pruden & Pruden and Shepherd & Shepherd, for appellees.

DOUGLAS, J. This is an action to recover damages for the destruction of fishing nets by the steamtug and barge of the defendants. Among other allegations in the complaint are the following: "(1) That during the spring of 1901 they were engaged in fishing Dutch and pound nets in the waters of Scuppernong river, where they had the right in law to fish same." "(4) That on said day (May 1, 1901), while the said nets of plaintiffs were setting in said water catching fish, at large profit to them, said nets were run over, greatly damaged, and partially destroyed by said transfer barge and said tugboat, being lashed together. (5) That said injury to and destruction of said nets were caused by the negligence of those operating said boats, they being employes of defendants, in failing to navigate them so as to avoid nets, as there was plenty of water for them to do so, and there was no necessity, either from stress of weather or from any other cause, to make them run over said nets; that said nets were injured willfully, wantonly, unlawfully, and unnecessarily, and three nets were injured or destroyed." The plaintiffs introduced evidence tending to show that the defendants' boats ran over and injured the plaintiffs' nets on May 1, 1901, between sunset and dark; that it was not too dark to see the nets, but that they could have been seen at a distance of 400 or 500 yards before reaching them; that the river

at that place is between 300 and 400 yards wide; that the nets did not extend into the regular channel of the river, where boats usually passed, but left a clear channel from 125 to 150 yards in width, along which the boats could have gone with ordinary care without inconvenience or danger, and without injuring the nets. There was also evidence tending to show the amount of damage. At the conclusion of the plaintiffs' testimony, the defendants moved for judgment as of nonsuit. This motion was granted.

It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true, and construed in the light most favorable for him. *Moore v. Railway Co.*, 128 N. C. 455, 39 S. E. 57; *Coley v. Railroad Co.*, 129 N. C. 407, 413, 40 S. E. 195, and cases therein cited. In *Purnell v. Railroad Co.*, 122 N. C. 832, 29 S. E. 953, Justice Furches, speaking for the court, says: "This motion is substantially a demurrer to the plaintiff's evidence, and, this being so, and the court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proved or tended to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendants." Thus construing this evidence, there can be no doubt that the case should have been submitted to the jury. Therefore there was error in the judgment of nonsuit.

The right of navigation is paramount, but not exclusive. If the nets had been across the channel of the river, or had been in any other way a bar to navigation, they could have been run over with impunity by any vessels that might have found it reasonably necessary to do so. *Lewis v. Keeling*, 46 N. C. 239, 62 Am. Dec. 168; *State v. Baum*, 128 N. C. 600, 38 S. E. 900. But there must be some such necessity. As was said by this court in *Lewis v. Keeling*, supra: "There must be no wantonness or malice, no unnecessary damage, but a bona fide exercise of the paramount right of navigation." This rule is not only uniformly recognized by the courts in awarding compensatory damages, but is further enforced by section 3385 of the Code by providing a penalty of \$100 for every such injury. The defendants rely upon *Baum's Case*, supra, but that case recognizes only the paramount right of navigation, and is based upon the obstruction of a navigable stream.

There was error in taking the case from the jury. Error.

¶ 2. See *Fish*, vol. 22, Cent. Dig. § 14.

(131 N. C. 466)

McCALL v. ZACHARY.

(Supreme Court of North Carolina. Dec. 9, 1902.)

OFFICERS—WRONGFUL POSSESSION OF OFFICE—ACTION FOR FEES—AMOUNT INVOLVED—JOINDER OF CAUSES OF ACTION—RES JUDICATA.

1. An action to recover the fees and emoluments of an office received by one of the defendants during his wrongful occupation thereof, alleged to be \$500, and to recover of the sureties on his bond, in the sum of \$200, given in an action of quo warranto to determine right to the office, conditioned to pay such fees and emoluments, is on but a single cause of action, and for purpose of jurisdiction involves \$500; the bond being only an incident to the recovery, and the action not being on it.

2. In an action to recover fees and emoluments of an office received by defendant during his wrongful occupation thereof, the judgment in quo warranto, which merely determined plaintiff's right to the office, is not *res judicata* against plaintiff's right to recover such fees and emoluments; the state being the plaintiff in the quo warranto action, and the fees and emoluments not being recoverable therein.

Appeal from superior court, Madison county; Council, Judge.

Action by R. S. McCall against W. W. Zachary. Demurrer to complaint was sustained, and plaintiff appeals. Reversed.

Frank Carter (V. S. Lusk and Pritchard & Rollins, on the brief), for appellant. Geo. A. Shuford and J. M. Gudger, for appellee.

FURCHES, C. J. The plaintiff was the duly elected solicitor of Madison county criminal court, but the defendant, under an appointment by the judge of said court, took possession of said office before the term of the plaintiff had expired. The plaintiff thereupon, by and with the permission of the attorney general, brought an action of quo warranto for the possession of said office, which terminated in his favor (125 N. C. 249, 34 S. E. 962), in which action it was held that he was the rightful solicitor of said court and the defendant was not, and that the plaintiff was entitled to the office and the fees and emoluments thereof. Upon the institution of said action of quo warranto the defendant, as he was required to do by act of assembly, entered into bond in the sum of \$200, payable to said McCall, with the defendants Ebbs and Redmon as sureties of Zachary, that he would account for and pay over to the plaintiff all such fees and emoluments as Zachary might recover by virtue of his incumbency of said office, if the plaintiff should succeed in recovering the same. But although the plaintiff succeeded in said action, and recovered said office, the defendant Zachary has failed and refused to account for and pay over said fees so received by him while he so wrongfully held said office, the plaintiff alleges, to the amount of \$500. This action is brought to recover said fees

and emoluments so wrongfully received by defendant Zachary while he was so wrongfully in the occupation and possession of the same. To the plaintiff's complaint, in which he alleges these facts, the defendant demurred: First, for that the court had no jurisdiction, as it appeared from the complaint that the action was brought on a bond for \$200; second, for that the complaint and exhibits show that said bond was given in the action of quo warranto, which has been tried, and judgment for the plaintiff for the office, but there was no judgment in that action for costs, and the matter is *res judicata*; third, for that several causes of action are improperly united in the same action,—one for the amount of fees received by defendant Zachary, and the other for the sum of \$200, the amount of the bond to secure the plaintiff against loss on account of Zachary's holding the office and receiving the fees and emoluments thereof.

The first ground of demurrer is not true in fact, and cannot be sustained. The action is not brought on the bond of \$200, but to recover the fees the defendant received while he wrongfully held said office, amounting, as plaintiff alleges, to \$500. This gave the court jurisdiction, and the bond of \$200 is only an incident to the recovery. It is like that of a bail bond, or a prosecution bond, or a bond given by a defendant in an action of ejectment to secure costs and damages, and does not affect the jurisdiction. It is true that recoveries on such bonds as those mentioned may be had in the action in which they are given, but that is by statute. Code, § 543. It is a well-recognized rule that when a court once gets jurisdiction of an action it retains the jurisdiction, and proceeds to pass upon and determine all matters incident thereto. *Chambers v. Massey*, 42 N. C. 286, cited and approved in *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783; *Lutz v. Thompson*, 87 N. C. 334. If there ever would have been any difficulty in the plaintiff's proceeding as he did in this action, that has been cured by the joinder of the legal and equitable jurisdiction in one court and in the same action. Under the present system we have adopted to a very great extent the equity practice, in which it was always allowed to give separate judgments against different defendants according to the merits of the case. So there can be no objection to the court's giving judgment against Zachary for \$500 and against the sureties on his bond for \$200, which would be discharged by the defendant Zachary paying the whole judgment, or by their paying that amount if Zachary did not. They stood, as to the \$200, as any other surety in a judgment does.

The second ground of demurrer cannot be sustained. The quo warranto action was by the state, in the exercise of its high prerogative right, to see that its offices are held

¶ 2. See Judgment, vol. 30, Cent. Dig. § 1267.

and exercised by its rightfully elected officers. To this extent the state was interested; but as to who received the fees, it, as a state, had no interest. That was a private matter between the parties, which they must settle themselves, according to the general principles of law, if the parties have to resort to the courts for a settlement. So the matter of fees was not involved in the former action, and could not have been. *McCall v. Webb*, 126 N. C. 760, 36 S. E. 174. And, as the matter of fees and emoluments were not and could not have been recovered in the quo warranto action, they could not have been adjudicated; and, if they could have been, they were not, and there can be no estoppel. *Glenn v. Wray*, 128 N. C. 730, 30 S. E. 167. But they may be collected in an independent action. 1 Enc. Pl. & Prac. 1018.

The defendant's third ground of demurrer—that there are several causes of action improperly united in one action—cannot be sustained. This ground has been substantially answered by what we have already said—that there is but one cause of action. The \$200 is not the cause of action, but the non-payment of the \$500 in fees that the defendant Zachary has wrongfully received, which belonged to the plaintiff. If these fees had been paid, that would have discharged the \$200 bond, which was given to secure their payment, and is only an incident to the cause of action, and does not affect the jurisdiction of the court. Code, § 184, provides for making all persons interested in the event of an action parties, and the sureties were interested in the event of this action, and were properly made parties thereto. If there had been different causes of action (as there were not), they grew out of the same transaction, and might well have been joined in one action. *Young v. Young*, 81 N. C. 91; *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122, and cases cited.

There was error in sustaining the demurrer. The plaintiff is entitled to recover the amount of the fees and emoluments received by the defendant Zachary, and \$200 of this amount against Ebbs and Redmon, if his recovery is that much or more against the defendant Zachary. Error.

(131 N. C. 460)

THOMAS v. GWYN et al.

(Supreme Court of North Carolina. Dec. 9, 1902.)

ACTION AGAINST AGENT—MONEYS COLLECTED—BURDEN OF PROOF—ESTOPPEL—COMMISSIONS.

1. Where, in an action by a principal against an agent for money he has collected and improperly retained, the answer admits the facts, but claims the money as commissions, the burden of proof is on the defendant to establish his right to the commissions.

2. Agents for the management of realty on the discontinuance of the agency sent the prin-

cipal a statement, charging commissions on rents to accrue in the future, and inclosing a check for the difference. The principal promptly notified the agents that she accepted the check only on account, and reserved the right to collect the money retained. *Held*, that the acceptance of the check did not estop the principal to claim the money retained.

3. Agents for the management of realty on the discontinuance of the agency retained commissions on rents to accrue in the future, transmitting the balance. In an action by the principal for the money retained, one of the agents testified that there was no formal contract; that it was usual to collect this commission as the rents accrued; and that the commissions covered the trouble of securing a tenant, collecting and remitting rents, supervising the property, and keeping it in repair. *Held* that, as these duties terminated with the agency, so that there could be no implied contract to justify the charge of the commissions, the agents had no right thereto.

Appeal from superior court, Buncombe county; Council, Judge.

Action by Mary W. Thomas against W. B. Gwyn and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Merrimon & Merrimon, for appellant. T. F. Davidson and Thos. A. Jones, for appellees.

CLARK, J. The plaintiff alleges that the defendants were her agents to collect rents for her houses, and had collected, up to December 31, 1894, the sum of \$366.90, which is due her, but which they refuse to pay over. The defendants admit the retention by them of said sum, collected by them as alleged in the complaint, but aver that the plaintiff owes them for commissions and services, for which they have retained said sum. The court properly held that the burden of proof was upon the defendants, for, if no proof had been introduced on either side, upon the admission in the answer of the collection of \$366.90 of plaintiff's money and retention of the same, nothing else appearing, the plaintiff would be entitled to recover. *Cook v. Guirkin*, 119 N. C. 13, 25 S. E. 715. The defendants dissolved partnership, and offered that one of them would collect part of the rents thereafter and the other the other part. The plaintiff declined this proposition, and discontinued the agency, as she had a right to do. *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119. The defendants then sent in a statement of account, charging commissions on rents which would thereafter fall due on leases made by them, and deducted therefor \$366.90, sending the plaintiff a check for the difference. The defendants now claim that the acceptance of said check is an estoppel upon the plaintiff to claim the balance, and rely upon *Ore Co. v. Powers*, 130 N. C. 152, 41 S. E. 6, and cases there cited. But they are not in point. In those cases the check or draft was sent with a statement therein, or in the letter, that it was in full settlement; and the creditor accepted it, or used it, without demur. In the

present case the defendants, in their letter of transmission, recognize that the check will not be a full settlement, unless so accepted by the plaintiff, and say therein: "We cannot, as a matter of course, undertake to predict with absolute certainty what a court of law will decide; but whatever is decided we will have to abide by. Decision adverse to us would not shake our firm belief in our moral right to this money." The plaintiff promptly notified the defendants that she accepted the draft only "on account," and reserved the right to collect the balance of \$366.90, which had been retained as commissions on future rents. The only point in the case, therefore, is as to the right to retain these commissions on future rents. These rents may or may not be collected. There was no contract shown authorizing such charge, and it would not arise by implication. The agents who shall hereafter collect them will, of course, charge therefor; and, if the original agents can also charge, that would throw an additional charge upon the owner whenever an agent is changed. It was in evidence for the defendants by one of themselves: "We never had any formal contract of any kind. I was asked to take charge and collect the rents, and I did so, and retained 5 per cent. in all cases;" and this course of dealing had continued 11 or 12 years. On cross-examination he said it was usual to collect this commission "as the rents accrued," and that they had deducted 5 per cent. on all the rents they had collected; that the \$366.90 was 5 per cent. on rents thereafter to accrue. He said that 5 per cent. covered the trouble of securing a tenant and drawing up the lease, collecting and remitting rents, and keeping a supervision of the property, and keeping it in repair. As all these duties terminated with the termination of the agency, save the first named, there could be no implied contract or quantum meruit to justify a charge of 5 per cent. on rents not yet accrued; and, as the defendant's testimony fails to show that the plaintiff was informed of any custom to that effect, and there was no express contract authorizing it, his honor properly sustained the demurrer to the defendants' evidence.

No error.

(131 N. C. 476)

FLEMING v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 9, 1902.)

INJURY TO EMPLOYEES—RAILROADS—ENGINES—COUPLINGS—RULES—WAIVER OF ACTION—INSTRUCTION.

1. Failure to equip a locomotive with an automatic coupler in general use is negligence, as much as failure to so equip a car.

2. A rule forbidding an employé to make couplings of cars by going between them, or

otherwise than by a stick, does not prohibit his going between a car and an engine to couple them where the coupler on the engine is five or six feet long and weighs 120 pounds; coupling with a stick being practically impossible.

3. Failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, making it liable for an injury to an employé while making a coupling in the discharge of his duty, notwithstanding his contributory negligence.

4. Under the fellow servant act (Priv. Laws 1897, c. 56, § 1), providing that an employé injured by defective appliances of a railroad company shall be entitled to maintain an action against it, and section 2, providing that any contract by an employé of the company to waive the benefit of the first section shall be void, he is prohibited only from waiving any right before injury, and, having received an injury, he may make a settlement of his claim without action.

5. An instruction that a contract of an employé of a railroad company to waive the benefit of an action which he may have against it for injuries is void is calculated to mislead, by giving the impression that a proper settlement after injury is not valid.

Appeal from superior court, Iredell county; Coble, Judge.

Action by D. E. Fleming against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

L. C. Caldwell, for appellant. Long & Nicholson, for appellee.

MONTGOMERY, J. The plaintiff, an employé of defendant company, alleged in his complaint that he was ordered by a conductor of one of the defendant's trains to make a coupling of an engine and a freight car, and in obeying the order was hurt through the negligence of the defendant, without fault of his own. In describing the manner in which he was injured, he further alleged "that the coupler on the engine was what was usually called a 'drawbar,' and of the weight of about 120 to 125 pounds, and of the length of about 5 or 6 feet; that one end of this drawbar was fastened to the engine, and the other end reached toward the front of the pilot, and in order to couple with this instrument it was necessary to raise the same about three feet, and attach the end thereof to the coupler of the car to which it was desired to make the coupling; that it was impossible to make the coupling without the brakeman getting on the pilot, in order to lift the drawbar and make the attachment; that on this occasion the plaintiff undertook to make this coupling under the direction of his superior, whose orders he was required to obey; and that this drawbar was one of the old-fashioned methods by which couplings were made." And as to the particular form of the defendant's negligence the plaintiff further alleged that his injuries were caused by the negligence of the defendant, in that it failed to furnish for said engine, and for the cars then and there in use upon its track at the said place, safe and suitable machinery, equipments, and devices for the purpose of safely

¶ 2. See Master and Servant, vol. 34, Cent. Dig. §§ 762, 767.

connecting, coupling, and operating the said engines and cars upon its said track, and with modern, self-coupling devices, as required by law, and such failure continued up to the time of the injury received by plaintiff as aforesaid. On the contrary, the said engine and cars were provided with unsafe, defective, unwieldy, and unsuitable machinery, appliances, and devices, not adapted to or answering the purpose of safe use for which they were intended, as the defendant well knew. The defendant in its answer denied that it was negligent in the manner alleged by the plaintiff, and averred that the plaintiff was hurt by the careless and negligent manner in which he made the coupling. And for a further defense the defendant averred that, after the plaintiff was hurt, he, for a valuable consideration paid to him by the defendant, executed and delivered to the defendant a full release and discharge of all claims he had against the defendant on account of the injuries complained of in the complaint; and the defendant pleaded the release in bar and estoppel of the action. The errors assigned by the defendant were: First, because the court admitted incompetent and improper evidence, pointed out in the case on appeal; second, because the court refused to give certain special instructions asked by the defendant, and in giving certain special instructions asked by the plaintiff; and, third, because the court failed, as defendant contended, to state in a plain and correct manner the evidence given in the cause, and to declare and explain the law arising thereon, embracing an explanation of its nature, purpose, and bearing, etc., to prevent misapprehension by inadvertence and mistake.

The first of the defendant's prayers for instructions was, in substance, that his honor should tell the jury that if they should find that the car to which the engine was attempted to be coupled by the plaintiff, at the time of his injury, was equipped with an automatic coupler, such as that required by law, and that the engineer was capable, and operated his engine with care and caution, then the defendant would not be liable, because not negligent, and the first issue should be answered "No." It was properly refused. There was evidence tending to show that automatic couplers were in general use, and on the engines of the defendant company, and that the engine which the plaintiff undertook to link or couple with the freight car was the only engine of the defendant on that road that was not equipped with a self-coupler at that time. It was also in evidence that engines necessarily have to be coupled with cars, and it seems to us to be as essential that the same kind of a device in the way of a coupler should be attached to an engine as is attached to a car; the end and aim of the law being the protection, as far as possible, of the lives and limbs of persons in railroad employment.

In the defendant's second prayer for instructions, it desired the jury to be charged to answer the first issue "No," because this court, in the case of *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, had declared May, 1898, as "the time" for the equipment of freight cars with automatic couplers. It was stated in the prayer that the plaintiff was hurt in October, 1897. It is not a fact that such time (May, 1898) was fixed as the beginning of the liability of railroad companies for not equipping their cars with automatic couplers. The plaintiff was injured in December, 1897. Greenlee was hurt in that same year (1897), but before the plaintiff was, and Greenlee's Case was heard in this court in 1898.

The third prayer was in these words: "If the jury should find from the evidence that the rules of the company forbade any employé to make coupling by going between cars, and should find that the plaintiff knew of such rule, and that he signed a paper positively prohibiting an employé from coupling by going between the cars, or any other way except with a stick, and the plaintiff, in violation of the same, exposed himself to danger, and went between the car and the engine for the purpose of making the coupling, he would be guilty of contributory negligence, and the jury would answer the second issue 'Yes.'" His honor properly refused to instruct as requested. The rule, taken literally, does not forbid the plaintiff from going between an engine and a car for the purpose of making the coupling. The prohibition is against coupling or uncoupling cars with a stick. The links and pins that connect cars are easily manipulated by a stick in the hands of a brakeman, who can stand away and from between the cars and make the coupling. That is a very different matter from the coupling of an engine and a car, where the coupler provided for the engine is a bar of iron five or six feet long and weighing from 100 to 125 pounds, lying across the pilot, and to be raised two or three feet in order to make the coupling. The plaintiff, as a witness in his own behalf, testified that he made the coupling in the usual way, and that, in order to get it (the drawbar) in position, "you have to raise it up,—one end of it; that you cannot raise it up without getting on the pilot; that you have to get on the pilot to raise it up," and he did it in the usual way that brakemen do it. The conductor testified that it was plaintiff's duty to couple the engine and the car. James Dumphy, a witness for the defendant, and in the defendant's employment as yard master at Asheville in 1898, said the usual way was to couple the engine to the car, and the rules of the company required it, and that, when the drawbar was down, witness always did it with his hands. He said further that it would have been very hard to raise the drawbar with a stick; that it would take a very powerful

man to raise the bar with a stick; it would be more difficult to make the coupling. That rule of the company, as we have seen, did not literally prohibit the plaintiff from going in between an engine and a car to couple them; and neither does it, when given a fair and just construction, require the plaintiff to use a stick for such coupling. And further, from the evidence in reference to the size and length and weight of the drawbar, and force necessary to raise it, it must have been the company's intention that such coupling should be made with the hand, and not with a stick.

The fourth, fifth, sixth, and seventh prayers for instructions concerned the alleged contributory negligence in making the coupling, and ought not to have been given. It has been decided by this court that "the failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, and where the negligence of the defendant is a continuing negligence, as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master's liability." *Troxler v. Railway Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. There can, then, be no contributory negligence of the plaintiff, available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury.

The eighth, ninth, and tenth of defendant's prayers for instruction will be disposed of when we come to consider the eighth and ninth of the plaintiff's prayers for instruction.

The plaintiff's first prayer was in these words: "First. If you believe the evidence, the drawbar which the defendant had upon its freight engine was not a self-coupling device. The failure of a railroad company to equip its freight cars with modern, self-coupling devices, is negligence per se, continuing up to the time of an injury received by an employé in coupling cars by hand, whether such employé contributed to such injury by his own negligence or not." There was no error in the giving of the instruction by his honor. The defendant's exception to it, no doubt, was founded upon the holding by his honor that it was negligence in the defendant not to equip the engine with an automatic coupler.

The second of the plaintiff's prayers was not given, and the third was in these words: "If you are satisfied, therefore, by the greater weight of the evidence, that the plaintiff went in to make the coupling when the defendant had not furnished the self-coupling

device, and received the injury, it is your duty to answer the first issue 'Yes,' and also your duty to answer the second issue 'No.'" It is plain that the exception to that instruction was based on the same view that the defendant took of the first prayer,—that is, that it was not negligence in the defendant to fail to equip its engine with a self-coupler,—and therefore that the jury should have been allowed to pass upon the question of the contributory negligence of the plaintiff. We are quite sure that his honor did not mean to say or to intimate that, if the plaintiff's injury grew out of a matter not connected with the coupler, the defendant would be liable, simply because the defendant was guilty of negligence in not having equipped the engine with a self-coupler. He had already told the jury in his general charge that the plaintiff must not only show that he was injured as was alleged in the complaint, but that they must find that the injury was due to the fact that the engine was not equipped with an automatic coupler. Neither can we think that the jury was misled by the language of the instruction. We think the clear meaning of that instruction, when taken with the other part of the charge on that point, is that the plaintiff was in duty bound to go in between the engine and the car to make the coupling, and that, because of a failure of the company to furnish a self-coupling device, he could not be held as contributing to his own injury, if he was hurt while between the engine and car, performing his duty. If the plaintiff had been injured while engaged in making the coupling under a state of facts as testified to by himself, he would not have been debarred of the right to maintain his action, even if he had been injured by an act of negligence on the part of the defendant, not connected with the defective coupler, or even by a lawful act of the defendant's agent or employé, because the continuing negligence of the defendant in not properly equipping the engine with a self-coupler must be concurrent with the act which produced the injury, and the one would be as much a proximate cause of the injury as the other. Of course, after the coupling had been made and completed, if the plaintiff then had committed some negligent act, as by standing so near the track as to be hurt by the moving engine or car, then the negligence of the defendant in not properly equipping the engine would not be the proximate cause of the injury, and the plaintiff's negligence would have been a matter for consideration. The bare fact that a railway company has failed to properly equip its cars with automatic couplers, and is therefore negligent, does not of itself make the company liable for an injury to an employé. The injury must be connected with and proceed from that particular negligence, and the employé must be in the discharge of his duty.

For the reason that this case has been under an advisari for a term, and other reasons satisfactory to us, we have, notwithstanding our conclusion to order a new trial for an error to be pointed out, discussed and decided the matters raised in the case on appeal, with the exception of his honor's instruction upon the matters connected with the defense of the release and discharge set up by the defendant in its answer, and the defendant's prayers for instructions (8, 9, and 10) in relation thereto. And what we shall now say concerning those matters will be merely incidental, and only in connection with the defendant's exceptions to the eighth and ninth of the plaintiff's special requests for instructions.

His honor, after having charged the jury upon the matter of the release and discharge, and refusing certain special requests of the defendant for instructions, gave to the eighth and ninth asked by the plaintiff, as follows: "(8) A rule of the railroad company, agreed to by the plaintiff, may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order. If you find by the greater weight of evidence in this case that the plaintiff signed the paper B, and agreed not to couple cars except with a stick, if you further find that the conductor ordered him to make the coupling you are instructed that the conductor had the power to waive or abrogate the said contract. (9) The legislature has enacted that any contract or agreement, expressed or implied, made by any employé of said company, to waive the benefit of an action which he may have against the company for injuries, shall be null and void. 'And it seems,' says the supreme court, 'that the legislature intended to put an end to such intention, by saying in the first section of the act that he shall have a right of action for injuries caused by such defective machinery, and providing in the second section that he cannot waive this right by contract, expressed or implied.'"

We need not discuss the correctness of the eighth special instruction of the plaintiff, which his honor gave, for the reason that what we have said above in discussing the refusal of his honor to give the third prayer requested by the defendant makes it unnecessary. It may be interesting to observe, however, that there is a marked difference between the language of the agreement made by the plaintiff in this case, not to go between the cars for the purpose of coupling them, and the language of the agreement on the same subject in the case of *Mason v. Railroad Co.*, 114 N. C. 719, 19 S. E. 362.

We think there was substantial error in the giving of the instruction asked by the plaintiff above set forth, numbered 9. The language was too broad, and was calculated, not to say intended, to mislead, and may have misled, the jury, and directed their minds to the release and discharge set up by the defendant in its answer. The language of section 2 of the fellow servant act (chapter 56, Priv. Laws 1897) does not read as it is quoted in the instruction. The language is, "That any contract or agreement expressed or implied made by any employé of said company to waive the benefit of the aforesaid section shall be null and void." It does not read that any contract, etc., made by an employé of said company to waive the benefit of an action which he may have against the company for injuries, shall be null and void. The first section of said act, in its application to employés who have been injured by defects in the machinery, ways, or appliances of railroad companies, provides that such persons shall be entitled to maintain an action against such company; and section 2 of the same act provides that the injured employé's contract to waive the benefit of the first section shall be null and void. That is, upon entering the service of a railroad company, or afterwards, before an injury might happen, the injured employé will not be bound (looking to the future) by any contract he may have made with the company, waiving the right to maintain an action for his injury. The words "which he may have against the company for injuries," as they appear in the instruction, have a double aspect. They look both to the future and to the past. And the jury may have applied that language to the release and discharge which the defendant had procured after the injury. And the last section of instruction No. 9 (a quotation from the opinion of this court in the case of *Coley v. Railroad Co.*, 128 N. C. 534, 39 S. E. 43), we can see, might have had a most injurious effect upon the defendant's rights. It could have had no application to the matters embraced in the eighth instruction requested by the plaintiff, which his honor gave. The whole instruction might reasonably have been considered by the jury as a statement made to them by his honor that there could be no release and discharge, even for a valuable consideration, by an employé who had been injured by the defective machinery of a railroad company. As we have said, we do not discuss in this opinion the matters relating to the release and discharge, and the alleged fraudulent character of the paper writing.

For the error pointed out, there must be a new trial.

(131 N. C. 473)

BENEDICT v. JONES et al.

(Supreme Court of North Carolina. Dec. 9. 1902.)

APPEAL—DISMISSAL—DOCKETING TRANSCRIPT.

1. Under Sup. Ct. Rule 5 (39 S. E. v.), providing that the transcript on appeal shall be docketed seven days before the call of the district to which it belongs, and rule 17 (39 S. E. vi), providing that, if appellant fails to so docket it, appellee may docket a certificate, and have the appeal dismissed, the appeal will not be dismissed, though the transcript is docketed later, too late for a hearing at that term, it having been docketed before docketing of the certificate and motion to dismiss.

Appeal from superior court, Buncombe county.

Action by Mary E. Benedict, executrix, against H. C. Jones and others. Judgment for plaintiff, and defendants appealed. Plaintiff moves to dismiss appeal. Motion denied.

Plaintiff (appellee) moves to dismiss the appeal, for that it appears from the record that the case was tried and final judgment entered at May term, 1902, of the superior court of Buncombe county, and that the counter case on appeal was served on defendants' (appellants') counsel July 31, 1902; and that, independent of such date, the appellee says it was the duty of appellants' counsel to file the transcript in time for the appeal to be heard at the present term of the supreme court, but that the transcript was not filed until November 26, 1902, too late, under the rule, for the appeal to be determined at this term; and asks that the appeal be dismissed.

F. H. Busbee, for appellee.

CLARK, J. The case was tried below in May, 1902, and the transcript was docketed here November 26, 1902, which was too late to permit of the appeal being argued at this term, it being within less than seven days before the call of the district to which it belongs. Rule 5, 128 N. C. 634, 39 S. E. v. After it was docketed, the appellee moved to dismiss. This was too late. Rollins v. Love, 97 N. C. 210, 2 S. E. 166; Barbee v. Green, 91 N. C. 158. The uniform ruling of this court has been in accord with the above decisions, and may be thus summed up: An appeal must be docketed not later than the termination of the next term of this court beginning after the trial below (with the exceptions specified in the proviso to rule 5, 128 N. C. 634, 39 S. E. v.). If not docketed at such term by the time required for hearing at such term, the appellee may docket a certificate under rule 17, 128 N. C. 638, 39 S. E. vi, then, or at any time during the term, if before the appellant docket the transcript, and have the appeal dismissed. But if the appellee is dilatory, and the appellant dock-

ets the transcript at that term, before the appellee moves to dismiss, though too late to secure a hearing, then the appeal will not be dismissed. Packing Co. v. Williams, 122 N. C. 406, 29 N. E. 366; Smith v. Montague, 121 N. C. 92, 28 S. E. 137; Speller v. Speller, 119 N. C. 356, 26 S. E. 160; Haynes v. Coward, 116 N. C. 840, 21 S. E. 690; Paine v. Cureton, 114 N. C. 606, 19 S. E. 631; Triplett v. Foster, 113 N. C. 389, 18 S. E. 714. There have been changes, as will be seen by the above cases, as to the time during such next term by which an appeal must be docketed to secure a hearing at that term. Originally, it must have been docketed "during the call of the docket of the district to which the appeal belongs," and, of course, the first time at which the appellee could have moved then to dismiss for failure to docket was at the end of the call of the district. Then the time was moved up so as to require docketing "during the first two days of the call of the district"; later the time for docketing to secure a hearing was "before the beginning of the call of the district"; and now it must be docketed "seven days before the beginning of the call of the district," and, of course, the right of the appellee to docket and move to dismiss has moved up accordingly, and has accrued upon default to docket by the time required in order to secure a hearing. But this has not affected, of course, the principle that, if the appellee fails to move to dismiss at the first opportunity under rule 17, 128 N. C. 638, 39 S. E. vi, the appellant can docket the case at any other time during that term, provided he does so before the appellee has moved to dismiss under said rule. Of course, if the appeal is not docketed till after the termination of such next ensuing term, it will be dismissed. Burrell v. Hughes, 120 N. C. 277, 26 S. E. 782; State v. James, 108 N. C. 792, 13 S. E. 112. The laches of the appellee in not moving to dismiss under rule 17, 128 N. C. 638, 39 S. E. vi, as soon as he might, will not authorize the appellant to docket after that term.

The transcript on appeal seems to be defective, in that it does not set out the organization of the court, and, possibly, in other particulars. State v. Butts, 91 N. C. 524, and other cases cited in Clark's Code (3d Ed.) p. 915. But this may be cured if a writ of certiorari is asked in proper time, and allowed, or a motion to dismiss may be made on those grounds when the case is reached at the next term. The cause is not before us upon such motions now. The transcript on appeal having been docketed at the proper term, though too late for argument, yet before the appellee moved to dismiss as authorized by rule 17, 128 N. C. 638, 39 S. E. vi, the motion to dismiss must be denied.

Motion denied.

(131 N. C. 470)

SMITH et al. v. PARKER et al.

(Supreme Court of North Carolina. Dec. 9, 1902.)

MORTGAGES—FORECLOSURE—INJUNCTION—RELEASE OF SURETIES.

1. Foreclosure of a mortgage given by sureties will be restrained, they alleging there was an extension of time of payment, without their consent, discharging them and the security, till determination of the question of such extension.

Appeal from superior court, Buncombe county; Moore, Judge.

Action by C. A. Smith and others against Haywood Parker, trustee, and others, to restrain foreclosure of a mortgage. From an order, defendants appeal. Affirmed.

Merrick & Barnard, for appellants. Thos. A. Jones, for appellees.

CLARK, J. This is an appeal from a refusal to dissolve a restraining order and from granting an injunction to the hearing. It appears in the affidavits of plaintiffs that C. A. Smith, as principal, and A. C. Smith, his wife, and W. D. Justice and Susan P. Justice, his wife, as sureties, executed a bond for \$1,500 to the defendant Frances Kohler, and to secure the same executed a deed in trust to the other defendant, Haywood Parker, upon property belonging to the said sureties,—C. A. Smith having no interest in said land except a contingent tenancy by curtesy,—and that defendant Kohler's agent, in making the transaction, well knew that A. C. Smith, W. D. Justice, and Susan P. Justice were sureties; that at maturity of the bond the creditor extended the time for payment for four months in consideration of payment of interest in advance for said period, and this was done without the knowledge or consent of the sureties; that the trustee has advertised the land for sale; that the defendant Frances Kohler is a nonresident of the state, and without sufficient property in this state to respond in damages. There were counter affidavits. An extension of time, without consent of sureties, discharges them, and also any security given for the debt. *Flemming v. Borden*, 127 N. C. 214, 37 S. E. 219; *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632; *Smith v. Association*, 119 N. C. 257, 26 S. E. 40; *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56. Receipt of interest in advance is prima facie evidence of a binding contract of forbearance. *Scott v. Fisher*, 110 N. C. 811, 14 S. E. 799, 28 Am. St. Rep. 688; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989. The affidavits and counter affidavits raise a serious contention, and the injunction was properly continued to the hearing, when the

disputed matters of fact may be determined by a jury. *Railroad Co. v. Aberdeen & W. E. R. Co.*, 125 N. C. 96, 34 S. E. 197; *Whittaker v. Hill*, 96 N. C. 2, 1 S. E. 639. *Harrington v. Rawls* (at this term) 42 S. E. 461. Is conceded by the defendants' counsel to be exactly in point, but they contend that that decision conflicts with *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78, which, they suggest, must have been overlooked in deciding *Harrington v. Rawls*. On the contrary, we think the two decisions are in entire accord. In *Hutaff v. Adrian* (decided Feb. term, 1893) 17 S. E. 78, it was said that, taking the allegations of the complaint as true, the defendant's bond and mortgage were barred by the statute of limitations, hence the purchaser at a mortgage sale would get no title, for the mortgage was dead, which is a question of law, and, the plaintiff being in possession, no injunction would lie merely to prevent such cloud upon title, though it would lie if there were a dispute as to the amount due, which is an issue for a jury, in order to prevent a sale which would put the mortgagor at a serious disadvantage, since he did not know how much was due. Soon after that decision, the enactment of chapter 6, Laws 1893, reversed the above doctrine to the extent of allowing parties in possession to restrain a sale of land under an alleged lien pending an action to have it declared invalid. *Mortgage Co. v. Long*, 113 N. C. 127, 18 S. E. 165. Besides, independent of that statute, here there is a disputed issue of fact whether the mortgage has been released by an extension of time to the principal, and this should be determined by a jury, for this makes a dispute whether anything is due, which, it was said in *Hutaff v. Adrian*, would authorize an injunction to the hearing. *Jones v. Buxton*, 121 N. C. 285, 28 S. E. 545. It would be a hardship on the mortgagor to compel him to rely upon an extraneous fact like a release being established after a sale under a mortgage in an action of ejectment by a purchaser, when by an injunction till the hearing the disputed issue of fact can be determined before a sale. Such injunction cannot harm the mortgagee, who, if he succeeds, will sell and collect the debt with interest added, whereas, if no injunction is allowed, and the disputed issue of release can only be determined after sale, the mortgagor will be either forced to pay the debt, or run the risk of the property being sold at an inadequate price (since no one will buy, under such circumstances, except a speculator), and thus would lose the value of the land in excess of the mortgage, if, on a trial in ejectment, the jury should find there was no release.

No error.

(121 N. C. 455)

BROWN v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 9, 1902.)

**RAILROADS—LIABILITY FOR TORT OF LESSEE
—INJURY TO EMPLOYE—MOTION
FOR NONSUIT.**

1. Notwithstanding the provision of Acts 1897, c. 109, for motion for nonsuit at the end of plaintiff's evidence, such a motion, in the nature of a demurrer to the evidence, may be made by defendant after introducing evidence, his evidence, however, not to be considered thereon.

2. A railroad company, which leases its road, as authorized by its charter, is liable to an employé of the lessee, injured through the lessee's negligence.

Cook, J., dissenting.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Action by J. B. Brown against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. F. Bason, for appellant. Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages for personal injuries sustained by him while in the service of the Southern Railway Company, the lessee of the defendant, the Atlanta & Charlotte Air Line Railway Company. The defendant, after pleading contributory negligence on the part of the plaintiff, for a further answer and defense denied its liability on the ground that it had leased the property to the Southern Railway Company, and was not responsible for the tortious acts of its lessee. The language of that part of the answer was in these words: "(12) And for a further answer and defense to said action, the defendant says that, having leased and conveyed its railroad, with all its property, rights, and franchises, to the lessee, the Southern Railway Company, as alleged in plaintiff's complaint, this defendant, at the time of the injury to plaintiff, had no control nor power over the said railroad, nor over the management or operation of the same. It had deprived itself of its property, rights, and franchises with the consent of the state, which had conferred upon it in its charter the right to convey and lease its railroad and all its property, right, and franchises granted in its charter, except the franchises to be and exist as a corporation. That, in view of the foregoing, as it is advised, it cannot be held, and is not liable in law, for the result of any conduct or alleged misconduct of its lessee, the Southern Railway Company, towards the plaintiff, in its operation of the said railroad. Defendant further says that it is advised that to hold it liable in this action, and to take from it its property in satisfaction of any judg-

ment which may be recovered in the same, will be to deprive it of its property without due process of law, and in violation of the fourteenth amendment to the constitution of the United States." At the close of the evidence "the defendant moved for a nonsuit upon the ground, as it appeared from the evidence, that this action was prosecuted against the defendant, the Atlanta & Charlotte Railway Company, the lessor, for the tort committed by the Southern Railway Company, its lessee, in the operation of its trains over the leased road." The motion was overruled, a judgment in favor of the plaintiff upon the verdict was rendered, and the defendant appealed.

Each and all of the exceptions, with the exception of the one to the overruling of the motion for nonsuit, was abandoned by the counsel of the defendant in this court. The plaintiff contends that the court properly overruled the motion for nonsuit, for the reason that the defendant did not make the motion at the proper time,—that is, when the plaintiff had concluded his evidence,—and that when it was made it was after the defendant had introduced its evidence on the execution of the lease, which was not permissible, a defendant not being allowed to move to dismiss upon testimony introduced by himself. The contention is based on the provision of Acts 1897, c. 109, as amended by Acts 1899, c. 131. The amendment of 1899 has been repealed by the subsequent amendment of 1901 (chapter 594), which latter amendment is substituted for the former one, but for the purposes of this discussion that is immaterial. The purpose of the motion was, not to procure a ruling by the court upon the right of the defendant to lease its road to the Southern Railway Company, for that had been admitted in the answer, but to have a ruling that the whole evidence showed that the plaintiff was injured while in the service of the lessee, and that it was not legally sufficient to establish the plaintiff's claim as against the defendant. If the defendant had proceeded under the statutory provisions above referred to, there could be no doubt that the question would have been properly raised. But was the defendant confined to the procedure marked out in those statutes? The motion was substantially "a demurrer to the evidence," and that practice is recognized in many of the states, and always has been with us. The purpose of the practice is to present to the court, instead of submitting the evidence to the jury, such facts as were shown, and as the evidence tended to prove, for the judgment of the court as to their sufficiency in law to establish the plaintiff's claim against the defendant. If the burden to make out the case is on the defendant, the plaintiff might demur to the evidence. The usual practice in this state before the enactment of the statutes above referred to was to proceed as is now

provided for, except that now it is discretionary with the defendant whether he will introduce evidence after the motion to dismiss or not, while before these acts that matter was discretionary with the court. But what can be the objection to moving, for the first time, when all the evidence is in, notwithstanding Acts 1897, c. 109, as the proper method of demurring to the evidence? Of course, the evidence of the demurrant could not be considered. In the case before us there was no evidence offered by the demurrant, except on the matter of contributory negligence of the plaintiff. The fact that the Southern Railway Company was operating the train was admitted in the answer, and exemption pleaded on that account for the defendant. We will consider the motion as a demurrer to the evidence, though not very clearly expressed, and only made at the conclusion of all the evidence, the demurrant's evidence not bearing on the matter embraced in the motion. But his honor was correct in his refusing to sustain the demurrer. We will not attempt to add anything further to what has been said by this court on the responsibility of railroad companies who are lessors for the negligent acts of their lessees. They are both liable. In *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959, the matter was thoroughly discussed and decided, and the opinion has been affirmed in numerous cases since. *Tillett v. Railroad Co.*, 118 N. C. 1081, 24 S. E. 111; *Benton v. Railroad Co.*, 122 N. C. 1007, 30 S. E. 333; *Perry v. Railroad Co.*, 128 N. C. 471, 39 S. E. 27; *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747.

No error.

COOK, J. (dissenting). I do not concur in that part of the opinion of the court which holds that the defendant lessor company is

responsible for the torts committed by its lessee, the Southern Railway Company. Under the powers conferred upon defendant company in its charter it had the right to lease, and in exercising the same did lease, its railroad and all its property, rights, and franchises (except the franchises to be and exist as a corporation), to the Southern Railway Company; and the latter, the Southern Railway Company, was, as such lessee, operating the same on its own account, and was the employer of the plaintiff at the time when the alleged injury occurred; and there was no contractual relation existing between the plaintiff and defendant. In no jurisdiction (except our own) is it held that the lessor company is liable for the contracts or torts of the lessee company, except—First, when the lease is made without legal license or authority (in which case the lessee is deemed to be the agent of the lessor); second, when the license or authority to lease is coupled with an express provision that the lessor shall be and remain liable for the acts of its lessee. In the case at bar the lease was made under express authority granted in the charter of the lessor company, and there is no provision that it shall be liable for the contracts or torts of its lessee. This doctrine was first held by this court in *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959, and was approved in a number of cases thereafter. But when it was again presented to this court for review (for the first time after I became a member of this court) in *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, and after a thorough study of the principle involved and examination of the decisions bearing upon the question, I became satisfied that it was unsound in law, and there gave a full expression of my views in my dissenting opinion, to which I now refer without a rediscussion of the subject.

(101 Va. 36)

WRIGHT'S ADM'R v. SOUTHERN RY. CO.
(Supreme Court of Appeals of Virginia. Dec.
11, 1902.)

INJURY TO RAILROAD EMPLOYEES—RULES—ENFORCEMENT—NEGLIGENCE.

1. It is the duty of a railroad company to adopt, promulgate, and enforce reasonable rules to promote the safety of its employes.

2. Though a railroad company adopted certain rules as to the use of flags in the repair yards to protect employes working under the cars, where the evidence showed that the rules were uniformly and continuously disregarded, with the knowledge of those in charge of the repair shop, it warranted a finding imputing knowledge of the condition of the affairs in this respect to the railroad company, or a want of ordinary care on its part if it remained in ignorance of such disregard of its rules.

Order to circuit court, Brunswick county.

Action by the administrator of J. W. Wright against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Everett Perkins, E. P. Buford, and C. V. Meredith for plaintiff in error. A. P. Thom, for defendant in error

KEITH, P. This is a writ of error to a judgment of the circuit court of Brunswick county in an action of trespass brought to recover damages for the death of J. W. Wright, who was employed as a car repairer in the shops of the Southern Railway Company. At the trial the defendant demurred to the plaintiff's evidence, the jury rendered a verdict in favor of the plaintiff for \$5,000, upon which the court entered judgment upon the demurrer for the defendant, and the case is before us upon a writ of error.

The defendant worked as car repairer in the car sheds of the defendant in error, into which ran a number of tracks upon which cars needing repair were placed. It is in proof that from 700 to 800 cars, to say nothing of other machinery, were annually repaired in the shops, necessitating the employment of a large number of workmen. J. W. Wright was at work upon track No. 3, aiding in making repairs to the drawhead of a car. In order to perform the duty assigned him he was in the middle of the track, in a crouching position, in front of the drawhead, when a shifting engine which was being coupled to a car struck and set in motion a car between the one in the repair of which Wright was engaged and that to which the coupling was being made, and drove it down the track, striking Wright and crushing him in such a manner that he shortly thereafter died.

It is charged that the railway company was negligent in failing to adopt, promulgate, and enforce proper rules and regulations for the guidance and control of its operatives engaged in the hazardous duties incident to employment in repair shops.

That it is the duty of a railroad company to exercise ordinary care to furnish reasonably safe appliances and instrumentalities for the protection of its employes, and to adopt, promulgate, and enforce reasonable rules to promote their safety, there can be no question. If authority for this proposition be needed, it will be found in *Shear. & R. Neg.* (5th Ed.) § 202:

"A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of these rules, so far as may be needful for their guidance. Thus a railroad company is bound to regulate, by published rules, the time and manner of running its trains, so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus to avoid danger. And a jury may find that it ought to have rules to protect men working underneath cars from the starting of such cars without due warning. The master is also bound to use ordinary care and diligence to enforce the rules which he has made, and disregard of such rules, with his acquiescence or neglect to enforce them, is tantamount to a suspension of the rules. A jury has no general right to find that a rule should have been adopted, without sufficient evidence that such rule was necessary and practicable."

That the jury were warranted, from the evidence, in finding in this case that it was the duty of the railroad company to adopt such rules, appears from the facts already stated. The evidence sufficiently shows a compliance upon the part of the railroad company with so much of its duty as required the adoption of rules. The evidence as to their promulgation is by no means so satisfactory, and a jury might have been warranted, upon that point, in finding that the rules relied upon were never so published as to bring them home to the plaintiff's intestate, and upon a demurrer to evidence, if that were all, it might have been the duty of the court to sustain the verdict; but with respect to the failure upon the part of the railroad company to enforce its rules, granting that they were duly adopted and promulgated, the evidence discloses a state of facts which well warranted a jury in finding that the railroad company had been negligent.

Without going into the details of the testimony of witnesses upon this point, it sufficiently appears from the evidence of Spain and Edwards that the rules were disregarded so uniformly and continuously, with the knowledge and practical acquiescence of those in charge of the repair shops, as to warrant a jury in imputing knowledge of the condition of affairs in this respect to the railroad company, or a want of ordinary care upon its part in the performance of its duties if it remained in ignorance of a disregard of its rules so general and long continued.

W. J. Spain, foreman of car repairs of the

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 283, 284.

Southern Railway Company at Lawrenceville,—a witness on behalf of the defendant,—speaking of the use of flags, was asked:

"Did you ever call any of the car repairers' attention to the fact that the flags were missing? A. Yes, sir; I threatened to discharge them for not having the flags up. Q. In other words, you did what you could to enforce the rule? A. Exactly."

On cross-examination he was asked: "Did you ever furnish the rule to these people?" To which he replied: "No, sir; not until recently. Q. Before Mr. Wright's death, which occurred on the 14th of January, 1900, the rules of the company were not furnished to the car repairers? A. They were not to the men, but they were furnished to inspectors and foremen on November 14, 1899. Q. You have stated there was great laxity about the use of flags among the employés? A. It was not permitted, and, as I stated before, we had threatened time and again to discharge men for being so careless about the use of flags. Q. Whether you threatened or not, it prevailed? A. It did in a measure; yes, sir."

R. S. Edwards, an inspector of repairs, employed at these shops,—a witness introduced on behalf of defendant,—speaking of the rule which had been adopted for the protection of car repairers, was asked: "Didn't you know well that this rule of the company had not been observed on the part of these car repairers; that they had never observed it, and that they were very ill-provided with flags? A. Well, I know there had been no rule read to the men, but the use of the flags had been there, and they had been using flags. Q. There had been a mighty lax and careless use of the flags? A. They were not as particular as they should have been. Q. Didn't each foreman suffer this laxity in the use of the flags? A. Yes, sir; it seemed to be a hard matter to make them keep the flags up. Q. And so hard they hadn't tried to enforce the rule? A. I always tried to discharge my duty. If I saw him in danger I told him of it."

There is some evidence that the flags had been, a good while before the date of the accident, distributed to the men, with instructions to place them when at work in repairing a car on that end of the car from which the approach of danger was to be apprehended; that, when the flag was so placed, it could not be removed except by the workman who had put it there, or with his knowledge and consent, and the car upon which it was placed could not be moved. But the evidence further is that those flags had, in great measure, disappeared; that those which remained had become so dirty and worn as to be indistinguishable, and their use, as we have seen, had fallen into practical abeyance. There is evidence tending to prove that a short time before the accident the intestate, who had gone to Edwards to get some supply connected with the work in which he was engaged, was told by him

that he was going to do some shifting, and to look out; but it affirmatively appears that Wright was not told that the shifting engine was going on repair track No. 3, where he was at work, but only in a general way Edwards told him that he "was going over where he was to do some shifting." It is further proved that the custom on the part of Edwards was to walk down the repair track in advance of the shifting engine, and personally notify those who were engaged in repairing cars upon that track.

Without going further into the testimony, enough has been said to show that the judgment of the court sustaining the demurrer was erroneous. There was evidence sufficient to warrant the jury in finding that the railroad company had not exercised ordinary care in enforcing its rules for the orderly and safe management of a dangerous and complicated business.

The judgment of the circuit court must be reversed, and this court will enter such judgment as it ought to have rendered.

(101 Va. 13)

ATLANTIC & D. RY. CO. v. WEST.

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

DUTY OF MASTER—DEFECTIVE APPLIANCES—EVIDENCE.

1. It is the duty of a master to use ordinary care to provide reasonably safe machinery and appliances for the use of his servants.

2. In an action by a servant for personal injuries, evidence held not to show a want of ordinary care on the part of a master in the construction of a platform by the giving way of which the servant was injured, where the defect could not have been discovered by most careful inspection.

Error to circuit court, Norfolk county.

Action by S. B. West against the Atlantic & Danville Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. P. Thom, for plaintiff in error. R. C. Marshall and C. W. Coleman, for defendant in error.

KEITH, P. S. B. West was employed as station master at Shoulder's Hill, on the line of the Atlantic & Danville Railway, and sustained an injury by a fall from a platform on the 20th of March, 1891, for which he brought suit, and upon a demurrer to the evidence the jury rendered a verdict in his favor for \$750, for which the court gave him a judgment, and the case is before us upon a writ of error awarded upon the petition of the railway company.

West had been in the employment of the plaintiff in error as station master at the place where he received his injury for about seven years. There was upon one side of the depot building the main line of the rail-

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 172.

road. Upon the opposite side was a switch, and the building and the convergence of the switch and main line formed a small triangle, which was occupied by a platform about $5\frac{1}{2}$ feet in height. Eighteen months or two years before the accident a part of this platform had been cut off, leaving a passageway about $2\frac{1}{2}$ feet in width, supported by planks fastened to two sills, the ends of the planks furthest from the building projecting over the sills from 3 to 6 inches. At the time of the accident West was passing along this passageway from one side of the building to the other in discharge of his duty, and, stepping upon the end of one of the planks, it tilted up, and he fell to the ground, broke an arm, and strained one of his hips. The plank was about 10 inches in width and about 2 inches in thickness. There was nothing in the appearance of the platform to indicate that it was out of repair, or to give any warning of danger. In the plank there was one nail hole, and another hole into which it seemed there had been an effort to drive a nail, which had not penetrated more than $1\frac{1}{2}$ inches; at least it had not gone through the plank. The evidence is not satisfactory as to whether a nail had ever penetrated the sill so as to attach the plank to it, and a jury would perhaps have been warranted in finding, if that were essential to their verdict, that it had not been nailed down at the time of its construction. The platform had been originally constructed some years before the accident. It had been remodeled, and cut down about 18 months or 2 years before the accident. During all that period it had been in constant use, and was apparently well constructed and in good repair.

It is the duty of the railroad company to exercise ordinary care to furnish a reasonably safe place to its employes in which to perform their duties. "It is a general rule of law of master and servant, repeatedly laid down by this court, that the master shall use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the use of the servant, and the master will be held liable for an injury to the servant which results from the omission to exercise such care and diligence." *Railway Co. v. Mauzy*, 98 Va. 696, 37 S. E. 285; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *Robinson's Adm'r v. Dinny*, 96 Va. 41, 30 S. E. 442; and *Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

During the year in which that platform had been in existence it had been in daily use, and had been walked upon in safety by perhaps thousands of people. One of the witnesses for the plaintiff says that he had perhaps crossed it more than 100 times, and the plaintiff himself had crossed it more frequently than any one else. Under such circumstances we cannot say that ordinary care was not exercised in its construction to provide a reasonably safe place for those whose

duties were to be performed in connection with it. It seems from the evidence, as we have already remarked, that there was nothing about the appearance of this platform at the point where the accident occurred to excite any suspicion of a lurking danger, but that it was a defect which would not have been disclosed to the most careful inspection; and any other conclusion upon this branch of the case would only have the effect of involving the defendant in error in the imputation of contributory negligence, for under the rules of the company it was his duty to keep himself advised as to the depot, platform, and grounds belonging to the company, and report upon their condition.

Upon the whole case we are of opinion that there is error in the judgment of the circuit court, for which it should be reversed.

(101 Va. 42)

BLANTON v. HECKSCHER.

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

CHANCERY—PAYMENT INTO COURT—INTERLOCUTORY ORDER.

1. In a suit against a trustee by the beneficiaries to compel him to account for certain moneys received by him for the benefit of the trust, an order compelling him to pay the fund into court is erroneous when made upon an interlocutory application, where he denies all liability.

Appeal from chancery court of Richmond.

Suit by A. Heckscher against Joseph W. Blanton, trustee. From an order requiring defendant to pay certain money into court, he appealed. Reversed.

S. S. P. Patteson, R. L. Montague, and Meredith & Cocke, for appellant. Hill Montague, for appellee.

WHITTLE, J. The question involved in this appeal is as to the authority of a chancery court to compel a trustee to pay money into court, who denies liability, before his responsibility for the fund has been adjudicated.

It appears that a syndicate composed of A. Heckscher, appellant, Joseph W. Blanton, appellee, and other creditors of the Virginia Pyrites Mining Company, purchased the real estate of that corporation under an agreement that their interests therein should be in proportion to the amount of their respective demands.

For convenience, the property was conveyed to Joseph W. Blanton, trustee, for himself and the other members of the syndicate.

It was subsequently placed in the hands of real estate agents for sale at an agreed commission of 10 per cent. of the purchase price, provided a sale at not less than \$100,000 was effected. The property was sold for that price, and the selling agents were paid their commissions of \$10,000, which they afterwards divided with Blanton, in consideration, as is alleged, of valuable assistance rendered them by him in consummating the sale.

Heckscher, who owned by far the largest interest in the property, upon learning of that transaction, filed a bill in the chancery court of the city of Richmond on behalf of himself and other members of the syndicate against Blanton, to require him to account for and refund to complainant his proportion of the \$5,000 which he had received.

The bill charges a secret arrangement between Blanton and the selling agents by which the latter were to charge 10 per cent. commission for their services, and to divide the same with Blanton. Blanton, in his answer, admits the receipt of half the commission, but denies that before the sale there was any agreement or understanding whatsoever between himself and the agents for any part of their compensation. His statement in that connection is that some months after the contract of sale had been executed the real estate agents voluntarily presented him with half their commission in recognition of the services rendered by him in effecting the sale.

Pending the preparation of the cause for trial, G. Norris Shuman, another member of the syndicate, made affidavit that the \$5,000 in controversy belonged to the syndicate; and also that since the institution of the suit Blanton had disposed of his real estate for the purpose of defeating any recovery that might be had against him.

In a counter affidavit Blanton repeats the allegations of his answer in respect to his right to retain the \$5,000. He admits the sale of his real estate, but insists that it was made in good faith for the purpose of paying debts; and he denies that he is insolvent.

The cause was heard upon the pleadings and affidavits, and a decree was entered directing Blanton within 10 days to deposit \$5,000, with interest, in bank, to the credit of the court in the cause. The decree further provides that, if Blanton should so elect, he might, in lieu thereof, enter into bond, with security, in the penalty of \$6,000, conditioned to pay and satisfy any decree which might be thereafter made against him. From that decree this appeal was allowed.

The general rule of chancery practice as to the payment of money into court is that, where a fiduciary admits in his answer or on his examination, or where it appears on a master's report, unexcepted to, that he has in hand money belonging to the trust estate, such money may be ordered to be paid into court upon interlocutory application.

The cases of *Farmer v. Yates*, 23 Gr. 145, and *Davis v. Chapman*, 83 Va. 67-74, 1 S. E. 472, 5 Am. St. Rep. 251, are illustrative of that practice, and are in accord with modern English precedents (see, also, *Wills' Adm'r v. Dunn's Adm'r*, 5 Gr. 384; 2 Lomax, Ex'rs [2d Ed.] 769), although a contrary rule seems to have obtained formerly in this state. Thus, in *Campbell v. Braxton*, 4 Hen. & M. 446 (decided in the year 1809), it was held that, where a report of a commissioner shows

a balance due from an executor, it is not a sufficient ground for an order directing the money to be brought into court. But the plaintiff should be required to proceed to a decree, and enforce it in the usual way. But, as remarked, the doctrine laid down in that case is not in accord with the present practice.

The doctrine is thus stated by Mr. Daniell: "The plaintiff will not be allowed to make use of affidavits to supply any defect in the answer: the rule of the court being that the order shall be made upon the defendant's admissions alone." 2 Daniell, Ch. Pl. & Prac. (5th Ed.) 1781.

It is apparent, therefore, from the foregoing authorities, that the rule has no application where the defendant denies liability. In such case the question of liability must be determined before an order will be made requiring a deposit of the fund. The principle that a litigant will not be compelled to pay that which he disclaims owing until his responsibility has been adjudicated lies at the very foundation of the administration of justice. A contrary practice would, in many instances, entail hardship and ruin upon suitors, the question of whose liability might be eventually determined in their favor.

The attachment statutes afford adequate remedies against debtors who undertake to escape liability by converting or disposing of their property in advance of judgment or decree, and at the same time safeguard the rights of the defendant. But, if no such remedies were provided by statute, the practice resorted to in this cause would not receive the sanction of this court. The court is not to be understood, however, as intimating any opinion as to the ultimate merits of the controversy. The scope of the decision is to deny the power of the trial court to require the fund in litigation to be paid into court until after the defendant's liability therefor has been ascertained and determined in the usual manner, but it extends no farther.

It follows from these views that the decree complained of is erroneous, and it must be reversed and annulled.

(100 Va. 731)

HANEY et al. v. BREEDEN et al.

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

EJECTMENT—DEFENSES—EQUITABLE ESTOPPEL—QUESTION FOR JURY—INSTRUCTIONS.

1. A mere equitable estoppel is no defense to an action of ejectment.

2. In an action for ejectment, whether or not plaintiffs took possession of the land in dispute by mistake, or without the intention of claiming title thereto, is a question for the jury.

3. An instruction calling special attention to part only of the evidence, and the fact it tends to prove, and disregarding other relevant evidence, is erroneous.

¶ 1. See Ejectment, vol. 17, Cent. Dig. § 114.

Error to circuit court, Greene county.

Action by James A. Haney and others against one Breeden and others. Judgment for defendants, and plaintiff James A. Haney brings error. Reversed.

O. F. McMullan and John S. Chapman, for plaintiff in error. John E. Roller, for defendants in error.

HARRISON, J. The tract of land sought to be recovered in this action of ejectment lies on the Blue Ridge Mountain, in Greene county, and contains $21\frac{3}{4}$ acres. The plaintiff in error claims that the land in controversy is embraced within the boundaries of a deed to himself and his brother Nicholas H. Haney, the father of his coplaintiffs in the court below, from Armistead Long and wife, dated November 29, 1849, and that they have been in continuous adverse possession of the same under said deed from its date until dispossessed by the defendants in April, 1901.

Upon the trial the defendants sought to maintain the issue on their part by the evidence of Wesley Knight, under whom they claim, who testified that he, after buying the land, and before paying for it, had a conversation with the plaintiff in error, and asked him if he (James A. Haney) claimed any part of the land which he (Knight) had bought from Col. Hill, commissioner, and that, if he did, he should come down with him and see Col. Hill about it, and that the plaintiff in error said, "I don't suppose you want to claim any further than my fence, or want to claim the strip in my field;" that he (Knight) replied that he did not claim that strip, and that the plaintiff in error then said, "All right. If that is the case, go on and pay for the land;" that he (Knight) did go on and pay for the land, and got a deed therefor. The plaintiffs moved the court to exclude this evidence, which motion was overruled, and this action of the court is made the subject of the first bill of exception.

The object of the defendants in offering this evidence was to make out a case of equitable estoppel, and upon that ground to defeat a recovery by the plaintiffs. It is well settled in this state that such a defense is not permissible in an action of ejectment.

In *Suttle v. Railroad Co.*, 76 Va. 284,—a case in which the plaintiff sought to establish an equitable estoppel, and upon that to recover, in an action of ejectment,—this court held that evidence very similar to that offered in this case was properly excluded; that an action of ejectment could be neither maintained nor defended by reliance upon a mere equitable estoppel.

In the case of *Jennings v. Gravely*, 92 Va. 377, 23 S. E. 763,—a case in which the defendants in an action of ejectment sought to prevail by relying upon an equitable title,—Judge Keith, speaking for this court, held that the plaintiffs having shown that they

were the holders of the legal title, and had a right of possession under it at the time of the commencement of the action, the defendants could not defeat such right by showing an equitable title in themselves.

These two cases show conclusively that it was error to overrule the plaintiffs' motion to exclude the evidence under consideration. In the case of *Jennings v. Gravely*, supra, the authorities have been so recently reviewed, and the subject so fully discussed, that it would be unprofitable to repeat here what is there said. The reasons can be read there for the conclusion reached here. A contrary doctrine to that laid down in the cases cited would make the right to land rest upon the slippery memory of man, rather than written muniments of title.

The evidence tending to make out a case of equitable estoppel being inadmissible, it was error to give instruction No. 4, set out in bill of exception No. 3, in which the jury are told that, if they believed said evidence, they must find for the defendants.

We are further of opinion that it was error to give instruction No. 3, set out in bill of exception No. 2, which is as follows:

"If the jury believe from the evidence that the defendant's title papers embrace a small strip of land within the plaintiff's fence, of about the width of two corn rows, and containing the fraction of an acre, and that said fence is near the line between the plaintiff's home place and the land in controversy, and that a road runs along said fence on the lands in controversy, and that from the location of said fence in its relation to the boundary line, the road, and the other features of said land at that point, that the true owner of the land would reasonably have supposed that it was put there by mistake, or that the fence was so near the true line that he would hardly have observed that it was located on his land, then, in either aspect, the possession of said strip of land is not such an open and notorious possession as to give to the plaintiff title by adverse possession of all the lands embraced in the deed from Long to Haney, and you should find for the defendant."

This instruction sets out certain facts relied on by the defendants, tending to show that the plaintiffs took possession of the land in controversy by mistake, and without the intention of holding it adversely, ignoring the countervailing evidence of the plaintiffs relevant to that issue, and tells the jury that, if they believe those facts, the possession of the plaintiffs is not such an open and notorious possession as to give to them title by adverse possession of all the lands embraced in the deed from Long to Haney, and that they must find for the defendants. It is true, adverse possession depends upon the intention with which the possession is taken and held; and, while the intention to claim title must be manifest, it need not be expressed. But whether or not the plaintiffs took possession

by mistake, or without the intention of claiming title, is a question for the jury; and it was error to submit that question to the jury upon certain facts and circumstances relied on by the defendants, ignoring the countervailing evidence relevant to the issue relied on by the plaintiffs.

This court has repeatedly held that an instruction must not call special attention to part only of the evidence, and the fact it tends to prove, and disregard other evidence relevant to the matter in issue. *Railroad Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593; *Montgomery's Case*, 98 Va. 852, 37 S. E. 1; and *Boush v. Deposit Co.* (decided at the present term of the court) 42 S. E. 877.

For these reasons, the judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial to be had, not in conflict with the views expressed in this opinion.

(101 Va. 28)

SCOTT v. BOYD.

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

CONTINUANCE—REFUSAL—REVIEW—INSTRUCTIONS—RESCISSION OF CONTRACT—PARTNERSHIP.

1. Absence of a witness whose evidence is purely cumulative is no ground for a continuance.

2. A motion for continuance being addressed to the discretion of the court, its refusal will not be reviewed unless abuse of discretion is shown.

3. An instruction is erroneous where there is no evidence to support it.

4. An action will not lie to rescind a contract for misrepresentation unless the misrepresentation alleged is set out in the pleading, and is as to a material fact, and fraudulently made, with intent to deceive.

5. A partner has no right to claim compensation for his services on behalf of the partnership without a special agreement.

Error to circuit court, Floyd county.

Action by James M. Boyd against Winfield Scott and Samuel Scott. Verdict for plaintiff, and defendant Winfield Scott brings error. Affirmed.

Scott & Staples, for plaintiff in error. A. A. Phlegar, for defendant in error.

WHITTLE, J. This litigation grows out of a sale by the defendant in error, James M. Boyd, of his interest in the partnership of James M. Boyd & Co. to his copartners, Winfield Scott, the plaintiff in error, and Samuel Scott. The price agreed to be paid for Boyd's interest was \$4,000, for which the Scotts executed two bonds, and made two promissory notes, each for the sum of \$1,000. Default having been made in the payment of these demands, Boyd instituted an action of debt upon them, to which action the defendants interposed a number of defenses by a special plea of set-off, under section 3299

of the Code. There was a verdict for the plaintiff for the full amount of his claims, which the trial court approved, and rendered judgment thereon for the plaintiff.

A trial of the action was delayed for several years, chiefly by continuances granted on behalf of the defendant Winfield Scott, his codefendant, Samuel Scott, having died pending the litigation.

Finally, at September term, 1901, the case was called for trial, whereupon the defendant again moved for a continuance on the ground of the absence of a material witness; his testimony in that connection being that he had caused a subpoena to issue for the witness, which had not been served, in consequence of his temporary absence from the state; that he expected to prove by him that, before the execution of the bonds and making of the notes in question, witness heard the plaintiff, Boyd, admit the existence of an agreement to the effect that the firm of J. M. Boyd & Co. was to pay the defendant Scott a salary of \$100 per month for his services as superintendent of the Scott Spoke & Handle Company; that the evidence was material to his defense; that it would be denied by Boyd; and that the defendant had no witness, other than himself, by whom he could establish the contract.

Upon that representation the case was again continued for the defendant. But afterwards, the court having been advised by Scott's counsel that there was a witness in attendance who would testify in respect to the matter which the defendant expected to prove by the absent witness, the order of continuance was set aside, and the defendant ruled into trial. To that action of the court the defendant excepted. It also appears that at the trial the defendant "introduced the evidence of himself and D. L. Weeks, tending to prove that there was an express contract that he should be paid one hundred dollars a month by the firm for his services as superintendent of the spoke and handle factory, and that he had served in that capacity for thirty-three months." It thus appears that the evidence of the witness was merely cumulative, and the general rule of practice is well settled that the absence of such a witness affords no ground for a continuance. *Railroad Co. v. Shott*, 92 Va. 35, 22 S. E. 811.

A motion for a continuance is always addressed to the sound discretion of the trial court, under all the circumstances of the case, and an appellate court will never reverse its judgment in the exercise of that discretion, unless plainly erroneous. *Payne v. Zell*, 98 Va. 294, 36 S. E. 379; *Kelly v. Manufacturing Co.*, 98 Va. 406, 36 S. E. 511, 81 Am. St. Rep. 736; *Kinzie v. Riely's Ex'r* (decided at the present term) 42 S. E. 872. In this instance the action of the court in setting aside the order of continuance and disposing of the case was manifestly right.

The second assignment of error is to the

¶ 1. See *Continuance*, vol. 14, Cent. Dig. § 72.

refusal of the court to give instruction No. 8 as asked for by the defendant, and in giving the same in modified form. The instruction, as originally offered, told the jury that if they believed from the evidence that, at the time of or before the execution and delivery of the evidences of debt in the declaration mentioned, the plaintiff promised, represented, stated, or agreed that he would retire from business, and would not for a period of 10 years from the date of said evidences of debt, in the town of Floyd, engage in or be interested in such business as the firm of J. M. Boyd & Co. had theretofore conducted, or such mercantile business as S. & W. Scott should during said period see fit to conduct at the place of business of said firm of J. M. Boyd & Co., and if they further believed from the evidence that such promise, representation, statement, or agreement constituted one of the inducements for the execution and delivery to the plaintiff of said evidences of debt, and was made by the plaintiff with the intention that it should be relied upon by S. & W. Scott, then he (the plaintiff) was bound by such representation, promise, statement, or agreement. And if the jury should further believe from the evidence that the Scotts continued the business of the firm of J. M. Boyd & Co., at its former place of business, and within 10 years from the date named, and while the Scotts were so engaged in business, the plaintiff engaged in or became interested in business of like character as that conducted by the firm of J. M. Boyd & Co., and thereafter continued by the Scotts in the town of Floyd, he is liable in damages to the defendant Scott.

The portion of the plea pertinent to this instruction is as follow: "And the said plaintiff undertook and agreed and faithfully promised the said defendant that he, the said plaintiff, would retire from business, and would not again, for a period of ten years from that date, enter into business of such character as said firms or mercantile firm had been conducting at Floyd C. H., Va., or have any interest in said business, under a penalty for a breach of said agreement of \$5,000, to be paid to said defendant by said plaintiff."

It will be observed that the plea avers that the alleged agreement was an express contract, which the defendant in his evidence maintained was in writing, and there was no evidence tending to prove a parol contract. While the plaintiff admitted that, pending negotiations for the sale of his interest in the partnership of J. M. Boyd & Co. to the Scotts, he stated that he was in poor health, and did not expect to resume the mercantile business at Floyd C. H., and knew that such statement was one of the inducements to the trade, he denied that there was any agreement to that effect. Upon this state of the pleading and evidence, the trial court refused to give the instruction

in the form in which it was offered by the defendant, but so modified it as to make it accord with the theory of the defendant, that the contract upon which he relied was in writing, and told the jury that if they believed from the evidence that there was an agreement in writing, as testified by the defendant, he (the defendant) would be entitled to damages for its breach, but not otherwise. The same principle was enunciated in instruction No. 2 given on the motion of the plaintiff.

There was no error in the ruling of the court in thus conforming the instructions to the evidence of the defendant. His contention was that the contract was in writing. He cannot complain, therefore, that the instructions limited the inquiry to his own theory of the evidence.

If there was not a written contract, there being no evidence of the existence of a parol contract, there was nothing upon which to have based any other instruction, and a court should never give an instruction in the absence of evidence to support it.

It was argued with much earnestness that a parol agreement to abstain from engaging in a particular business at a particular place for 10 years is not within the statute of frauds.

A determination of the matter under consideration does not call for a decision of that question, and upon it no opinion is expressed.

But inasmuch as the modification of instruction No. 3, and the giving of plaintiff's instruction No. 2, were proper, for the reasons given, the error, if error there was, in the view of the trial court that the case came within the statute of frauds, is harmless. *Leftwich v. City of Richmond (Va.)* 40 S. E. 651.

The court would have been justified in refusing to give instruction No. 3, in the form asked, on the further ground that it told the jury that the plaintiff would be liable in damages for engaging, during the period named, "in such mercantile business as the Scotts should see fit to conduct at the place of business of the firm of J. M. Boyd & Co.,"—a stipulation neither embraced by the defendant's pleading nor proof.

Nor was there any error in the refusal of the court to submit to the jury the question of statements and representations of the plaintiff as inducements to the contract of sale.

There was neither issue nor evidence upon which to have based that instruction. The statement of the plaintiff that his health was bad, and that he did not expect to resume the mercantile business in the town of Floyd, and that he knew that such statement was one of the inducements to the trade, if otherwise available, was not put in issue by the pleadings, and could not be relied on at the trial.

It is well settled that in order to entitle a

party to relief from liability on a contract by reason of statements or representations made by the other party to the contract, either by way of rescission or in damages for its breach, the matter relied on must be within the pleadings, and the statement or representation must either have been of a material, existing fact, or contradistinguished from a mere opinion or expectation or declaration of intention, or must be alleged and proved to have been made fraudulently, with intent to deceive or mislead. *Watkins v. Land Co.*, 92 Va. 10, 11, 22 S. E. 554; *Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845.

The remaining objection, insisted upon in the argument before this court, was to the giving of plaintiff's instruction No. 3.

That instruction is as follows: "The jury are instructed that one partner is not entitled to receive compensation for services which he may render about the partnership business, other than his share of the profits, unless there was an express contract between him and the other partners that he should do so, and the burden is on the defendant in this case to show by a preponderance of evidence that there was such an agreement."

The instruction clearly and correctly propounds the law governing the right of a partner to claim compensation for services rendered on behalf of the firm. The doctrine is that, in the absence of a special agreement to that effect, no such right exists. *Forrer v. Forrer's Ex'rs*, 29 Grat. 134; *Frazier v. Frazier*, 77 Va. 792.

Upon the whole case, there is no error in the judgment complained of, and it must be affirmed.

(101 Va. 17)

MCALLISTER v. HARMAN et al.

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

JUDICIAL SALE—SPECIFIC PERFORMANCE—TITLE—ADVERSE POSSESSION—EXTENDING TIME—RETAINING SUIT.

1. Suit was brought by M., administrator and trustee of R., to partition lands between C. and the heirs of R., and to sell the part assigned to R.'s heirs. Before confirmation of the report of the commissioners to partition the land, C. and M. (the latter, trustee under a deed by R. of his interest) gave an option on the land to H. After confirmation of the report partitioning the land, H. elected to purchase, and the sale was reported to the court by M., trustee; and it entered a decree approving and confirming it, and directing (O. consenting) that the purchase price be paid to the general receiver of the court, but referring to it as a sale made by M., trustee, and C. in his own right. *Held*, that the sale was not a judicial sale, which is one made by a court in a pending cause, through its authorized agent.

2. There being no stipulation in a contract of sale of land by M., trustee of an undivided half of it, and C., owner of the other half, that they were not bound to make a good title, the purchasers, even if they have no right to demand

from M. any better title than he held as trustee, have a right to a good title to C.'s moiety, and such title to the other moiety as M., trustee, could convey.

3. A contract of sale of land will not be specifically enforced; the vendors' title depending on a junior grant, with adverse possession, and they not having shown such possession.

4. Vendors seeking specific performance of a sale of land—their title depending on a junior grant, and adverse possession—will not be granted more time to show adverse possession; they having had eight years after objection to the title, during which the land has been diminishing in value.

5. A suit for specific performance of a sale of land will be retained for an accounting and a decree thereon—the purchaser having paid part of the purchase money,—though the title is not such that specific performance can be decreed.

Appeal from circuit court, Bath county.

Suit by McAllister, trustee, for partition and sale. From a decree refusing to specifically enforce a contract of sale against Harman and another, McAllister appeals. *Affirmed*.

W. M. & J. T. McAllister and Benj. Haden, for appellant. R. L. Parrish & Son and A. C. Braxton, for appellees.

BUCHANAN, J. This suit was brought to the April rules, 1890, by William M. McAllister, administrator and trustee of Robert J. Glendy, deceased, and others, to settle the accounts of the said administrator and trustee, to ascertain the debts of the said decedent and their priorities; to partition the "Wilderness" lands between Charles D. Glendy and the heirs of Robert J. Glendy; to sell the lands assigned to the latter, and out of the proceeds to pay the decedent's debts, and distribute the residue, if any, among those entitled. The bill also contained a prayer for general relief. At the June term, 1890, commissioners were appointed to make partition of the land known as the "Wilderness Estate." The commissioners made partition thereof, and reported their action to the court, which was confirmed at the September term, 1890, of the court, and ordered to be certified to the county court of Bath county for recordation as provided by statute. On the 6th day of September, 1890, after the commissioners had been appointed to partition the lands, but before the confirmation of their report, William M. McAllister (trustee in a certain deed of trust executed by Robert J. Glendy) and Charles D. Glendy entered into an agreement with Harman & Berkeley by which they gave the latter an option upon the lands, running until the 1st day of January, 1891, at the price of \$17,000; one half to be paid when the option was closed, and the other half 12 months after that date, with interest. The agreement further provided that, in the event the option was closed, one half of the purchase price of the lands was to be paid to such person or persons as the circuit court of Bath county might direct in the pending suit of Robert J. Glendy's administrator against Robert J. Glendy's heirs, and the oth-

er half of the purchase price was to be paid to or settled with Charles D. Glendy.

In December, 1890, Harman & Berkeley elected to purchase the land under their option; and William M. McAllister, trustee, reported the sale to the court, and asked that it might be confirmed by the court, which was done in vacation, after notice to Harman & Berkeley. By the same decree, William M. McAllister, the general receiver of the court, was directed to collect from Harman & Berkeley the cash payment, including that due to Charles D. Glendy,—he consenting thereto,—and hold the same subject to the future order of the court. By a decree entered at the April term, 1891, the general receiver was directed to collect the residue of the purchase price at or before maturity. At the September term, 1891, it appearing to the court that Harman & Berkeley were in default in making their cash payment, a rule, upon motion of the plaintiff, was awarded against them, returnable to the first day of the next term of the court, to show cause why the property purchased by them should not be resold at their costs and charges. The rule was docketed at the April term, 1892, of the court. At the September term, 1893, of the court, Harman & Berkeley filed their answer to the rule, in which, among other things, they deny that they are bound by the vacation decree of the court confirming the sale to them, as they were not parties to the suit. They state in their answer that about the time that decree was entered they transferred whatever rights they had in the property to Dr. J. S. Lawrence, who agreed to become the purchaser thereof at the price stipulated in the said option contract; that he had, as they are informed, paid to the receiver about \$2,500 of the purchase price, and given a negotiable note to him for \$3,000 more thereof; that the said lands were not offered for sale by the court, but that the option contract was made by C. D. Glendy, the owner of one half thereof and by William M. McAllister, trustee, in whom was the title to the other half; that the option contract embraced about 4,400 acres of land, and provided for a good title; that at the time they entered into that contract, and at the time Dr. Lawrence agreed to become the purchaser of the lands, the title to the lands was believed by them and others interested to be perfect, but since then a suit had been instituted, and is now pending in the same court, in which the plaintiffs set up a title to all of said lands except about 900 acres; that they are not advised as to the merits of the claim asserted in that suit, but the suit itself has placed a cloud upon the title to the lands, and had, as they are reliably informed, prevented the payment of the purchase price in full by Dr. Lawrence, and had defeated him in carrying out a sale of the lands which he had made; that the respondents had never contemplated purchasing less than the whole of the lands contracted for, and that the court would not compel

them to take one-fifth of what they intended to purchase, but would either release them, or require their vendors to remove the cloud from the title without delay; but, if the court should be of opinion that they were bound as purchasers, no sale should be decreed until the title to the property be made secure, and, if it cannot be made secure without delay, they ask to be released, and deny that their vendors can, under the circumstances, compel them to take a clouded title, or enforce a specific execution of the contract until the cloud upon the title shall have been removed. At the September term, 1894, a decree was entered by which one of the commissioners of the court was directed to ascertain whether or not Harman & Berkeley had really become purchasers of the land, and what was the condition of its title. In April, 1895, the commissioner made a report, which by consent of parties was recommitted. In September, 1895, on motion of the plaintiffs, it being reported to the court that the tenant in possession of the land was committing waste by cutting and destroying valuable timber, the court entered an order restraining Harman & Berkeley, their agents and assigns, and the tenant in possession, from committing waste. In April, 1896, the court ordered its general receiver to rent out the land for one year, which was done, and such renting was continued until the decree appealed from was entered. At the September term, 1897, McAllister, trustee, and C. D. Glendy filed their demurrer and replication to the answer of Harman & Berkeley, in which replication they insist that the sale to Harman & Berkeley is valid, having been confirmed by the circuit court with their full knowledge and consent, and that the title to the lands is beyond question, the entire property having been in the actual and uninterrupted and adverse possession of the vendors and those under whom they claim for more than 50 years; that the plaintiffs in the chancery suit referred to in the answer of Harman & Berkeley have no connected title to, and no actual possession of, any part of the land; that their claim does not cast a cloud upon the Glendy title; and that it would be a useless task to require them (McAllister, trustee, and Glendy) to remove such supposed cloud.

In April, 1898, the commissioner reported that Harman & Berkeley had become the purchasers of the land in accordance with the provisions of the option contract, and that the chancery suit which was alleged in the answer of Harman & Berkeley as casting a cloud upon the title to the lands had been dismissed by the circuit court, and, as he was informed, its action had been affirmed by the court of appeals, and that, whilst the commissioner had no information as to what portions of said lands were involved in that suit, the cloud thereon upon the title to the property by its institution and prosecution did not seem to have been of a very serious character, especially in

view of the sworn and uncontradicted statements of the replication of C. D. Glendy and Wm. M. McAllister, trustee.

Harman & Berkeley excepted to this report. Without passing upon the exceptions, the report was recommended to the commissioner. In April, 1900, Harman & Berkeley moved the court to dismiss the commissioner from further consideration of the cause, and without waiting for a report from the commissioner, or granting further time for the vendors to complete their evidence, to proceed to hear and decide the cause upon the rule and proceedings had thereunder. This motion was resisted by the vendors of the land, who moved the court to continue the cause until the next term. This latter motion was resisted by the vendees. The court overruled the motion of the vendees, and continued the cause for the vendors, with instruction to the commissioner to file his report in time for the cause to be heard upon its merits at the next term.

In September, 1900, the commissioner reported that he only learned of the order entered at the April term, 1900, a few days before; that he had given notice to the parties, and taken the deposition of Wm. M. McAllister, trustee, but had been unable to take the evidence the parties desired. On the next day after that report was filed, Harman & Berkeley moved the court to discharge the rule which was pending against them, and to release them from the purchase of the land described in the rule and proceedings had thereunder. This motion was resisted by the vendors, who moved the court to continue the cause "for the purpose of allowing them to take further evidence on the line of showing a perfect title to all the land in question by adversary possession." This motion to continue was overruled, and the cause was made a vacation cause. At the April term, 1901, the court entered a decree in which it held that the sale to Harman & Berkeley was not a judicial sale, but a sale in pais; that the vendors had not shown their ability to convey to the vendees such title to the lands sold as would entitle them to a decree against the vendees for a specific performance of the contract, and that, even if the vendors could and would now remove the cloud upon the title of said lands, it would be inequitable to require the vendees to comply with their contract of purchase at that late date, after the land had materially diminished in value, and that the vendors had, by their delay in removing the cloud upon the title, even supposing that they could at this time remove the same, deprived themselves of the right to have the contract specifically performed; dismissed the rule against Harman & Berkeley to show cause, annulled and set aside the contract of sale, and declared that Harman & Berkeley and their assigns, who had paid the purchase price of the land, so far as it had been paid, should have an equitable lien on the

land to secure its repayment, and directed the necessary accounts to ascertain the balance due. From that decree this appeal was allowed.

It seems to be conceded that, if the sale to Harman & Berkeley was a judicial sale, the purchasers would have no right, under the facts of the case, to raise any question as to the title of the land purchased by them.

The first question, therefore, to be considered, is whether or not the sale was a judicial sale.

A judicial sale is defined to be one which is made by a court of competent jurisdiction in a pending cause, through its authorized agent. *Terry v. Coles' Ex'r*, 80 Va. 695; *Alexander v. Howe*, 85 Va. 198, 201, 7 S. E. 248; *Ror. Jud. Sales* (2d Ed.) § 1. See, also, *Christian v. Cabell*, 22 Grat. 82.

Tested by this definition, it is clear that the sale in question was not a judicial sale. The court neither made the sale, nor authorized McAllister, trustee, and Glendy to make it. The agreement to sell does not purport to be a sale by the court, nor its authorized agent or agents, but is a sale by the parties of the first part,—one as trustee and the other in his own right. Its validity is not made to depend and did not depend upon the court's confirmation. It is true that the sale was reported to the court by McAllister, trustee, and that it entered a decree approving and confirming it, and directed (the vendor Glendy consenting) that the purchase price should be paid to the general receiver of the court; but the decree refers to the sale as made by McAllister, trustee, and C. D. Glendy, and states that it appears from the report of sale that Harman & Berkeley had made their purchase from C. D. Glendy in his own right and from McAllister, trustee.

It is further true that the pleadings in the cause were sufficient to authorize the court to have decreed a sale of the moiety of the land assigned to McAllister, trustee, in the partition made between himself and C. D. Glendy. But the court had no jurisdiction, under the pleadings, to order the sale of the moiety assigned C. D. Glendy at the time the sale was made. The land was capable of partition in kind, had been so partitioned, and the parties assigned their respective moieties. Report of that partition had been confirmed by the court. All this was done before Harman & Berkeley had determined to close their option and become purchasers of the land.

The next error assigned is that the court erred in holding that the record showed that there was any cloud upon the title to the land, and in holding that it was the duty of the vendors to show that their title was free from objection.

A vendor, in the absence of any stipulation to the contrary, is bound to make a good title, free from incumbrance of every description which may embarrass the full and quiet

enjoyment of the premises by the purchaser. *Garnett v. Macon*, 6 Call, 308, Fed. Cas. No. 5,245; *Jackson v. Ligon*, 8 Leigh, 161; *Hendricks v. Gillespie*, 25 Grat. 193, 194; 2 Minor, Inst. (4th Ed.) 876.

The burden is on the vendor who asks for the specific execution of a contract to show that he has such title as he contracted to convey. Judge Allen in *Carrington v. Otis*, 4 Grat. 253; *Hendricks v. Gillespie*, 25 Grat. 197. See, also, *Fry*, Spec. Perf. § 824; 2 Minor, Inst. 893, 894.

Whether in this case the purchasers had the right to demand from McAllister, trustee, any better title than he held as trustee, is immaterial. They clearly had the right to a good title to the C. D. Glendy moiety of the land; and being a sale by McAllister, trustee, and Glendy, jointly, of the whole land, the purchasers would not be compelled to take any part of the land unless they could get good title at least to C. D. Glendy's moiety, as well as such title to the other moiety as McAllister, trustee, could convey.

The cloud upon the title to which the court's attention was called in *Harman & Berkeley's* answer to the rule was the pendency of the suit of Bailey against Byrd. In that suit, which is a part of the record in this case, it appears from the answer of C. D. Glendy and of the heirs of Robert J. Glendy that about 2,000 acres of the Wilderness tract were within the lines of an older grant, and that the Glendy title to that 2,000 acres is based upon adverse possession under junior grants for 50 years or more. It may be that a court of equity will specifically execute a contract for the sale of land at the suit of the vendor who claims under a junior grant, where he shows that his title has been perfected by adversary possession. The record in this case shows that the Glendy title to a large part of the land in controversy depends upon adversary possession under junior grants, yet the evidence does not show that the vendors and those under whom they claim have had such possession.

Although objection to the title was made in 1893 by the purchasers, and the demand made that they should be released from their purchase unless the objection to the title should be removed without delay, yet the vendors had wholly failed to show such title to the land as the purchasers were entitled to under their contract when the decree appealed from was entered, in 1901. This, too, in face of the fact that the land was diminishing in value during that period. The vendors were clearly not entitled to a specific execution of the contract upon the record as it was when the court entered the decree appealed from. Nor were they entitled, under the facts and circumstances of the case, to further time within which to show that they could make such title as the purchasers were entitled to call for.

Neither did the court err in not leaving the parties to their remedy or remedies at

law when it refused specific execution of the contract.

Although specific performance be refused by the court, it will not usually, in a case like this, turn the purchaser, who has paid the purchase price in whole or in part, round to his remedy or remedies at law to recover damages for the breach of contract, but, having properly acquired jurisdiction of the case, will proceed to do final and complete justice between the parties, by ordering the necessary accounts to ascertain the purchase money paid, the rents with which the purchaser may be chargeable, together with damages for waste for which he may be accountable, the value of permanent improvements for which he should be allowed compensation, the taxes paid by him, if any; and, having ascertained the balance due, the court will make a decree that the same shall be paid, and, in favor of the purchaser, will ordinarily charge it upon the land. *Payne v. Graves*, 5 Leigh, 561; *Bowles v. Woodson*, 6 Grat. 78; *Stearns v. Beckham*, 31 Grat. 420 (Judge Staples' opinion); *Grubb v. Starkey*, 90 Va. 831, 20 S. E. 784; *Newberry v. French*, 98 Va. 479, 38 S. E. 519; 2 Minor, Inst. (4th Ed.) 875.

We are of opinion that there is no error in the decree complained of, and that it should be affirmed.

(100 Va. 865)

GOLDMAN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 4, 1902.)

CRIMINAL LAW—EVIDENCE—DEALING IN PROHIBITED ARTICLES—DEMURRER TO EVIDENCE.

1. In every prosecution it devolves upon the commonwealth to prove—First, that the crime charged has been actually perpetrated, and, secondly, that it was committed by the accused; and, to justify a conviction, the evidence must be so convincing as to exclude every reasonable doubt of the guilt of the prisoner.

2. Under Code, § 3715, providing that, if any person buy or receive brass or certain other articles with intent to defraud, he shall be confined in the penitentiary, and that possession of such articles, so bought or received from any other person than the manufacturer thereof or his authorized agent, or of a regularly licensed dealer therein, shall be prima facie evidence of such intent, possession of the articles is no evidence that they were bought from any other person than the manufacturer.

3. In a criminal prosecution involving the right to personal property, where the alleged owner thinks he has lost the property, but will not swear that he has, the ownership is not sufficiently proved.

4. Upon a demurrer to evidence, in ascertaining the facts established by any one witness, everything stated by him, as well on his cross-examination as upon his examination in chief, must be considered, and facts imperfectly stated in answer to one question may be supplied by the answer to another; and, where, from one statement, considered by itself, an inference may be deduced, that infer-

1. See Criminal Law, vol. 14, Cent. Dig. §§ 732, 734, 1267.

ance may be strengthened or repelled by the facts disclosed in another.

5. Evidence considered, and held insufficient to support a conviction under Code, § 3715, providing that, if any person buy or receive brass or certain other articles with intent to defraud, he shall be confined in the penitentiary.

Keith, P., dissenting.

Error to hustings court of Roanoke.

R. A. Goldman was convicted, under Code, § 3715, of having possession of certain brass with intent to defraud, and appeals. Reversed.

Scott & Staples and Hart & Hart, for plaintiff in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

WHITTLE, J. Plaintiff in error, R. A. Goldman, was jointly indicted, along with S. Goldman, in the hustings court of the city of Roanoke, for feloniously buying and receiving certain railroad brass, known as "switch locks," the property of the Norfolk & Western Railway Company, with intent to defraud. There were a demurrer and a motion to quash the indictment, both of which were overruled, and thereupon the prisoner R. A. Goldman pleaded not guilty. At the trial the jury found the prisoner guilty as charged in the indictment, and fixed his punishment at 60 days in the city jail. The court overruled the prisoner's motion to set aside the verdict and grant him a new trial, and rendered judgment upon the verdict, and the case is here upon a writ of error to that judgment.

From the view taken of the case by this court, it is only necessary to notice the last assignment of error, which involves the sufficiency of the evidence to warrant a conviction of the prisoner of the felony of which he stands charged.

It will not be inappropriate, in approaching the consideration of that question, to do so in the light of certain well-settled principles of law which apply in every prosecution against a citizen for crime.

It devolves upon the commonwealth to prove—First, the corpus delicti (that is, the fact that the crime charged has been actually perpetrated); and, secondly, that it was committed by the accused. To justify a conviction, the evidence must be so convincing as to exclude every reasonable doubt of the guilt of the prisoner.

In McBride's Case, 95 Va. 826, 30 S. E. 457, this court said: "The prisoner is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point out any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty man. He rests secure in that presumption of innocence until proof is adduced which establishes his guilt beyond a reasonable doubt; and, whether the proof be direct or circumstantial, it must be such as

excludes any rational hypothesis of the innocence of the prisoner."

In the case in judgment, the corpus delicti is that the prisoner did "feloniously buy and receive twenty-eight pieces of railroad iron, brass, metal, and composition thereof, and known as 'switch locks,' of the value of fifty cents each, being the goods and chattels * * * of the Norfolk and Western Railway Company, a corporation, with intent feloniously to defraud."

The act upon which the prosecution is based is found in section 3715 of the Code, as amended by Acts 1889-90, p. 30, which declares that "if any person buy or receive," amongst other things, articles such as are described in the indictment, "with intent to defraud, he shall be confined in the penitentiary not less than one, nor more than two, years, or, in the discretion of the jury, in jail not exceeding one year." And the statute further provides that possession of such articles, so bought or received from any other person than the manufacturer thereof or his authorized agent, or of a regularly licensed dealer therein, shall be prima facie evidence of such intent.

It will be observed that the statute does not declare that possession of the contraband articles shall be prima facie evidence, or, indeed, any evidence, that they were bought or received from any other person than the manufacturer thereof, etc., but that, when so bought or received, possession shall be prima facie evidence of an intent to defraud. So that, before any such presumption can arise from the possession of the articles, it is incumbent upon the commonwealth to prove, as an essential element of the offense, that they were bought or received in the manner proscribed by the act. Upon that subject there is no evidence in the record.

Nor does the evidence relied on for that purpose establish with that degree of conclusiveness required in criminal prosecutions that the Norfolk & Western Railway Company has lost any of its switch locks, or that those described in the indictment are the property of that company. On the contrary, but two witnesses testify directly on that point. Neither proves that the company had lost any switch locks, and both decline to positively identify the locks in question as the company's property, although they testify to circumstances tending to support that theory. On the other hand, the witness Beeton, introduced by the commonwealth, testifies that the Norfolk & Western Railroad Company, the immediate predecessor of the Norfolk & Western Railway Company, each having the same initials, "N. & W. R. R.," used locks similar to the ones in question. Non constat but that these locks were the property of the old company, and not of its successor. It is true, another witness testifies that he unlocked two of these switch locks with a key furnished him by a switch tender of the Norfolk & Western Rail

way Company; but the same, doubtless, would have been the case with switch locks of the old company, of similar pattern.

It does not appear that the Norfolk & Western Railway Company had ever missed any of its switch locks. "Where the alleged owner thinks he has lost the property, but will not swear that he has, * * * the ownership is not, by this evidence, sufficiently proved." 2 Bish. Cr. Law, § 752. Such alleged owner could hardly expect a jury to find that his ownership of property was proved beyond a reasonable doubt, when his own doubts were so great that he could neither swear that he had lost, nor that the property in question was his own.

The prosecution originated as follows: Some of the large brass lamps belonging to the Norfolk & Western Railway Company had been stolen from its passenger cars, and the agents, suspecting that they might be found in the barrel of junk, then in the freight depot, consigned in the name of S. Goldman, shipper, to the Ajax Metal Company of Philadelphia, opened the barrel, and discovered the articles described in the indictment.

Whilst the witness Baldwin, a detective in the employment of the Norfolk & Western Railway Company, testifies with characteristic zeal in his effort to fix the guilt upon the accused, a careful scrutiny of his evidence shows more or less conflict between it and that of other witnesses for the commonwealth. These discrepancies are the proper subject of comment, and must impair the value of his testimony. At his instance, Officer Rigney accompanied him to the junkshop of S. Goldman, and was present at a conversation between him and the prisoner. Yet, so far as appears from his testimony, Rigney heard no admission from the prisoner that he bought and sold junk in S. Goldman's shop, or that "he had bought no switch locks except some brasse; which he had gotten from a showman," as Baldwin testified. His testimony on that point is that prisoner stated that he had not bought any railroad locks, since Baldwin notified him not to do so, except a few which he got from Beeton, all of which were broken. True, Rigney says he was a few feet distant during part of the conversation between Baldwin and prisoner. But he certainly heard the question and answer referred to, and his testimony as to what that answer was is essentially different from that of Baldwin's version of it.

Again, the action of the prisoner in connection with the purchase of locks from Beeton repels the inference to be drawn from the alleged admission to Baldwin that he was in control of the shop and business, and tends to show his true status in relation to the business of S. Goldman.

Beeton distinctly testifies that when he carried certain junk, including the broken switch locks, to the shop, prisoner told him to unload it, but that the sale was to prisoner's

father, who came into the shop, and fixed the price, and paid the purchase money.

The witness Baldwin likewise testified that prisoner showed him an entry in the books, dated March 4, 1901, as follows: "Beeton's bicycle shop, Campbell avenue, S. W. 73 lbs., scrap brass fittings and N. & W. R. R. locks, \$2.00;" that the words "N. & W. switch locks" were not in the books at the time, but were put there afterwards; that he was absolutely certain of this,—as certain as that he was sitting there, or that he was living. He subsequently came back on the witness stand, and admitted that he was mistaken, and testified that the entry had not been changed; that the witness Robinett had told him that he was mistaken.

"Upon a demurrer to evidence, in ascertaining the facts established by any one witness, everything stated by him, as well on his cross-examination as upon his examination in chief, must be considered. Facts imperfectly stated in answer to one question may be supplied by the answer to another. And where, from one statement, considered by itself, an inference may be deduced, that inference may be strengthened or repelled by the facts disclosed in another." *Ware v. Stephenson*, 10 Leigh, 161.

Now, it appears from the evidence on behalf of the prisoner, not in conflict with any direct testimony adduced by the commonwealth, and just inferences to be drawn therefrom, that S. Goldman is the mother of the prisoner, a minor, 19 years of age; that she is a regularly licensed junk dealer, occupying a shop and carrying on business in the city of Roanoke; that the business is managed by her son Herman Goldman; that prisoner had no interest in the business, and received no wages for his services, but staid about the shop, and did what he was bidden to do. Among his other duties was that of accompanying to the depot of the Norfolk & Western Railway Company freight belonging to S. Goldman, intended to be shipped to other points. On March 11, 1901, there was taken to the depot of the railway company in the city of Roanoke, by the prisoner, in company with a negro drayman, a barrel marked "S. Goldman," to be shipped to the Ajax Metal Company of Philadelphia. The barrel was received for shipment, the contents classified as "scrap lead," and a bill of lading issued in the name of S. Goldman, consignor, and delivered to the prisoner.

There is no evidence tending to show that the prisoner had anything to do with packing the barrel, or any knowledge of its contents, other than what may be inferred from his alleged statement to Detective Baldwin that the shipment of 800 pounds of junk contained no brasses or locks, other than those bought of Beeton,—a statement which rather tends to confirm the theory that prisoner had no knowledge of the fact that the property in question was ever in the possession of his mother, or formed any part of the

contents of the package referred to. The property was not claimed by the accused, and there is no supposition that he was in any wise interested in its purchase or sale. His only possession of the barrel, in evidence in the case, is the fact that he delivered it, in company with the negro drayman, at the Norfolk & Western depot. His agency extended to overlooking the shipment of the freight, and that of the drayman's to hauling the junk to the depot. Each had the barrel in custody for the purposes of his agency. Neither had possession of it, in the sense of ownership.

It need hardly be argued that by no just interpretation can such custody, alone, be construed to amount to guilty possession, in contemplation of the statute. The possession intended by the statute must imply something more than mere physical contact; otherwise a drayman or transportation company, having the custody of contraband articles for transportation, merely, would be liable to indictment. The statute must therefore be construed to mean a guilty possession, as contradistinguished from mere custody, without claim of title to or interest in the subject.

It further appears that S. Goldman received a letter from the consignees of the junk complaining of a shortage in weight of the shipment in question, and that the prisoner, on behalf of his mother, carried the letter to the agent of the company, and demanded an explanation of the shortage. The inquiry of the detective had already apprised him of the fact that the company was at that time investigating the question as to whether any of its switch locks had passed through his mother's junkshop; and it is hardly reasonable to suppose, if he was possessed of the guilty knowledge attributed to him, that he would have courted an investigation likely to connect him with the commission of a felony. Applying the doctrine of a demurrer to evidence in all its stringency, and according full faith and credit to the testimony of Baldwin, the evidence is nevertheless plainly insufficient to warrant a verdict of conviction.

In addition to an entire absence of proof of the corpus delicti, the following language of Judge Moncure in a case in which the appellate court, upon writ of error, set aside a verdict of conviction and awarded a new trial, and the doctrine of which has repeatedly received the sanction of this court (see cases cited in Shepard's index to 29 Grat.), is apposite to the evidence relied on to connect the prisoner with the alleged offense: "These circumstances, taken singly or altogether, while they create a suspicion of guilt, are yet inconclusive and wholly insufficient to prove such guilt, but are also consistent with the fact of innocence. If they be not at least as consistent with the fact of innocence as with the fact of guilt, they certainly do not amount to such degree of proof as to connect the accused with the offense,

and to warrant his conviction thereof." Johnson's Case, 29 Grat. 814. And in Burch's Case, 20 S. E. 778, it was said that the verdict should be set aside when the evidence makes only a case of suspicion or probability of guilt. See, also, Brown's Case, 97 Va. 791, 34 S. E. 882.

An adherence to the basic principles upon which the criminal jurisprudence of this commonwealth has ever rested is far too important to justify a departure from them in order to meet the exigencies of particular cases, and the hurtfulness to society of the class of offenses within the purview of the statute affords no justification for the courts sustaining convictions in doubtful cases by way of prevention.

It follows from what has been said that the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein.

KEITH, P. (dissenting). Counsel for plaintiff in error place great reliance upon the demurrer to the indictment, and the unconstitutionality of the statute upon which it is framed, but the court, in its opinion, has not passed upon these assignments; and as, in my judgment, the act in question, as construed by the opinion of the court, merely establishes a rule of evidence, and is therefore clearly constitutional, I shall have nothing further to say upon this subject.

The indictment follows the statute, and seems to be free from objection. The opinion of the court deals with the motion to set aside the verdict as contrary to the evidence, and upon that ground alone reverses the judgment of the corporation court. A mere difference of opinion as to the weight of the evidence would perhaps not justify, and would certainly not require, a dissenting opinion; but with all respect for the majority of the court, and for the learned judge who speaks for it, I think the opinion tends to disturb and unsettle well-settled principles of law, essential to the due administration of justice, and I therefore feel constrained to enter my dissent.

The facts of the case, as they appear to me, are as follows: W. G. Baldwin testifies that he is a special agent of the Norfolk & Western Railway Company, and as such, among other things, it was his duty to investigate violations of the law with respect to the property of the Norfolk & Western Railway Company; that he is by profession a detective; that about a year prior to March last he went to the junkshop of Goldman, and found R. A. Goldman, the prisoner, there in charge, and the witness then and there cautioned the prisoner not to buy any journal brasses of the Norfolk & Western Railway Company, and showed him a mark or stamp on the brasses by which he, the said Goldman, could tell whether the brasses were the property of the Norfolk & Western Railway Company; that on

March 14, 1901, he was sent for to come to the freight depot of the Norfolk & Western Railway Company, in the city of Roanoke, Va., to examine some railroad brasses. Upon his arrival at the depot he found piled up on the floor in a room of the freight depot a lot of railroad brasses, etc., among which were 21 locks, apparently whole. Nine of these locks were stamped "N. & W. R. R.," marked "Switch No. 78," to be opened with a bent or crooked key. Nine of them were stamped "N. & W. R. R.," to be opened with a straight key. Three of them were stamped "A. M. & O. R. R." There were also seven pieces of locks, on which were stamped "N. & W. R. R." These locks having been introduced in evidence, and being then in the presence of the jury and in the presence of the witness, he stated that they were similar to the locks he saw in the room of the freight office on the 14th of March; that the good locks, while at the freight office, were strung on a string, and the string on which the locks were strung when produced before the jury was a similar string to the one on which they were strung at the freight depot; that the broken locks were not put on a string at the freight depot; that all of these locks, with certain other railroad brasses, were put in a bag at the freight depot, and sealed up and left there. He further says the railroad brasses and switch locks are exactly like those that he saw on March 14th, and he believed they were the same locks. From the freight depot the witness went for Officer W. J. Rigney, and asked him to accompany the witness to the junkshop of Goldman, which Rigney did. On the arrival at the junkshop they found the prisoner, R. A. Goldman, in charge of the place, and saw no other person there, but a small crippled boy on the outside of the shop. Witness first asked the prisoner if he had bought any railroad brasses since he had previously notified him not to do so, and the prisoner replied that he had not, except some brasses he had gotten from a showman. Witness then asked the prisoner if he had shipped any Norfolk & Western Railway switch locks in a shipment made of old lead a few days ago to Baltimore, and the prisoner replied that he had not, except some old locks bought of Mr. Beeton, and that these were the only locks shipped at that time; that the witness then asked him how many switch locks he had gotten from Mr. Beeton, and he replied that he had not gotten more than eight or ten from him, and that all he did get were broken.

Thereupon H. D. Guy was introduced for the commonwealth, who testified: That "he is the freight agent of the Norfolk & Western Railway Company, and had charge of its freight station in the city of Roanoke. That on the — day of — there was brought to the freight station of the Norfolk & Western Railway Company a barrel consigned to the Ajax Metal Company of Philadelphia, with the name of S. Goldman thereon as con-

signor; the bill of lading was made out in the name of S. Goldman; and that the paper now handed him was the one issued to the shipper. It was marked, 'Old scrap lead.' I had the package opened, and in it found the pieces of journal brass and switch locks now produced before the court, and referred to by Mr. Baldwin. They were packed in an old lard tierce. They were put in a bag, and deposited in a room in the freight station under my charge, under lock and key. The things were carried to the grand-jury room and from the grand-jury room back to my office, and from my office to the police court. They were delivered to one of the court officers, since which time I have not had them." In answer to the question as to whether or not the switch locks shown him were the property of the Norfolk & Western Railway Company, he replied: "Yes; if the railway company can identify them as belonging to it."

This witness further testifies that, a short time after the receipt of the package referred to, the accused, R. A. Goldman, came to him at his place of business, and stated that a letter had been received from the consignee, claiming that there was a shortage, and he wanted to know how it was that the shortage occurred. Witness told him that the barrels had been opened, and the switch locks and brasses had been taken out, and that probably accounted for the shortage. He offered to show witness the letter that had been received, but he said it was no use for him to see it.

And the commonwealth, to further maintain the issue on its part, introduced a witness, W. J. Rigney, who testified that he was a member of the police force of the city of Roanoke, and that, on the 14th day of March last, W. G. Baldwin asked him to accompany him to the junkshop of Goldman; that he did accompany Baldwin to the junkshop, on Norfolk avenue, and there found R. A. Goldman, the prisoner at bar. Baldwin asked the prisoner if he had bought any Norfolk & Western brasses or switch locks since the former had told the prisoner, about a year ago, not to purchase such, and the prisoner replied that he had not purchased any, except a few which he got from Beeton, all of which were broken. A few little pieces of old brass and old pieces of locks were shown the witness by Baldwin, in a pail. A part of the time while they were talking, witness states that he was some eight or ten feet from Baldwin and Goldman, who were standing further in the shop, and that he might not have heard all the conversation, as he was looking at some old beer bottles of the Virginia Brewing Company, which he thought were stolen; that there was no one else in the junkshop on this occasion, but that there was a little crippled boy in the yard.

R. M. Robinett testified that he was a special officer of the Norfolk & Western Railway Company; that in March, 1901, he ascertain-

ed that some of the large brass lamps in some of the passenger cars were missing; that he had reason to believe that they had been stolen; that he was trying to find them, and he suggested that an examination be made of the barrel of junk then in the freight depot of the Norfolk & Western Railway Company, consigned under the name of S. Goldman. Accordingly the barrel was opened in the presence of himself and Mr. Guy, the freight agent, and none of the missing lamps were found, but the journal brass and switch locks now in court, consisting of 28 railroad switch locks, 21 of which are whole locks, and seven are parts; one side of the same being absent. Eighteen of these whole locks have stamped on their back the initials of the company, "N. & W. R. R." Nine of the whole locks bear the number "78," and have stamped on their clasp "N. & W. R. R." The locks being in the presence of the jury, the witness sorted out the broken locks and those that had "N. & W. R. R." stamped on their face, and those that had "N. & W. R. R." stamped on their clasp; and the witness stated that the locks examined by him in the presence of the jury were just like the locks found in the barrel at the Norfolk & Western freight office on the 14th of March, marked "Old Lead," and consigned in a barrel with the name of S. Goldman on it; that the barrel weighed between 700 and 800 pounds; that on examination the locks seemed to be of two different kinds. Three whole locks were stamped "A. M. & O. R. R.," and eighteen of the whole locks were stamped "N. & W. R. R.," and eight broken locks were stamped "N. & W. R. R." The witness then took a key from his pocket, which he said he had just obtained from a switchman on the yards of the Norfolk & Western Railway in Roanoke city, with which he unlocked two of the whole locks upon which were stamped "N. & W. R. R." but said this key would not unlock the other whole locks, for the reason that some were of a different pattern from the two which he did unlock, and required a straight key; and witness thought that, if he had this straight key, he could unlock a number of these locks. The witness then picked up some of the locks stamped "N. & W. R. R.," and said they were of a new pattern; that he did not know anything about the three locks which were stamped "A. M. & O. R. R.," and, so far as he knew, they were not now in use in the yards in Roanoke, and he knew of no key that would unlock the lock thus stamped. The two locks that he could unlock were in good repair and fit for use, and the other whole locks appeared to be in good order. The two locks that he could not unlock with this key, and the eight straight-key locks, have been in use in the yards here for eight or ten years.

H. C. Macklin testified that he was the

general storekeeper for the Norfolk & Western Railway Company, and, being asked whether the 28 switch locks then in evidence before the jury were the property of the Norfolk & Western Railway Company, he stated that all the locks had "N. & W." stamped on them; that he did not know anything about locks stamped "A. M. & O. R. R.," and that there was nothing on the locks by which he could positively identify them as the property of the Norfolk & Western Railway Company; that he cannot say that any of them were ever in the possession of the Norfolk & Western Railway Company; that he could not say absolutely that the locks stamped "N. & W. R. R." were the property of that company, but all purchases of locks for the Norfolk & Western Railway Company were made through his office; that, when switch locks got out of repair, they were shipped to the manufacturers, in Philadelphia, to be repaired and shipped back, and such locks as could not be repaired in Philadelphia were sent back to his office; that neither new nor repaired locks were ever sold by the Norfolk & Western Railway Company to any person, and that they were only given to the employes of the road for the use of the road; that 18 of the switch locks appeared to be sound and serviceable, and that he would not have shipped locks in as good condition as they are now to be repaired; that the switch locks of the company are made by —, in the city of Philadelphia, and have stamped upon them the initials of the road; that this company, he supposes, makes switch locks for other roads, having the initials of the roads stamped upon their respective locks; that the key for the locks of the Norfolk & Western Railway Company would not fit locks made for other railroad companies; that the manufacturer of these locks never furnished them to the Norfolk & Western Railway Company, except upon the order of the company, and for purposes, and upon forms or models approved by the railroad company; that the railroad had to have this done for its own protection.

E. L. Slaughter testified that he was employed by the Norfolk & Western Railway Company at its freight depot in the city of Roanoke as check clerk; that on the 11th day of March, 1901, he received a barrel from S. A. Goldman, the prisoner at bar, marked "S. A. Goldman," and consigned to the Ajax Metal Company, Philadelphia; that it was brought to the depot by the prisoner in a wagon, and he thought, driven by a negro driver; that he came with the bill of lading which has been introduced in evidence; that the barrel was received to be shipped, and was the said barrel which was opened, and in which were found the switch locks which are now in court; the bill of lading heretofore referred to is the one which was issued on that occasion, and it was brought to the depot already made out; that the prisoner generally

brought to the depot packages marked "S. Goldman" as the shipper. The bill of lading was signed and delivered to the prisoner.

The bill of lading was then introduced, and is in the usual form.

Beeton, another witness for the commonwealth, testified that he resides in the city of Roanoke, and is a locksmith and repairer of machinery; that some eight or ten years ago some officers of the Norfolk & Western Railway Company brought to him a lot of broken and out of repair switch locks; that he repaired all that could be repaired, but threw aside in a pile those that could not be repaired, and that they remained there until he had to move, and, not having a place to put them when he moved, he decided to take them to the junkshop; that there were a small number,—not half so many as the pile introduced in evidence,—and they were all broken and in such a condition that they could not be repaired; that they were taken to the junkshop of S. Goldman, along with other junk (principally iron, steel, and old files), and sold, he receiving therefor \$2; this is the item which was found on the account book of S. Goldman.

J. E. Craig, sergeant of the city of Roanoke, testified that the switch locks and brasses then in court were the same that were turned over to him for safe-keeping by W. G. Baldwin at the adjournment of the grand jury; that he had kept them since that time under a lock and key.

R. A. Goldman testified that the junkshop in question was the property of his mother, S. Goldman; that she is a regularly licensed junkdealer; that he (R. A. Goldman) is 19 years of age, has no interest in the business, and receives no salary for his services; that his brother Herman Goldman is the manager; that he (R. A. Goldman) stays about the place and does whatever he is told to do; that he cannot recollect whether he carried to the depot a barrel of junk referred to in the testimony of Mr. Slaughter, but it is very probable that he did; that he very often performed that character of work; that, if he was told to carry it there, he did so; that he did not pack the barrel, and did not know what was in it, and had nothing to do with it; that he did not buy or receive the switch locks or brasses now in court, and had nothing to do with the purchase of them; that he was present when Mr. Beeton brought the junk referred to in his testimony to his mother's place of business; that he did not have anything to do with the purchase of it, or the receipt of it, or the unloading of it; that it was unloaded by another party and piled up to one side, and he thinks that it was taken from that pile when it was shipped; that he knew neither of the purchase nor receipt of any switch locks, except what was bought from Mr. Beeton; that he remembers Baldwin coming to the place of business of his mother with Rigney at the

time referred to by him; that he did not tell him what Baldwin said he did tell him, except that Baldwin asked him if he had bought any railroad brasses or any switch locks since he had spoken to him about that matter, a year ago, to which he replied that no switch locks had been bought, except from Mr. Beeton; that he did not have the other conversation with Baldwin, as stated by Baldwin.

The first question to be determined is, under what rule is this evidence to be considered by an appellate court? The opinion of the court, as I understand it, proceeds upon the idea that the judgment should be reversed unless the evidence is so conclusive of the guilt of the prisoner as to exclude every reasonable doubt to the contrary, or that, if there be a reasonable doubt cast upon the proof of any fact essential to the guilt of the prisoner, it was the duty of the jury to acquit, or in the event that it found the prisoner guilty, and the trial court entered judgment upon the verdict, it should be reversed and remanded for a new trial.

Such is not my understanding of the law. In all civil cases it is the duty of the jury to find in accordance with the preponderance of the testimony. In cases which involve moral turpitude, the jury are told that they should only make such an imputation upon the character of a litigant in obedience to clear and convincing testimony. It has been said in *Brockenbrough's Ex'rs v. Spindle's Adm'rs*, 17 Grat. 21, that, to convict a person of usury, it must be proved beyond a reasonable doubt to the contrary; and in all criminal cases the court will, upon request, instruct the jury that such is their duty. But suppose the jury, in the exercise of their unquestioned prerogative, find against the weight of evidence in a civil case; then the rule at once changes, and the case, at least in an appellate court, is heard as upon a demurrer to the evidence, and the question is no longer where the weight of evidence lies, but whether there is sufficient evidence to sustain the verdict.

Where the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the court which presides at the trial, but its decision is not the subject of a writ of error or supersedeas, or examinable by an appellate court; and this applies in criminal as well as in civil cases. *Grayson's Case*, 6 Grat. 712.

The courts have in recent times struggled against the application of that rule in criminal cases.

When what is now section 3484 of the Code was first enacted, it provided that when a case at law is tried by a jury, and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict as contrary to the evidence, and the evidence is certified, the rule of decision in an appellate

court, in considering evidence, shall be as upon a demurrer to the evidence by the appellant.

While in that form this court refused to apply it to criminal cases, but held it applicable only in civil cases; but, when it was introduced into the Code as section 3484, it was expressly made applicable to cases at law, civil and criminal, and it now reads as follows:

"When a case at law, civil or criminal, is tried by a jury, and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence; or when a case at law is decided by a court or judge without the intervention of a jury, and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence (not the facts) is certified, the rule of decision in the appellate court in considering the evidence in the case shall be as on a demurrer to the evidence by the appellant, except that when there have been two trials in the lower court, in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon."

That is the law by which we are governed in passing upon the case before us. However harsh and severe it may be, it is the law of the land, and while it so remains it should be loyally enforced. Courts have nothing to do with sympathy or with policy. Their sole duty is to enforce the law. What, then, is the rule of decision upon a demurrer to evidence? It has been nowhere more clearly and forcibly stated than by this court, speaking through our lamented Brother, Judge Riely:

"By the demurrer to the evidence the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom."

Before undertaking to apply the rule thus clearly stated to the evidence before us, I will observe upon another feature of the opinion of the court. Reference is made to, and, I presume, reliance is placed upon, the fact that the principal witness for the commonwealth is a detective. To this I reply that while detectives may, and doubtless often do, become partisans, and stretch the truth to sustain their theory of the case, they are necessary adjuncts to the administration of justice, and must, of necessity, be resorted to for the protection of society, and any

criticism which may be leveled at them affects, not the competency, but the credibility, of their testimony; and I presume it needs no authority to maintain the position that all questions affecting the credibility of witnesses come exclusively within the province of the jury, and its verdict is conclusive upon the subject.

First, then, is the evidence sufficient, considered in the light of the rule established in *Johnson's Adm'r v. Railroad Co.*, 91 Va. 171, 21 S. E. 238, and, by virtue of section 3484 of the Code, the unquestioned law of this case, to establish the corpus delicti,—sufficient to warrant the jury in finding that the property in question had been stolen from the Norfolk & Western Railway?

It is casually observed by one of the witnesses (Beeton) that some years ago locks and brasses had been brought to his shop for repair, the property of the Norfolk & Western Railroad; and this, the only mention of the Norfolk & Western Railroad, as distinguished from the Norfolk & Western Railway Company, which I have been able to discover in the record, appears to have cast a doubt upon the ownership of the property. The Norfolk & Western Railroad Company was the predecessor in title of the Norfolk & Western Railway Company. It went out of existence years ago, and its franchises and property passed into the ownership and possession of the Norfolk & Western Railway Company.

It is proved that the locks in question are made by a particular manufacturer in Philadelphia, and delivered only upon the order of the railroad company, and furnished only upon forms approved by said company; that the keys made for the locks furnished to the Norfolk & Western Railway Company would not open the locks made for any other company, although they might have the same initials; that these locks were not made for sale, but only for the use of the company, and were never sold or given away by it; that they were identical in appearance, in all respects, with the locks in daily use by the company at the present time; and that the keys now in use upon the switches of the Norfolk & Western Railway Company unlocked a portion of those locks; and, while the witness would not swear absolutely to the locks as being the property of the railroad company, he believed that they were, and established their identity as completely as any honest witness could identify articles which are manufactured in large quantities, and similar in all respects in appearance. To require a more complete identification than is given by the evidence in this case would preclude the jury, with respect to all articles, similar in appearance, manufactured or otherwise, from fixing their ownership either in a civil case or criminal prosecution. To the untutored eye, all the sheep in a flock look alike; cattle and even horses are hard to identify; while with respect to manufac-

tured articles the catalogue would be endless; and especially is this true with respect to money; yet all personal property may be the subject of larceny, and it is for the jury to weigh the evidence and pass upon its identity; and I cannot think that it is for the best interest of society that the court should establish an impossible standard. Is it possible to say that there is no evidence of the corpus delicti, in the face of the proof to which I have adverted?

Let us consider, then, for a moment, whether the prisoner bought or received this property with intent to defraud. Whenever we get a glimpse in the evidence of the junkshop of S. Goldman, R. A. Goldman is found to be in charge of it. He, and he alone, as far as the testimony other than his own proved in this case, managed its affairs, received the articles in which it dealt, kept its books, prepared the goods for shipment, took them to the depot, and forwarded them to their destination. When the prisoner was asked by Baldwin if he had shipped any Norfolk & Western Railway switch locks in a shipment of old lead a few days ago to Baltimore, he replied that he had not, except old locks bought of Mr. Beeton, and that these were the only locks shipped at that time. He did not plead ignorance of the contents of the package. He asked no question and made no reference to it. He feigned no ignorance, but his answer was positive and direct. When he is confronted before the jury, his attitude is altogether different. He knew then where the shoe pinched; and his testimony, if it is to be believed, completely exculpates him. He denies having had the conversation with Baldwin to which the latter testifies, but, under the rule by which we are required to hear this case, that denial is in vain. It must be as completely effaced from the record as though he had never uttered it, and Baldwin's statement is as firmly established as though it were expressly admitted by Goldman to be true.

Junkshops are doubtless useful, and perhaps necessary. They furnish a market for much that would otherwise be lost. But it is a traffic capable of great abuse, and one which the legislature has striven to regulate so as to render it, as far as possible, harmless to society. For the sake of a few pennies, a house may be despoiled of its plumbing; or a railroad switch, for the sake of the brass, be robbed of its locks. In the one case the house may be ruined, and in the other a train may be wrecked. Therefore the legislature has required that daily reports of their purchases be made by all licensed junk dealers, and has enacted the statute under which this prosecution took place, which provides that: "Any person buying or receiving pig iron or railroad iron, brass, metal, or any composition thereof, with intent to defraud, he shall be confined in the penitentiary not less than one nor more than two years, or, in the discretion of the jury, in jail not ex-

ceeding one year. Possession of any pig iron or railroad iron, brass, metal, or any composition thereof, so bought or received from any other person than the manufacturer thereof or his authorized agent, or of a regularly licensed dealer therein, shall be prima facie evidence of such intent."

It is a reasonable and salutary law, intended to regulate a business capable of great abuse, and ought, in my judgment, to be strictly enforced. A jury, with all the facts before it,—with a knowledge of the witnesses and of the whole environment which we do not possess,—have found the prisoner guilty, and imposed upon him a moderate punishment; and I think their judgment is warranted by the testimony, and should be sustained.

McBride's Case, 95 Va. 828, 30 S. E. 457, which is cited in the opinion of the court, well illustrates the position for which I contend. The court, in the quotation made, was dealing with an instruction to the jury, and not with the facts, and the error in the instruction was pointed out; and the law by which the jury should be guided was, I think, correctly stated. Here we are considering the power of a court over the verdict of a jury upon a motion to set it aside; and, under the statute, prisoner stands as a demurrant to the evidence. The duty of the jury was to acquit unless the evidence excluded every reasonable doubt of the prisoner's guilt, and it was the duty of the trial court, if requested, to so instruct them; but the jury having rendered a verdict, we, sitting as an appellate court, are bound by the statute to apply the rule of *Johnson's Adm'r v. Railroad Co.* supra. I cannot reconcile the idea of hearing a case as upon a demurrer to evidence, and at the same time requiring the evidence to exclude all doubt as to the correctness of the demurrant's position. It would be to say that the verdict should be set aside if there was a reasonable doubt of its propriety, which is utterly at war with and subversive of the doctrine of demurrers to evidence. The truth I believe to be as I have stated. The jury should decide all cases in accordance with the weight of evidence. They should acquit in criminal cases unless the evidence excludes all reasonable doubt of the prisoner's guilt, but if, in the exercise of their unquestioned prerogative, they find against the weight of evidence, the court cannot destroy the verdict for that reason, or because the judges, if on the jury, would have reached a different conclusion, or because they have a doubt where the jury had none. To say otherwise would be to say that on a demurrer to evidence an appellate court would be obliged to set aside every verdict in a criminal case which was, in the opinion of the court, contrary to the weight of evidence, for, if we may weigh the evidence at all, then the preponderance of the evidence must in every case create a doubt; and, if the doctrine that a prisoner can only

be convicted where there is no doubt of his guilt shall prevail, the conclusion logically follows that to create a doubt in an appellate court would require a reversal, and such doubt must always exist where the verdict is against the preponderance of evidence.

(101 Va. 1)

ATLANTIC & D. RY. CO. v. LYONS.

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

TAXATION—RAILROAD PROPERTY—PRACTICAL CONSTRUCTION OF STATUTES.

1. Though the statutes conferring power on counties to tax railroads are not clear and explicit, the practical construction placed thereon since the passage of Act April 22, 1882 (Acts 1881-82, p. 506), by the county officers in taxing their real and personal property, and the railroad companies in paying the taxes, will be adopted.

Appeal from circuit court, Norfolk county.

Suit by the Atlantic & Danville Railway Company against Lyons, treasurer. Decree for defendant. Complainant appeals. Affirmed.

A. P. Thom, for appellant. R. O. Marshall and Crocker & Crocker, for appellee.

KEITH, P. The Atlantic & Danville Railway Company is a Virginia corporation, whose principal office is in the county of Norfolk and whose lines pass through a number of counties in this state. The board of public works, in assessing railroad properties for the year 1895, assessed the Atlantic & Danville Railway Company with mileage lying in the county of Norfolk as follows: 6.95 miles at \$8,000 per mile, and 9.98 miles at \$5,000 per mile; and stated in its assessment that the value of rolling stock was \$277,510, the value of depots, depot grounds, station buildings, and fixtures and machine shops in the county of Norfolk \$8,850; and that the value of stores in the said county was \$8,965.27.

The board of supervisors of Norfolk county for the year 1895 levied a tax upon this property of 80 cents upon the \$100, making a total of taxation, \$3,203.40. Of this sum the company paid to the treasurer the sum of \$840.80, being in full of the taxes due the county at the rate of 80 cents on the \$100 on the basis of the assessment per mile made by the state for its purposes, and furnished by the auditor of public accounts to the board of supervisors on the company's property situated within the limits of the county of Norfolk, but refused to pay the balance of the bill, amounting to \$2,262.60, which was arrived at by imposing the rate of 80 cents on the \$100 on the alleged value of the depots and grounds, rolling stock, and stores belonging to the company. The treasurer of the county was about to enforce the collection of this sum against the property of the railway company when it filed its bill in the circuit court of Norfolk

county, setting forth the above facts and claiming that the board of supervisors had no right to enforce the collection of the balance claimed by it to be due. Upon the hearing of the cause, the circuit court dissolved the injunction and dismissed the bill, and the case is now before us upon an appeal from that decree.

The power to levy taxes is conferred upon the board of supervisors of the counties by the second subdivision of section 833 of the Code, which reads as follows:

"To fix the amount of county levies for the ensuing year; to order the levy on all persons over the age of twenty-one years, and on all property assessed with state tax within the county; to order the levy on the real and personal property of telegraph and telephone companies, and railroad companies and their telegraph lines, which pass through their respective counties, except such as are exempt from county or other local taxes, based upon the assessment per mile made by the state for its purposes and furnished by the auditor of public accounts to said board."

By an act passed March 27, 1876 (Acts 1875-76, p. 171), it is provided that "every railroad and canal company shall report annually, on the first day of June, to the auditor of public accounts the estimated value of its real and personal property of every description as of the first day of February of each year, classifying the same under the following heads:" (Then follows an exhaustive classification of every species of property owned by railroad companies.)

The next act which it is proper to notice is that of April 22, 1882 (Acts 1881-82, p. 506), which requires railroads to show "particularly in what county or corporation such property is located."

There was no substantial change in the law bearing on this subject from that time down to the act of February 18, 1892 (Acts 1891-92, p. 428), which provides that the report of the company shall show "particularly in what county or corporation the principal office or agency of such company is located in this state, and in what county or corporation such property is located." It further provides that "it shall be the duty of the secretary of the board (public works) to furnish * * * a certified copy of the assessment of taxes made by the board of public works of such company's property which shall definitely show the character of the property, its location and value for purposes of taxation."

In 1878 this court decided the case of Virginia & T. R. Co. v. Washington Co. Sup'rs, reported in 30 Grat. 471, in which it was held that "the constitution of the state does not authorize the county authorities to assess property for taxation and levy taxes upon. Independent of the action of the legislature; secondly, under the present legislation of the state the county authorities can only levy a tax upon such property as by law is assessed

with state taxes in the county; and, third, under the present legislation of the state, county authorities cannot levy a tax on the real estate of railroads in the county, either for county, township, school, or road purposes."

As we have seen, the statute law was amended at the session of 1881-82, and from that time to this the counties have assessed and levied taxes on railroads, including not only the track but their real and personal property.

A number of cases have come to this court in the meantime in which, for various reasons, railroads have called in question the exercise of the power of taxation. In most, if not all, of those cases, some question more important, perhaps, was involved, but in several of them the tax bill embraced items of taxation coming within the class the right to tax which is denied by appellant in this case.

For instance, in *Railroad Co. v. Koontz*, 77 Va. 698, for purposes of state taxation for 1881 no assessment was made on railroads until September, 1881, when the railroads in the county of Shenandoah were assessed by the board of public works at \$15,000 per mile. Consequently the assessment of \$5,000 per mile of those railroads made July 25, 1881, by the supervisors of that county, and the levy of taxes thereon for that year, was ultra vires and void. Thereupon the board of supervisors, on April 17, 1882, levied a tax upon the Baltimore & Ohio Railroad within that county for the year 1881, the railroad company resisted it, and the case ultimately found its way to this court. The chief question there was as to the right of the county to levy a tax for the preceding year, but in the tax bill is embraced depots, depot grounds, lots, station, and grounds, etc., valued at \$3,000. The argument of the court is addressed to the principal proposition, but the decree which was rendered could only have been arrived at by maintaining the right of the county to levy a tax upon property which it is claimed in this record is not the subject of county taxation.

In *Shenandoah Val. R. Co. v. Clarke Co. Sup'rs*, 78 Va. 279, the principal question, it is true, was whether the tax levied in the county of Clarke on railroads was higher than for other species of property in the county, and, if so, whether the tax was legal; but the court, in the course of its opinion, uses the following language:

"Prior to the act of 1880 the supervisors had no authority to assess the property of railroads; but by that act, which was passed subsequently to the decision of this court in *Virginia & T. R. v. Washington Co. Sup'rs*, it is enacted that it shall be lawful, and authority is given to the supervisors of a county, to levy a tax on the roadway, and track, depots, depot grounds and lots, station buildings, and other real estate of a railroad company, whose road passes through such county; such tax to be equal to the tax imposed upon other property for the county and school purposes, and based

upon the assessment per mile of the same property made by the state for its purposes."

In the case of *Norfolk & W. R. Co. v. Smyth Co. Sup'rs*, 87 Va. 521, 12 S. E. 1009, the power of the board of supervisors of a county to levy and collect taxes on railroad property within its limits was called in question, and Judge Richardson, who delivered the opinion of the court, after quoting from *Virginia & T. R. Co. v. Washington Co. Sup'rs*, supra, proceeds as follows:

"That decision doubtless called the attention of the legislature to the subject, and to the necessity for legislation to render operative section 1, art. 10, of the constitution, which provides for an equal and uniform tax upon all property, to be provided by law; and, realizing the inequality and injustice resulting from a want of the needed legislation, the legislature passed the act of February 27, 1880 (Acts 1879-80, c. 106, p. 82), before referred to, by which it is provided that 'it shall be lawful, and authority is hereby given to the supervisors of a county to levy a tax on the roadway and track, depots, depot grounds and lots, station buildings, and other real estate of a railroad company whose road passes through such county. Such tax to be equal to the tax imposed upon other property for county and school purposes, and based upon the assessment per mile of the same property made by the state for its purposes.'" *Prince George Co. v. Atlantic, M. & O. R. Co.*, 87 Va. 283, 12 S. E. 667.

In *New York, P. & N. R. Co. v. Board of Sup'rs of Northampton Co.*, 92 Va. 661, 24 S. E. 221, it was held that "a levy by a board of supervisors for district school purposes on the property of a railroad company, as a whole, within a county, without reference to what part thereof is located in the several districts, or so as to show the amount levied for each district, is void." In that case, the taxes were levied on the roadway, track, buildings, personal property, and telegraph lines, and the court, in the course of its opinion, uses the following language: "A tax levied by the board of supervisors on the property of the railroad company for county purposes was held by this court not to be valid, on the ground that the authority of the county board of supervisors to assess property for taxation and levy taxes upon it was dependent upon the action of the legislature, and that the legislation of the state at that time did not authorize county authorities to levy a tax on real estate of railroads in the counties, either for county, township, school, or road purposes. *Virginia & T. R. Co. v. Washington Co. Sup'rs*, 30 Gratt. 471.

"To meet the difficulties in the way of reaching the property of railroad companies by taxation for county purposes, as disclosed by this decision, the legislature passed an act authorizing the boards of supervisors of the respective counties to levy a tax for county purposes upon the property of railroad companies, based upon the assessment

of the board of public works, certified down to the boards of supervisors of the several counties. Acts 1879-80, p. 82. And by a number of decisions following the passage of this act it has been held that a levy for county purposes, under the provisions of the act, is a valid levy." The cases referred to in this opinion are cited, and others.

The constitution of the state at that time required that all taxation, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, "to be ascertained as prescribed by law"; and it was doubtless the purpose of the several acts which we have mentioned to carry that salutary provision of the constitution into effect, and make the property of railroads bear their just proportion of taxes levied by the counties as well as by the state. The acts of the legislature were, perhaps, not as clear, and the power to tax was not conferred in language as explicit, as is to be desired, but we cannot say, in the face of the uniform interpretation placed upon the several acts by the boards of supervisors charged with their execution, which have continuously since the passage of the act of 1881-82 levied taxes upon all the property of railroads, that there was no ground for such construction. The contention becomes still more difficult to maintain in the light of the numerous cases we have cited in which that construction has received the sanction of this court, and the difficulty becomes almost insurmountable when we find that during all that period such taxes have been paid by the railroads.

"The practical construction given to a statute by public officials, and acted upon by the people, is not only to be considered, but in cases of doubt will be regarded as decisive. It is allowed the same effect as a course of judicial decision. (The legislature is presumed to be cognizant of such construction, and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction."

"It is a rule of construction that, if a statute is of doubtful import, a court will consider the construction put upon the act when it first came into operation, and that construction, after lapse of time, without change either by the legislature or judicial decision, will be regarded as the correct construction." *Smith v. Bryan*, 40 S. E. 652.

We are not unmindful of the salutary principles announced in *Supervisors v. Tallant*, 96 Va. 723, 32 S. E. 479, that statutes which levy duties or taxes upon citizens are to be construed most strongly against the government and in favor of the citizen, and their provisions will not be extended, by implication, beyond the clear import of the language used; that property can only be taxed in the mode prescribed by law, and it is the duty of the legislature to pass the necessary laws to carry into effect the constitutional

provision relating to taxation, and that, in the absence of any legislative enactment on the subject, property cannot be taxed at all; but, after a careful consideration of the facts of this case, the statutes bearing upon it, the uniform and long-continued construction given to those statutes by the officials charged with their execution, the recognition of the correctness of that construction, which is, to say the least, strongly implied in numerous decisions of this court, and that the exercise of the power by which the burden of taxation under existing laws has been imposed upon railroads has been acquiesced in and submitted to by them, leaves us no room to doubt, viewed in the light of established rules of construction, that there is no error in the decree of the circuit court which upheld the power of taxation in the case under consideration.

We have said that this exercise of power has been acquiesced in and submitted to by the railroads. If it has ever been called in question, then it can only have been in the cases which we have cited; and those cases, having uniformly upheld the power of taxation, become authorities which are decisive of the case. If, however, as appellant contends, the question was not considered in those cases, then the conclusion follows that the construction placed upon the act by the officials charged with its execution has been acquiesced in, or at least has not been controverted.

Norfolk county, it appears, is the domicile of the appellant, and it is well settled that the rolling stock is properly taxable at that place. It might be more equitable, perhaps, looking to the interests of the various counties through which the road passes, if the revenue derived from this source were distributed, but in the absence of legislative enactment upon the subject it was properly taxed by the county of Norfolk.

The decree of the circuit court of Norfolk county is affirmed.

(131 N. C. 804)

STATE v. FOY.

(Supreme Court of North Carolina. Dec. 16, 1902.)

LARCENY—FELONIOUS INTENT.

1. A felonious intent is not shown by evidence that B., an employé in a candy factory, seeing a box of candy under a table in a room, several days later sent defendant, also employed in the factory, into the room for some sugar, and defendant brought back both the sugar and candy, and, on being asked what he had, said nothing.

Appeal from superior court of Forsyth county; Shaw, Judge.

Will Foy was convicted of larceny, and appeals. Reversed.

J. S. Lanier for appellant. The Attorney General, for the State.

COOK, J. Whether there was any evidence tending to show that defendant was

guilty of the larceny of the box of candy is the question raised by defendant's demurrer to the evidence. The only evidence introduced was that testified to by the witness Barbee, as follows: "I am employed as clerk by Mrs. W. J. and Clarence Cromer, candy makers and confectioners in the city of Winston. Defendant, Will Foy, had been working there for some time. On Monday, about the 16th of June, 1902, I saw a box of candy in the back room, under a table. I could not tell who put it there. I watched it every day to see if I could catch the defendant, Will Foy, taking it away. On Friday of the same week I sent Will Foy in the room where the box of candy was, to get some sugar, and thought that was a good way to catch him, if he put it there. Will Foy, the defendant, went after the sugar; and while he was gone I waited and watched for him, to see if he got the candy. He came back with the sugar, and also the box of candy. I said, 'Will, what have you got there?' He did not say anything. I phoned for a policeman, and Policeman Miller came and sought the defendant, and took the box of candy away from him." Cross-examined: "I waited from Monday until Friday, trying to catch the defendant. During the whole time the box of candy remained in the other room, under the table. I could have prevented it from being stolen, but wanted to catch the one who put it under the table, so I could have him punished. I sent defendant in the room where the candy was, for some sugar, for the purpose of catching him if he should take it. I had been missing some candy, and I wanted to catch the thief, whoever he was."

To constitute the crime of larceny, there must be evidence of a felonious intent in the taking. Something more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the intent. There must be evidence to show that the taking was done under circumstances inconsistent with an honest purpose, such as when done clandestinely, or, when charged with, denies, the fact (4 Bl. Comm. 232); or secretly (*State v. Sowls*, 61 N. C. 152; *State v. Ledford*, 67 N. C. 61; 2 Archb. Cr. Prac. & Pl. [6th Ed.] p. 366, note 4), or forcibly (*State v. Powell*, 103 N. C. 424, 9 S. E. 627, 4 L. R. A. 291, 14 Am. St. Rep. 821; *State v. Grigg*, 104 N. C. 882, 10 S. E. 684; *State v. Coy*, 119 N. C. 901, 26 S. E. 120); or by artifice (*State v. Deal*, 64 N. C. 270); and that there was an original felonious intent, general or special, at the time of the taking (*State v. Arkle*, 116 N. C., at page 1031, 21 S. E., at page 408). The evidence of the state's witness fails to show any act done by defendant inconsistent with an honest purpose, or inconsistent with the duties of his employment. The box of candy was lying under the table, where by inference it appears it did not belong, and there is no evidence to show that defendant had put it there or that he knew it was there. He was working for the firm, and was sent

by the witness in the room after some sugar, and returned with the sugar, and also the box of candy; bringing them both to the witness, clerk of the firm, who had sent him. Being asked (having the sugar and the box of candy), "What have you got there?" did not say anything, and was forthwith arrested. There is no more evidence to show that he took the candy feloniously than the sugar. He was ordered to bring the sugar, and also brought the candy, which was out of its usual place, but the taking of both was under the same conditions and circumstances. There was no artifice, trick, secrecy, concealment, force, or appropriation of either. The fact of his bringing the candy together with the sugar was no evidence that he had placed the candy where it was found. The evidence was insufficient, and his honor erred in not sustaining defendant's demurrer.

Error.

(131 N. C. 486)

STEWART v. KEENER et al.

(Supreme Court of North Carolina. Dec. 18, 1902.)

LANDLORD AND TENANT—SURTEANANT—ESTOPPEL TO DENY TITLE—EVIDENCE—SUFFICIENCY—GRANTS—PRIORITY.

1. Where there are two grants by the state, covering the same land, the second conveys no title.

2. One who enters on land in accordance with an understanding with a tenant who vacates when he enters is himself estopped, as a tenant, from denying the title of the original tenant's landlord.

3. Evidence examined, and held sufficient to support a verdict that one entering into possession of land did not do so in accordance with any agreement with the vacating tenant, and therefore did not himself become a tenant, so as to be estopped to deny the title of the original tenant's landlord.

Appeal from superior court, Macon county; Moore, Judge.

Action by Henry Stewart against Benj. Keener and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. F. Ray, for appellant. H. T. Robertson, for appellees.

FURCHES, C. J. This is an action of ejectment, in which the plaintiff undertakes to derive his title from a grant of the state to K. Elias and others, dated February 19, 1883, and mesne conveyances from said grantees to himself, and also upon the ground that the defendants are his tenants, and are thereby estopped to deny his title. The defendants denied the tenancy and the plaintiff's title and right to recover. And for the purpose of showing that the plaintiff had no title, the defendants introduced a grant to Jackson Johnson, dated in 1856, which was shown to cover the land in controversy. This being so, the plaintiff derives no title under the grant to Elias and others, and mesne conveyances therefor, for the reason that, the

state having granted the land to Johnson in 1856, it had no title to convey to Elias and others in 1883. *Rowe v. Lumber Co.*, 129 N. C. 97, 39 S. E. 748. It is a rule of law that, if one enters upon and takes possession of land as the tenant of another, he is estopped to deny the title of his lessor while he remains in possession. And any one entering and taking possession under the tenant so let into possession becomes the tenant of the original lessor, and is also estopped to deny his title. *Conwell v. Mann*, 100 N. C. 234, 6 S. E. 782; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322, and cases cited.

It seems to be conceded that Andy Webb entered as a tenant of the plaintiff's assignors, and when he left the premises the defendant Ben Keener entered and took possession, and it is contended by the plaintiff that he did so by reason of an understanding and agreement with Andy Webb that he should do so, and, this being so, Keener became the tenant of the plaintiff, and is estopped to deny the plaintiff's title. The contention of the plaintiff states the law correctly, and presents the question of fact for the jury. The plaintiff, for the purpose of establishing this fact, introduced the defendant Keener as a witness, who testified that he was the tenant of Frame; that he leased from Frame; that the lease was in writing, and he entered under the written lease; that Webb moved out the same day he moved in, "but he never said anything to Webb about his moving there; he made no arrangement with Webb about moving there." This evidence was offered by the plaintiff, and seems to be all the evidence in the case as to how Keener got possession, and seems strongly to disprove the plaintiff's contention that Keener took possession under an agreement with Webb, or under a collusive arrangement between him and Webb. But this question was left with the jury fairly and fully in the charge of the judge, and they found that issue for the defendants. This covers all the exceptions discussed in the defendant's brief, and seems to be the only exception necessary to discuss. We see no error.

Affirmed.

(131 N. C. 397)

STATE v. PUGH.

(Supreme Court of North Carolina. Dec. 16, 1902.)

LARCENY—EVIDENCE.

1. A conviction of larceny cannot be sustained on testimony merely that a person accused defendant of stealing his clothes, which charge defendant then and at the trial denied.

Appeal from superior court, New Hanover county; Timberlake, Judge.

Eugene Pugh was convicted of larceny, and appeals. Reversed.

B. G. Emple, for appellant. The Attorney General, for the State.

CLARK, J. The defendant was convicted of the larceny of a suit of clothes, and sentenced to 10 years in the state's prison. The only evidence was that a sailor accused the defendant of having stolen his suit of clothes out of a bag which the defendant was carrying for him, and the defendant denied the charge when made. The judge should have charged the jury, as requested, that there was no evidence. The sailor was not at the trial, nor was there any witness who testified to any circumstance bearing upon the alleged commission of the offense. The remark of the sailor was hearsay, and was only competent as a quasi admission if the defendant had failed to deny the charge. This the defendant did promptly when so charged, and also went upon the stand and denied it at the trial. There was not the scintilla of any evidence against him.

Error.

(131 N. C. 488)

BIRD v. BRADBURN.

(Supreme Court of North Carolina. Dec. 16, 1902.)

SETTING ASIDE VERDICT—DISCRETION OF COURT—FINDINGS OF FACT—APPEAL.

1. Granting a motion to set aside a verdict, and ordering a new trial at the same term the verdict was rendered, is a matter of discretion, from which an appeal does not lie; and it is not necessary for the judge to find the facts on which he bases his ruling.

Appeal from superior court, Jackson county; Moore, Judge.

Action by J. W. Bird against J. F. Bradburn. From an order setting aside a verdict for defendant and granting a new trial, defendant appeals. Dismissed.

Coleman C. Cowan, for appellant. Walter E. Moore, for appellee.

CLARK, J. On the coming in of the verdict in favor of defendant, the plaintiff's counsel moved to set aside the verdict and for a new trial. After argument of counsel, the court at the same term granted the motion, set aside the verdict and ordered a new trial, and the cause was continued. The defendant requested the court to find the facts, and state its reasons upon the record for setting aside the verdict. The court declined to do so, beyond stating that the verdict was "set aside in the exercise of the discretion which is vested in the court, in order that the case may be properly tried hereafter, and justice done to all the parties."

The power of the court to set aside a verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The judge is not a mere moderator, but is an integral part of the trial; and, when he perceives that justice has not been done, it is his duty to set aside the verdict. His discretion to do

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 582.

so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence, in which, of course, he will be reluctant to set his opinion against that of the 12; but he may perceive that there has been prejudice in the community, which has affected the jurors, possibly unknown to themselves, but perceptible to the judge, who is usually a stranger, or a very able lawyer has procured an advantage over an inferior one,—an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such and many other instances which would not furnish a legal ground to set aside the verdict, the discretion reposed in the trial judge should be brought to bear to secure the administration of exact justice. This being an exercise of discretion, it could subserve no possible purpose to find the facts. *Allison v. Whittier*, 101 N. C., bottom of page 494, 8 S. E. 338. Indeed, in view of the effect in a new trial, it would be sometimes important that the facts should not be spread upon the record. It is only when a new trial is granted as a matter of law that such action is reviewable, and then the facts should be found. When the verdict is set aside as a matter of discretion, it is not necessary to find the facts (*Allison v. Whittier*, supra, and no appeal lies (*Braid v. Lukins*, 95 N. C. 123; *Jones v. Parker*, 97 N. C. 33, 2 S. E. 370); and, if no reason is given, it is presumed that the new trial was granted as a matter of discretion, and the appeal will be dismissed (*Braid v. Lukins*, supra; *State v. Braddy*, 104 N. C. 737, 10 S. E. 261). The appellant relies upon *Moore v. Edmiston*, 70 N. C. 471; *Johnson v. Bell*, 74 N. C. 355; *Carson v. Dellinger*, 90 N. C. 226,—that the judge, if requested, should put on record his reasons for setting aside the verdict, that his action may be reviewed. Code, § 548. Those cases state that, if his action was not in the exercise of his discretion, it is reviewable, and therefore his reasons should be given, if asked. That has been done here, for the judge has stated, when requested to give his reasons, that the verdict was set aside “in the exercise of the discretion which is vested in the court.” This matter has already been discussed and decided at this term. *Wood v. Railroad Co.* 42 S. E. 462.

Appeal dismissed.

(121 N. C. 499)

SHELTON et al. v. WILSON et al.
(Supreme Court of North Carolina. Dec. 16, 1902.)

EJECTMENT—ACTION BY A TENANT IN COMMON—LIMITATIONS—PLEADING—PROOF.

1. A tenant in common may maintain ejectment against a third person.

2. In ejectment defendant can prove possession in himself under a colorable title for seven years under the general denial, without specially pleading the statute.

Appeal from superior court, Transylvania county; McNeill, Judge.

Action by W. M. Shelton and another against W. Wilson and others. There was a judgment for plaintiffs, and defendants appeal. Sustained.

George A. Shuford, for appellants.

CLARK, J. In 1853 Benjamin Wilson died seised of a tract of 700 acres of land. By his will he devised the same to his wife, Jane Wilson, “to be possessed and enjoyed, to enable her to raise, support, and school” their children, and when the youngest child should become of age, or at the death of the widow, “what property remains to be equally divided between them, taking into consideration what they have received.” There were 11 children. In February, 1860, Matthew M. Wilson, one of said children, conveyed to his sister Laura Shelton “all his interest” in said 700 acres, without warranty. The plaintiffs are her children. In 1883 Jane Wilson, who till then had continued to live on said farm, using it as her own, caused the same to be divided among the 10 children then living, and executed deeds for their respective tracts, described by metes and bounds, and put them each in possession, reserving to herself a life estate in one certain tract. Matthew M. Wilson on September 18, 1884, divided his tract into two, and conveyed one to his son Columbus, and the other to his daughter Sarah E. Bolen; and it was in evidence that they have been in possession ever since, unless the order appointing a receiver herein in 1896 (who has received no rents) is an interruption. On January 5, 1889, an action for the recovery of said land was brought by these plaintiffs against Matthew M. Wilson and William Bolen. The case on appeal adds Sarah E. Bolen, but the record of said cause, sent up as part of the record herein, shows that Sarah E. Bolen was not a party, and the record controls. At September term, 1891, the plaintiffs took a nonsuit. On August 30, 1892, the plaintiffs brought this action against Matthew M. Wilson, and service was made by publication against him, he being a nonresident. On his death in 1897, his five children and William Bolen, the husband of his daughter Sarah, were made parties defendant.

The objection as to the deeds to plaintiffs from their co-tenants need not be considered, for one tenant in common can maintain an action of ejectment against third parties. *Yancey v. Greenlee*, 90 N. C. 317; *Gilchrist v. Middleton*, 107 N. C., at page 684, 12 N. E. 85; *Winborne v. Lumber Co.*, 130 N. C. 32, 40 S. E. 825.

The fifteenth exception is to the following paragraph in the charge:

“In no view of the evidence is the plaintiff’s claim barred by the statute of limitations.”

The deed from Jane Wilson to Matthew M. Wilson in 1883 was color of title, as were also the deeds from Matthew M. Wilson to Columbus Wilson and Sarah E. Bolen in September, 1884. There was evidence that they

have been in possession ever since,—certainly until the receivership in this case in 1896, since which time the evidence of possession is conflicting. Columbus Wilson and Sarah E. Bolen were parties to no action till joined herein in 1897, and their title had then ripened. Even if Sarah E. Bolen had been, as stated in the case on appeal, which is contradicted, however, by the record, a party to the action begun in 1889, she was not made a party to the new action begun August 30, 1892, within 12 months after the nonsuit taken in September, 1891; and the statute ran, as to her, from September 18, 1884, till made a party in 1897. The conveyance from Matthew M. Wilson to Laura Shelton in 1860, under which the plaintiffs claim, contained no warranty, and is not an estoppel upon Columbus Wilson and Sarah E. Bolen, who claim under the deeds to them from Matthew M. Wilson in 1884, and seven years' possession thereunder. It was not required that the defendants should plead the seven-year statute. Code, § 141. This defense can be shown under the general denial of the plaintiff's title. *Cheatham v. Young*, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617; *Manufacturing Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456.

In view of this error, it is unnecessary to consider the other exceptions, and the interesting questions which they present. Error.

(131 N. C. 501)

McDOWELL COUNTY COM'RS v. NICHOLS et al.

(Supreme Court of North Carolina. Dec. 16, 1902.)

SURETIES—INDEMNITY FOR ONE.

1. One about to become a surety with others can stipulate with the principal, without the knowledge of the other sureties, for a separate indemnity for his own benefit, in which, in the absence of fraud, or unless it was intended for the benefit of all, the others cannot participate till he is reimbursed.

Appeal from superior court, McDowell county; Council, Judge.

Action by the commissioners of McDowell county against R. L. Nichols and others. Judgment for plaintiffs. Defendant W. A. Conley appeals. Reversed.

J. T. Perkin, for appellant. S. J. Ervin, for sureties on bond.

MONTGOMERY, J. The defendant R. L. Nichols, as sheriff of McDowell county, executed two bonds to the state of North Carolina conditioned for the collection and settlement of all the public taxes. One of the bonds was dated the 31st of August, 1899, and the other one was dated the 31st of August, 1900. Both bonds covered one and the same term of office, and certain of the other defendants executed the first bond as sureties, and certain of the other defendants exe-

cuted the second bond. Nichols, the sheriff, made default in the settlement of the first year's taxes, and was in default at the time of the execution of the second bond, the renewal bond. The commissioners of the county brought suit for the amount of the deficiency against the sureties on both bonds. The pleadings having been filed, the cause was referred to Edmund Jones to take and state an account of the questions of law and fact arising upon the pleadings. The sureties on the last bond—that of 1899—raised no question as to their liability equally with the sureties on the first bond in their answer. The referee decided that they, as a matter of law, were so bound, and no exception was entered. *Poole v. Cox*, 31 N. C. 69, 49 Am. Dec. 410; *Oates v. Bryan*, 14 N. C. 451; *Coffield v. McNeill*, 74 N. C. 535. It appeared before the referee that on the 31st day of August, 1889, Nichols, the sheriff, executed a deed of trust to D. E. Hudgins, as trustee, to indemnify W. A. Conley, one of the sureties on the bond of 1889, against loss on account of his liability as bondsman, and that Conley refused to sign the bond until the indemnity had been given; that he signed it on the 5th of September, 1899, when the commissioners received and approved it; and that the bond had been signed by the other sureties on the last-mentioned date. There was no evidence that the sureties had any knowledge of the indemnity given to Conley at the time it was given, or before they had executed the bond. The amount realized from the sale of the property by Hudgins, trustee, was \$2,614.59, which has been paid to the plaintiff. In adjusting the liabilities of the co-sureties amongst themselves, the referee held as a matter of law that each of them on both the bonds was entitled to share in the benefit of the payments made by the trustee, upon his payment of his proportionate part of the recovery against the principal and sureties. The defendant Conley excepted to that finding of the referee, and, upon the confirmation of the report by the court he entered the same exception.

The doctrine of contribution among co-sureties does not arise by contract between them, but it grows out of an equitable principle,—the principle that equality is equity among persons who stand in the same situation. Does the defendant Conley stand in the same situation as do the other co-sureties? If he does not, then the principle above stated does not apply, "for equality among persons whose situations are not equal is not equity." Do Conley and the other sureties then occupy the same and equal situation? The answer to the question depends upon whether or not one who is about to become a surety with others can stipulate with the principal, without the knowledge of the other sureties, for a separate indemnity for his own benefit, primarily. We believe it can be done, and that it cannot be reached and

applied to the equal benefit of all the sureties, unless it was procured through fraud, or unless it can be shown that, although it was executed for the benefit of one alone, yet it was intended for the benefit of all. The true principle underlying this question is stated with great clearness in the case of Hall v. Robinson, 30 N. C. 56, where the court said: "The relief between co-sureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter security to any extent, it inures to the benefit of all. The risk and the relief ought to be co-extensive." And in each and all of the cases in our Reports (and they are numerous) where the principle is upheld and the indemnity applied to the common benefit of all the sureties the indemnity was procured subsequently to the execution of the obligation. In the case before us the risk was never a common one between Conley and the other sureties. Before he had any relation or connection with the other sureties, and before he would assume any responsibility, he stipulated with the principal for a separate indemnity. When Conley signed the bond, he had already stipulated for separate indemnity; and the other sureties have no right to complain of an act of precaution which they might have availed themselves of, and to reach the benefit of that indemnity, provided it was executed in good faith, or unless they showed that it was intended for the benefit of all, which they could have shown, if it had been true, in an equitable proceeding, as this was. The equitable doctrine ought not to be extended so far as to reach the matter of indemnity stipulated for before the relation of co-surety exists. Until that relation is brought about, the sureties have each the right to look out for his own separate indemnity; afterwards the procuring of indemnity is and ought to be for the common benefit, on the principle mentioned in this opinion. And this has been decided by this court in the case of Long v. Barnett, 38 N. C. 631. Ruffin, C. J., for the court, there said: "As one, when he is about to become a surety with others, may stipulate for a separate indemnity from the principal to him, and the co-sureties would be only entitled to a surplus after his reimbursement (Moore v. Moore, 11 N. C. 358, 15 Am. Dec. 523), so there can be no doubt that, after two persons have become sureties for a common principal, they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal or for contribution from another co-surety."

Error.

(131 N. C. 519)

SIMPSON v. ENFIELD LUMBER CO.

(Supreme Court of North Carolina. Dec. 16, 1902.)

LOGGING CONTRACT—RAILROAD FOR REMOVING TIMBER—FIRES—NEGLIGENCE.

1. Under a contract between two private parties by which plaintiff sold to defendant all the timber of a certain size on his land, and granted to it the right to maintain necessary railroads thereon for removing the timber, and to locate the road and use trees and undergrowth necessary for its construction and maintenance,—defendant to have a year to cut and remove the timber,—plaintiff has the duty of protecting his property; and defendant, though permitting brush and combustibles to accumulate on its roadbed, to which a fire is communicated by sparks from its engine, properly equipped and operated, is not liable for injury therefrom to plaintiff, as a regular railroad company would be.

Douglas and Clark, JJ., dissenting.

Appeal from superior court, Halifax county; Brown, Judge.

Action by W. P. Simpson against the Enfield Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Dey & Bell and T. N. Hill, for appellant. E. L. Travis, for appellee.

COOK, J. On the 6th day of August, 1900, plaintiff sold and conveyed by deed to defendant, in consideration of \$2,000 paid him, all the timber upon his tract of land (583 acres) measuring 10 inches and above in diameter at the stump, and granted to defendant the right "to construct, maintain, and use such roads, tramways, and railroads * * * on and upon said land as it may deem necessary for cutting and removing said timber. * * * and shall have the right and privilege of locating said road, * * * and the use of such trees, undergrowth, and dirt as may be necessary to construct and maintain the same; * * * that said party of the second part shall have the term of one year from date of deed within which to cut and remove said timber." Pursuant to the provisions of said deed, defendant company entered upon said land, constructed its railroad, cut and removed timber; and on September 14th, when the train was taking its last load of timber from the land, a fire originated on said railroad, "right at the track, right on the side, most by the tie," shortly after the engine had passed, and thence spread to and ignited plaintiff's woods (lying on both sides of the track), burning the unsold timber and undergrowth, and this action is brought to recover damages for such burning. Verdict and judgment in favor of plaintiff, and defendant appealed.

Plaintiff admits that the engine was in proper order,—equipped with proper spark arrester,—and that there was no negligence in that respect. But the ground of negligence upon which he relies is that an accumulation of leaves, brush, and combustible material was permitted by defendant company to be

and remain upon the right of way and near the right of way, and when the track was constructed, instead of carrying off this combustible material, defendant company piled it up alongside of the track, and in dangerous proximity to it, and that sparks fell upon such and ignited the same, which communicated the fire to his land, causing the damage complained of. There is only one witness,—Candace Williams,—who testified to the origin of the fire, the substance of which is above quoted. She says she was 200 yards off, and saw two little puffs of smoke rise up after the engine passed. She further testified that she was on that track a great deal of the time, and she had to pass backwards and forwards, and saw the condition of it before the fire, and how it was laid down. "It was just cut down place enough for the train to go over, and then put down the ties, and just ran the track anyway. There was nothing in the world taken away. Just put the trees and bushes out of the way so the train could go along. The rubbish and things were lying all along up and down the sides. They never raked out anything in the world. Just laid the cross-ties right on top of it." It appears that it was a temporary structure, and was in use less than two months. No one saw any sparks emitted from the engine, nor did any one know positively that any were emitted, or that the fire caught in the rubbish, or that there was any rubbish where it caught; but the circumstances furnished sufficient evidence to warrant such a finding of fact.

The material question involved in the case on appeal is raised by the second, fifth, and twelfth exceptions. The second and fifth are taken to the refusal of the judge to nonsuit the plaintiff, and the twelfth to the following part of his charge to the jury: "If the defendant permitted the brush and combustible material to accumulate on its roadbed, and a fire was communicated to the same by its engine, and burnt over the plaintiff's land, then it would be negligence; and you will answer the first issue, 'Did the defendant negligently and wrongfully burn the plaintiff's timber as alleged in the complaint?' 'Yes.'" So the question raised is one of construction of the contract: Upon whom did the duty rest, under its terms, of providing against fire?

The principle of eminent domain is not involved in this contract, nor in this case on appeal. No franchise is claimed, nor was any exercised. For his own private purposes, an individual has as much right to construct, equip, and operate a railroad for doing his own hauling as he has to use horse or other power for such purposes. Under their contract, defendant acquired no right of property in the land, or right of control or possession thereof, other than for the use therein expressed. Plaintiff knew when he made the contract that fire was necessary

for generating steam in running the locomotive upon the railroad, and must be deemed to have had notice of the probable danger from sparks necessarily emitted from an engine; and having retained absolute control and possession of all the land lying adjacent to the track, as well as to that upon which the track laid, except so far as it was in use for the train and maintenance thereof, it was his duty to have protected his adjacent land from the sparks and spread of fire. The contention of plaintiff is based upon the theory that the rules applicable to incorporated railroad companies (quasi public corporations, common carriers) apply to defendant company, but they do not. Quasi public corporations, with their right of eminent domain, have an easement in all the land condemned for right of way, and have the right to enter thereon when needed for their use; and, even when not needed for their use, they have the right to enter in order to remove whatever may be thereon which would endanger the safety of its passengers, or which might, if undisturbed, subject it to liability for injury to adjacent lands or property; *Ward v. Railroad Co.*, 109 N. C. 358, 13 S. E. 926; *Id.*, 113 N. C. 566, 18 S. E. 211; *Shields v. Railroad Co.*, 129 N. C. 1, 39 S. E. 582. Wherefore, such corporations, having such right of entry upon and control over their right of way, are held liable if grass and inflammable material are allowed to negligently accumulate thereon and become ignited from sparks, causing damage to adjacent landowners by the spreading of the fire. *Black v. Railroad Co.*, 115 N. C. 667, 20 S. E. 718, 909; *Shields v. Railroad Co.*, *supra*.

Under defendant's contract, it had no right of way of specific width. Its domain and control extended no further than to put down its track on plaintiff's land and run its trains over it, and to use the ground in removing the timber and loading it on the cars, and such as was necessary in cutting and removing the timber from the land, and the use of such trees, undergrowth, and dirt as would be necessary in constructing and maintaining its road. No right is given it to enter upon the lands for the purpose of cleaning the rubbish therefrom. The rubbish belonged to plaintiff, and, having no right to remove the same, it cannot be held liable for its remaining there. But it may be argued that it cut and put rubbish there, and therefore is liable for its being there. Be that so; yet it had a right to do that much, but had no right to do more without subjecting itself to an action of trespass. It had no defined rights of way, under its contract, for which it assumed any liability. Its duty under the contract was to so use its property as not to injure the property of plaintiff, and this the defendant did, by properly equipping its machinery and operating it in a prudent and careful manner. Plaintiff entered into this contract with full knowledge of the dangers

incident to running a locomotive across his land. He well knew of the condition of the woods through which the track would be constructed, and of the inflammable matter which had accumulated thereon and would thereafter be likely to accumulate. So the duty, under the contract, rested upon plaintiff to protect his property, and not that of defendant company. Having failed to provide against it, plaintiff became his own insurer, and assumed the risk, rather than go to the expense of cleaning off, or firing against the sparks which would probably escape from the engine. Under this express contract between two private parties, no duty arises from one to the other, except such as appears in terms, or necessarily arises by implication from its context. And it nowhere appears therein that the defendant company obligated itself to assume the control and liability of a right of way, such as is imposed upon a public railroad corporation. A public railroad corporation goes where it is licensed by law, carrying the dangers incident to its operation with it, even in spite of the protest of a landowner whose land it condemns and uses; while, as between the parties to this contract, the defendant company ran its locomotive over plaintiff's land with his consent, in order to enable defendant company to carry out a contract made with plaintiff, which enabled plaintiff to sell his timber, and defendant company to purchase it. There is no provision in the contract which imposes, by expression or implication, upon defendant company the duty of cleaning off the rubbish either from its track or the land adjacent to it; nor does it appear therefrom that it was in the contemplation of the parties that defendant company should assume any liability on account of the condition, foul or otherwise, of the plaintiff's land. If such had been their intention, it ought to have been expressed. As it is not expressed, it cannot be inferred; for defendant company might have refused to enter into such a contract, and declined to purchase the timber. The rule of so using one's own property as not to injure the property of others was complied with by defendant company, in using a properly equipped engine, and operating it carefully and in a prudent manner, which is admitted to have been done.

There is error in the instruction excepted to, and in not sustaining the motion to nonsuit. New trial.

DOUGLAS, J. I cannot concur in the opinion of the court, because it is based upon what seems to me an erroneous principle of law. The opinion holds that it was error in the court below to give the following instruction: "If the defendant permitted the brush and combustible material to accumulate on its roadbed, and a fire was communicated to the same by its engines, and burnt over the plaintiff's land, then it would be negligence,

and you would answer the first issue, 'Yes.'" It is admitted that this instruction would be correct if the defendant were a regular railroad company, but I fail to find any distinction either in principle or precedent. On the other hand, some authorities hold private railroads to a higher degree of responsibility than those that are public, on the ground that the latter have a public license to operate. I do not think that makes any difference. The principle of eminent domain is in no way concerned. The power of condemnation is given to railroad companies simply to enable them to acquire the lands necessary for their construction. They may acquire such lands by purchase, and it is evident that the law deems this the proper method to pursue, as it permits the condemnation of land only in the event of the railroad company's being unable to agree with the owners for its purchase. Code, § 1943. Moreover, by condemnation a railroad in this state can never acquire more than an easement in the land, while by deed or grant it may acquire any interest therein, including the absolute fee. The defendant is a corporation, but whether it had the chartered right to build a railroad is immaterial to this question, as it entered upon the plaintiff's land, admittedly, under the contract set out in the record.

It is contended that the defendant owed no duty to the plaintiff, inasmuch as it did not contract to keep its roadbed clear. I am not aware of any statute requiring an ordinary railroad company to keep its track clear of combustible matter. It is held by the courts, with practical unanimity, that a failure to do so is evidence of negligence, or in certain cases may be negligence per se. This is simply one phase of the rule of the prudent man. Would a man of ordinary prudence, operating a railroad through his own land, permit the track to become so foul as to be in constant danger of catching fire from coals dropping from the engine, when the probable result of such fire would be the loss of a large amount of valuable timber? Would a man of ordinary prudence pile up leaves and other combustible matter near his house and adjoining the place where hot ashes are habitually thrown out? Would he have the right to pile them away from his own house, but in dangerous proximity to another's house and ash pile? The fact that the engine was properly equipped with a spark arrester has little or no bearing upon the question. Where the roadbed itself is covered with combustible matter, the danger is not so much from the sparks that come out of the smokestack as it is from the live coals that drop from the ash pan. In such cases the danger from the latter is much greater, on account of the larger size of the coals, and their greater capacity to retain and communicate heat. Of course, they are not thrown as far as sparks, and, in fact,

cannot well get beyond the ditches. Ordinarily they fall between the rails, but when the engine is rapidly rounding a curve they may be thrown beyond the rails and down an embankment, if there happen to be one. This danger may be increased or lessened by use of the dampers at each end of the ash pan, but these dampers must necessarily be controlled to a great extent by the needs of the engines. The only safe way is to clean off the roadbed, and I see no reason why in this particular a lumber road should not be held to the same degree of care as an ordinary railroad. They both use the same dangerous agency, causing the same character of loss; and in both cases the danger can be avoided by the same means, involving the cheapest labor and the simplest tools. A coal from one is as dangerous as a coal from the other, and a common hand, with a rake or a hoe, can clean off one as easily as he can the other. There may be some difference as to the width of the right of way, but that does not affect the principle. In the case at bar the defendant was evidently in full possession of its track or roadway and ditches, which constituted its right of way. These, I think, it was required to keep clear of combustible matter. I do not think it could be required to clean up the land beyond its ditches, but, at the same time, it did not have the right to pile up combustible matter in such immediate proximity to its track as to be in constant danger of being set on fire by its engine.

I cannot find any case directly in point, nor is any cited by the court. In *Garrett v. Freeman*, 50 N. C. 78, the defendant was held liable for damage caused by fire escaping from a log pile he was burning on his own land. Judge Pearson, speaking for the court, says: "A prudent man would not permit a log pile to be made so near the fence [from three to five yards], with a dead pine between the pile and fence, nor would he permit fire to be set to it without having the trash raked from around it." In *Roberson v. Morgan*, 118 N. C. 991, 24 S. E. 667, it was held that the plaintiff, although having no cause of action under the Code, might recover as at common law for negligently permitting fire to escape. In 2 *Shear. & R. Neg.*, it is said in section 668: "One who uses a steam engine on his own land ought to use the ordinary means for confining sparks, especially if he burns wood; and he is liable if, for want of such precautions, the sparks set fire to a neighbor's property. He is also bound to use ordinary care to keep his own grounds in such condition that any fire set thereon by the engine shall not be communicated thence to adjacent premises."

From reason and analogy, if not from direct authority, I am compelled to dissent from the opinion of the court.

CLARK, J., concurs in the dissenting opinion.

(131 N. C. 527)

LIVERMON v. ROANOKE & T. R. CO.
(Supreme Court of North Carolina. Dec. 16, 1902.)

RAILROADS—FIRES—NEGLIGENCE.

1. For a railroad company to permit its track and right of way to become covered with dead grass and combustible material, to which fire, spreading to property of another, is communicated by sparks from an engine, is at least evidence of negligence.

Appeal from superior court, Bertie county; Brown, Judge.

Action by A. T. Livermon against the Roanoke & Tar River Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for the recovery of the value of cord wood burned through the negligence of the defendant while piled up along its track, awaiting shipment. The material portions of the complaint are as follows: "(2) That on or about the 28th February, 1899, the plaintiff was the owner of a large quantity of cord wood, which was of the value of \$200, and which had been by him placed in the vicinity of the defendant's line of railway, preparatory to its shipment to market by the defendant's trains. (3) That on or about the 28th February, 1900, the defendant, by means of fire negligently permitted to be communicated from its locomotive to said wood, did unlawfully and wrongfully burn the same, to plaintiff's damage \$200. (4) That defendant on or about 28th February, 1900, unlawfully and negligently permitted weeds, grass, and stubble, and other inflammable material, to accumulate on the line of railway, and adjacent to which the plaintiff's said wood was placed for shipment over its road, and to which sparks were negligently permitted to escape from its locomotive to inflammable material, grass and stubble, etc., hereinbefore mentioned, and thereby communicating fire to the said wood, and by which the same was totally destroyed, and to his damage \$200." The answer denies every allegation in the complaint, and then proceeds as follows: "(5) That some cord wood was placed near defendant's track in the fall of the year 1899, or the following winter. (6) That if said cord wood was placed on defendant's right of way near its track by plaintiff, then said plaintiff negligently contributed to his own injury, in that he placed said wood near defendant's track without the permission of this defendant, and nearer to its track than a man of ordinary prudence and care would place it, and too near to defendant's passing engines or locomotives to be safe from fire, and nearer to the track than the defendant's rules allow; that the defendant directed plaintiff to remove said wood, and offered to furnish a car for shipment of same in order to get it away, notwithstanding it had never given the plaintiff authority to place it there, but plaintiff re-

refused to allow it to be shipped, and failed to remove it, but, on the contrary, allowed it to remain at the place it was until it became dry and easy to ignite, and, if the same was burned, it was without the fault or negligence of this defendant; and such contributory negligence the defendant especially pleads and sets up in bar of any recovery in this action." The jury found that the wood was burned by the negligence of the defendant, and that the plaintiff did not contribute by his negligence to his own injury. There was competent evidence tending to sustain these findings. Among other evidence, there was testimony to the effect that the defendant's right of way was covered with dead grass and other inflammable material adjacent to the wood; that the fire was first seen on said right of way, about a foot from the cross-ties and 60 feet from the wood, about a minute or so after the passage of one of the defendant's trains; that the wood was piled on the right of way, 9 feet from the track, by permission of the defendant, for the purpose of shipment; that the wood remained there from August and September, 1899 to the 28th February following, when it was burned; that the reason for the wood remaining there so long was the refusal of the defendant to ship any of the wood until there was a trainload ready for shipment; and that it was the custom of the defendant to permit wood to be so piled for shipment.

The following is the entire evidence for the defendant:

"Pruden, conductor of the railroad, testified that plaintiff's wood was placed only 4 or 5 feet from the end of the cross-ties. Have seen other wood along right of way, but further off from the track. Cross-Examination: Wood is generally placed not closer than six feet. In fact, the rule of the company requires all wood to be placed not nearer than six feet from the cross-ties. I never measured distance of wood from ties; only saw it.

"L. C. Hedgepeth testified: I was notified to remove this wood; that the section master wanted to put in a switch there. I stated that I did not own the wood, but I repeated to plaintiff that company wanted this wood removed; that they desired to put in a siding there. I did not repeat it to plaintiff at the request of any one, but of my own motion. A negro delivered me the message. I don't know who sent him."

Judgment for plaintiff. Appeal by defendant.

St. Leon Scull, for appellant.

DOUGLAS, J. (after stating the case). At the close of the plaintiff's evidence, the defendant moved for a judgment as of nonsuit. This was properly refused. Permitting its track and right of way to become covered with dead grass and combustible material was at least evidence of negligence. The de-

fendant, after introducing evidence, offered various prayers for instructions, among which were the following: "(9) Upon the whole evidence, the plaintiff cannot recover. (10) Upon the whole evidence, the defendant is not guilty of negligence, and the plaintiff cannot recover." In view of the substantial evidence tending to prove negligence, these prayers were manifestly improper, and would have been so in any event. Where there is no evidence tending to prove negligence, or nothing more than a mere scintilla, the court may so instruct the jury; but in all such cases the evidence must be construed most strongly against the party asking for the direction of the verdict, as it is practically a demurrer to the evidence. All contradictions must be solved in favor of the opposite party, taking his evidence as true, and construing all the evidence in the light most favorable to him. *Cowles v. McNeill*, 125 N. C. 385, 34 S. E. 499; *Coley v. Railroad Co.*, 129 N. C. 407, 40 S. E. 195, and cases there cited. The form of the prayer is itself objectionable, as it assumes that equal weight is to be given to all the evidence. The prayer should be substantially to the effect that there is no evidence tending to prove the negligence of the defendant or the plaintiff, as the case may be. A mere scintilla is not considered evidence.

Two of the defendant's prayers were given, as follows: "(1) If the jury shall find from the evidence that the plaintiff piled or raked up the wood on defendant's right of way, very near the track, without obtaining consent of defendant, then and in that event the plaintiff assumed all risk of fire from defendant's engine, and plaintiff cannot recover." "(8) The plaintiff must go further, and show more than that the right of way was not clear of stubble, etc., but must also show to the satisfaction of the jury that the fire originated from defendant's engine, before plaintiff can be allowed to recover." The court further charged the jury as follows, to which defendant excepted: "(1) If the jury find that the wood was placed on the right of way by consent of defendant for shipment, and that along that section of the road the track and right of way were foul and littered with inflammable material, and that sparks were communicated from defendant's engine to this inflammable material, and that such fire spread and extended to plaintiff's wood and destroyed it, you will answer the first issue, 'Yes.' (2) If you find that defendant had a rule and regulation prohibiting the placing of wood, delivered on right of way, within six feet of said roadbed, and that plaintiff did place his wood within six feet of said roadbed, that would be negligence on the part of plaintiff; and if you further find that the sparks from the engine were communicated directly from the engine to this wood by reason of its dangerous proximity, it would be contributory negligence, and you will answer the second is-

sue, 'Yes.' We see no error in these instructions of which the defendant can complain, and in fact it might well be questioned whether the second one is not too favorable to the defendant, inasmuch as it holds the plaintiff to the observance of a rule which does not appear to have been brought to his knowledge. We think that these instructions, with the prayers given, fairly and sufficiently present the defendant's case. The remaining prayers were properly refused.

There are many exceptions to the evidence, none of which can be sustained. It was proper and necessary for the plaintiff to show that the wood was placed on defendant's right of way with its permission, for the purpose of shipment, and that it was not close enough to the track to interfere in any way with the passage of a train.

In the absence of error, the judgment must be affirmed.

(131 N. C. 808)

STATE v. DIXON.

(Supreme Court of North Carolina. Dec. 16, 1902.)

MURDER—JURY—EVIDENCE—CONTRADICTING WITNESS—DYING DECLARATION—MAGAZINES—HARMLESS ERROR—ASSIGNMENT OF ERROR—INSTRUCTIONS.

1. The regulations in Code, §§ 1722, 1728, relative to revision of the jury list, being directory only, failure to add new names to the jury list, or to do more than to merely purge the box by taking out the names of those who have not paid their taxes, will not vitiate the venire.

2. To contradict witnesses of defendant, their statements under oath at the coroner's inquest are admissible, though the coroner was not legally authorized to hold the inquest.

3. Statement of deceased in his dying hours, after he had said he was dying, as to how he was shot, and that his assailant looked and ran like defendant, are admissible as dying declarations.

4. A copy of a magazine is admissible, without proof of its genuineness, for the purpose of comparing with it wadding from the gun with which deceased was killed, and a like magazine found in defendant's house, from which pieces of the size of the wadding had been torn.

5. Testimony that the gun found in defendant's possession, with which it was claimed he shot deceased, had belonged to witness, but was lost two years before, when defendant worked for him, is not prejudicial, even if it tended to charge defendant with larceny.

6. Recitals of fact in an assignment of error cannot be considered unless found by the judge and set out in the case on appeal.

7. The mere fact that the jury, during their deliberations, had in full view the court docket and the gun with which it was claimed defendant shot deceased, does not show that defendant was prejudiced thereby.

8. Where all the evidence tended to show a shooting from ambush, and the sole question was whether defendant was the slayer, it is proper to charge that the jury return a verdict of guilty of murder in the first degree or not guilty.

Appeal from superior court, Jones county; Winston, Judge.

Cyrus Dixon was convicted of murder, and appeals. Affirmed.

Thos. B. Womack, for appellant. A. D. Ward and the Attorney General, for the State.

CLARK, J. The prisoner was convicted of murder in the first degree of Godfrey Webber. The appeal was most fully argued here, and every exception which counsel thought might avail the prisoner was taken below, as 50 exceptions appear in the record, though on fuller consideration these were reduced, as was proper, to 13 errors assigned in the case on appeal. After careful consideration, we have been able to find nothing prejudicial to the rights of the prisoner, and must affirm the judgment. It would serve no good purpose to go over, one by one, each assignment of error, and discuss them in a lengthy opinion, since opinions are for guidance in other cases, and there is little presented by the exceptions which has not already been decided, or the discussion of which would be of service in any other case. We have none the less carefully considered and passed upon each error assigned in the record. Among the errors assigned, those perhaps most earnestly pressed were:

The plea in abatement and motion to quash on the ground that the county commissioners in June, 1901, added no new names to the jury list, and merely purged the box by taking out the names of those who had not paid their taxes, were properly overruled. It has been too often decided, to be questioned, that "the regulations contained in sections 1722 and 1728 of the Code, relative to the revision of the jury list, are directory only, and, while they should be observed, the failure to do so does not vitiate the venire, in the absence of bad faith or corruption on the part of the county commissioners." *State v. Perry*, 122 N. C., at page 1021, 29 S. E. 384, and numerous cases there cited. Those cases are not overruled in *Moore v. Guano Co.*, 130 N. C. 229, 41 S. E. 293, which merely holds that the conduct of the county commissioners in that case went beyond mere irregularity, and was as to a matter so serious in its nature as to invalidate the panel drawn in such manner.

To contradict the testimony of witnesses for the defense, the court allowed evidence of their statements made (some of them in writing) under oath at the coroner's inquest. The prisoner excepted on the ground that the coroner was not legally authorized to hold such inquest. That was immaterial. Contradictory statements, no matter when or where made, were competent.

The deceased was shot about 7 p. m. November 22, 1901, by some one lying in ambush along the road. In his dying hours (he died that night, after being carried home), after stating that he was dying, and asking for prayers, he stated he was first shot from behind, and, when he fell, the man rushed

1. See *Homicide*, vol. 24, Cent. Dig. §§ 425, 430, 431.

out and shot him while lying on the ground on his back (which was corroborated by the physician's testimony as to the range of the shot), and said that his assailant was a small white man, and that he looked like Cyrus Dixon, and when he ran off that he ran like him. This testimony was competent as dying declarations. There was evidence of the tracks of a man running from the place to a branch which led up back of Dixon's house; that the tracks were measured, and an impression was taken by cutting paper to fit in the track, and this pattern corresponded with the prisoner's shoes. It was further in evidence that the gun wadding picked up at the place of the killing, between the stump from behind which the shooting was done and where the deceased fell, was part of pages 361 and 362 of the *Delineator* magazine, and that at Dixon's house the magazine was found with those pages torn out. Another copy of the *Delineator*, of the same date, was produced, and the matter on pages 361 and 362 contained the same matter as was on the wadding thus picked up. The prisoner objected because the genuineness of the last copy was not proved by the publishers. We cannot sustain the objection. The whole was a circumstance properly left to the consideration of the jury.

There was evidence tending to show improper intimacy between the prisoner, who was 21 years of age, and the wife of the deceased, who was 20, while the deceased was older; that on one occasion the prisoner had sought to hire a horse and buggy to take "his gal" to church; that, when questioned as to who she was, he had replied (pointing to the deceased), "She is that old man's wife," and, when cautioned, had said that she was "already his"; that he had carried her in a buggy to a camp meeting, and there had introduced her as a "Miss Lina Hall, from the Banks"; that he had said the deceased had told him to let his wife alone, and had threatened him, but he said, "Damned if powder and shot are not cheap for me as for old man Webber;" that he had refused to take service where Webber was employed, "because," as he said, "there was an unpleasantness between them"; that on one occasion he and Webber's wife had gone into the woods "to get toothbrushes," accompanied by a negro woman, and had sent the negro woman back; that the afternoon just before the slaying he had bought some new caps for his gun; and that when his gun was examined, soon after the killing, it had new caps, and bore signs of having been recently fired. These and many other circumstances went to the jury, together with such evidence as the prisoner offered, in rebuttal or contradiction. One witness testified that the gun found in the prisoner's possession had been his two years before, but had been lost, he knew not how, and that at the time of its disappearance the prisoner was working at

his place. The prisoner contended that this tended to charge him with larceny, and was prejudicial. It did not tend to show larceny, —this possession after the lapse of two years, —and, while its relevancy is not very apparent, its admission was not reversible error. Even if it had been charged (which was not), and even had been shown, that the prisoner stole the gun, the jury could not have therefrom concluded that beyond a reasonable doubt the prisoner waylaid and slew the deceased. The facts of this case in many particulars resemble those in *State v. Outerbridge*, 82 N. C. 617.

The prisoner assigns as error that the jury, during their deliberations, had the gun and the court docket in full view. The recital of facts in an assignment of error cannot be considered by the court unless such facts are found by the judge, and set out in the case on appeal. *Patterson v. Mills*, 121 N. C., at page 269, 28 S. E. 368; *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3; *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364. But even if the above had been so found and set out, we do not see that they could prejudice the result. It is not enough that there was opportunity, but the court must find that in fact the jury were prejudiced by such matters. *State v. Tilghman*, 33 N. C. 513.

The judge properly told the jury that they should return a verdict of murder in the first degree or not guilty. All the evidence tended to show a killing by shooting from ambush, and there was nothing to contradict this; and the sole question, if the evidence was believed, was simply whether the prisoner was, beyond all reasonable doubt, the slayer. *State v. Rose*, 129 N. C. 575, 40 S. E. 83. We find no error in the judge's charge in any of the matters excepted to.

It has been stated to us by the attorney general that he has been informed that the prisoner has escaped jail since the argument. We are not advised whether the report has been verified, nor do we know whether the prisoner has been retaken or not. If the reported escape is not true, the report is immaterial. If it is true, it is not ground for any favor. In a capital case, even when the escape is before argument here, "the court may, in its discretion, either dismiss the appeal, or hear and determine the assignments of error, or continue the case." *State v. Cody*, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692, *State v. Anderson*, 111 N. C. 689, 16 S. E. 316, and *State v. Jacobs*, 107 N. C. 772, 11 S. E. 962, 22 Am. St. Rep. 912, in two of which cases the appeal was dismissed. One who thus dismisses himself abandons his appeal, and has no ground to invoke a review of the trial by the appellate court. Certainly, when the escape is after argument here, the court should dispose of the appeal, unless it prefers to dismiss, and leave the judgment below in force.

Affirmed.

(131 N. C. 638)

FITZGERALD v. ALMA FURNITURE CO.

(Supreme Court of North Carolina. Dec. 20, 1902.)

MASTER AND SERVANT—EMPLOYMENT OF INFANTS—INJURY TO SERVANT—FAILURE TO WARN—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS—QUESTION FOR JURY.

1. In an action by a boy nine years of age for injuries sustained in a factory, an instruction that if plaintiff only had the intelligence of an ordinary boy of his age, and had never seen a machine like the one he was assisting to operate until the day he was injured, and did not have capacity to understand the dangerous parts of the machine, and, because of his youth and inexperience, while waiting for the man operating it he threw his arm on the machine to rest himself, and defendant's agent who employed him failed to warn him against danger, the jury should consider such facts in passing on the question whether plaintiff was guilty of contributory negligence, was proper.

2. In the absence of an appeal by the plaintiff, whether instructions were too favorable to the defendant will not be reviewed.

3. In an action by a boy nine years of age to recover for injuries sustained in a factory, it was not error to permit the father to testify that he did not hire plaintiff to defendant.

4. Where a boy nine years of age was employed to work in a factory without his parents' consent, and the foreman directed him to assist in operating a machine, without instructing him as to the dangers incident thereto, and his arm was caught between the rolls of the machine and crushed, in a manner not disclosed, the question of defendant's negligence was for the jury.

Furches, C. J., and Montgomery, J., dissenting.

Appeal from superior court, Davidson county; T. J. Shaw, Judge.

Action by William Fitzgerald, by his next friend, against the Alma Furniture Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

King & Kimball, for appellant. Watson, Buxton & Watson, for appellee.

OLARK, J. The plaintiff, who sues by his next friend, testified: That when nine years old, one day when his father was absent from home (and he did not return until after the little boy was injured), he went to the factory of the defendant to get work. The foreman offered him 25 cents a day, and put him to work "tailing a molder" and pulling sawdust to the furnace. The next day he tailed the planer, and the next day, about 1 o'clock, he was put to work on the sander, which is a machine with rollers, and sandpaper on the rollers, run by belts. That when he went to work at it a man was running the machine, and stood at its front end, and he was at the back end. The man told him to take the planks as they came out of the machine. He worked there an hour and a half before he got hurt. The planks were 1 foot wide, 1½ feet long, and about an inch thick. He had never worked in a factory before, and had never seen a sander. He further said: That the man in

charge of the machine left to go after planks, but did not stop the machine. While the man was gone, he leaned up against the machine and laid his hand on it, was caught, and his hand was mashed. He "hollered," and some one came and raised up the machine. His hand was mashed between the rollers. He had hired himself for three weeks, and told the foreman he was a school-boy. On cross-examination he said he was then four feet high. He was not instructed about the machine. He did not climb up on the machine, and does not know how his hand touched the wheel. Does not know where he put his hand, but did not think it was where the lumber came out. He knew it would hurt to put his hands on the moving wheels. Says he would not have been hurt if he had stood off from the machine. Did not remember what he leaned against the machine for. Just never thought of himself, he reckons, and leaned up against it. His hand could not get in there unless he put it in there. It was a pretty dangerous place where he was working. The sandpaper on the rollers was going round as fast as it could. Does not think he put his hand in. But it could not have got in unless he put it in. One roller ran one way, and one the other. Was standing on his feet when he got hurt. Did not get off the floor. The plaintiff's father testified: That he lived on a farm in the country. That he did not hire his son to the defendant, and knew nothing about it. When he got back home his boy was in the bed, with his arm dressed. An abscess rose on it. The doctor came to see the boy every day for ten days, and he was in bed for two months, and has suffered greatly. Another witness testified, who thought that if the boy was only four feet high he must have climbed upon the machine and stuck his hand in; that there was no danger from leaning against the machine, and it had an iron casting all around it, and there was no danger about the machine unless you put your hand in. This, in substance, is the evidence. The defendant did not offer any evidence, but moved to dismiss upon the evidence of the plaintiff. During the discussion of the evidence his honor remarked to the plaintiff's counsel that he had not made out a case, unless it was negligent in the defendant to employ the plaintiff at all, to which there is no exception, and submitted the question, upon all the evidence and attendant circumstances, to the jury, who found that the defendant was negligent, and the plaintiff was not guilty of contributory negligence.

The court charged the jury at the request of the plaintiff: "If the jury find from the evidence that the plaintiff at the time of the injury was a boy nine years and five months of age; that he only had the intelligence of ordinary boys of his age; that he had never seen a machine like the one he was helping to operate until one o'clock of the day he

was injured; that he did not have the capacity to understand the mechanism of the machine or its dangerous parts; that because of his want of age and experience, and while waiting for the man operating, he threw his arm upon the machine to rest himself, and for the further reason that the defendant's agent who employed him had failed to warn him against danger,—then it will be the duty of the jury to consider these matters in passing upon the question as to whether the plaintiff was guilty of such negligence as the law terms 'contributory negligence,' which would justify the jury in finding the second issue 'Yes.'" The defendant excepted to this, but we find no error. This hypothetical summary was a state of facts which the jury would be justified in finding from the evidence, and it could not be error in telling the jury they should consider that state of facts, if they found them to be facts, in passing upon the second issue. To none of the other instructions, nor to any part of them, did the defendant except. Whether they were not too favorable, in some particulars, to the defendant, is not before us, as the plaintiff is not appealing.

The court gave certain charges at the request of the defendant. The other prayers for instructions were properly refused.

Nor was it error to permit the father to testify that he did not hire his son to the defendant. The complaint alleged that it was negligence to employ a boy of the plaintiff's tender years, lacking in capacity to understand and appreciate the dangers incident to his employment, and unfit, by reason of his youth and inexperience, as the defendant well knew, to be set at such work without instructing or cautioning him, though he was wholly ignorant of the dangerous character of the same. There was evidence strongly tending to prove that state of facts, and the real point in the case is raised by the motion to dismiss, i. e., whether the facts, the youth of the child, his inexperience, his ignorance of the nature and dangers of the work, and the failure to instruct him, made it negligence to employ him. The reason of the thing, and all the best authorities, sustain that it was not error, of which the defendant could complain to submit this evidence to the jury. Judge Cooley, in his work on Torts (page 652), says: "The master may also be guilty of actionable negligence in exposing persons to perils in his service, which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. * * * The duty of the employer to take special cautions in such cases has sometimes been emphatically asserted by the courts." "The law," says Thomp. Neg. 978, "puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and

dangers connected with the business, and of instructing him how to avoid them. Nor is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same state as if he were an adult." These be wise and just words, and were so esteemed by the supreme court of Ohio, which cited with approval both the above extracts in *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 598. Further, citing like authorities from the decisions of sister states, that court further held that an infant employé, whose employer has not instructed him, as it was his duty to do, and who, while in the discharge of his employment, suffers an injury by reason of such neglect, may maintain an action therefor notwithstanding he did, by reason of his youth and ignorance, some act which contributed to his injury, but which he was not advised would be likely to injure him. To same purport, cases cited in the notes to that case (15 Am. St. Rep. 603), and *Smith v. Irwin*, 51 N. J. Law, 507, 18 Atl. 852, 14 Am. St. Rep. 699, and notes. In *Tagg v. McGeorge*, 155 Pa. 368, 26 Atl. 671, 35 Am. St. Rep. 889, it was held that the master is liable for the injury resulting when he puts a young and inexperienced person to work with a dangerous machine without giving suitable instructions as to the manner of using them, and warnings as to the hazard of carelessness in their use. See, also, notes to this case (35 Am. St. Rep. 889). To the like purport is *Norton v. Volzke*, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167, and cases cited therein and in the notes thereto. In *Bailey, Pers. Inj.* § 2766, it is said: "Persons who employ children to work with dangerous machinery or in dangerous places should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed; and, as a reasonable precaution in the exercise of such care in that behalf, it is the duty of employer to so instruct such employés concerning the dangers connected with their employment, which dangers, from their youth and inexperience, they may not comprehend or appreciate, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom,"—and further adds that an infant who, by reason of his youth and inexperience, is injured, when not properly instructed and warned as to the dangers incident to his work, may recover therefor. See, also, sections 2774, 2777, and 2789. In section 2767 (also in 1 Shear.

& R. Neg. § 73a) it is said (quoting authorities) that over 14 years of age the law presumes capacity and intelligence, and under that age the presumption is the other way. The duty of masters to infants is also summed up in similar language to the above authorities in 1 Shear. & R. Neg. §§ 73, 219. In Wats. Pers. Inj. § 114, it is said: "The defendant will be liable, if negligent, though it is the act of the child injured which is proximate to his own injuries, if such act is of a character naturally to be expected of a child, and in accordance with the usual indiscretions and errors of judgment characteristic of immature years." It does not appear, and cannot be ascertained, how this injury occurred. The little sufferer, in his artless testimony, says he does not know; that he did not put his hand in, and he could not have been hurt if he had not, yet he was hurt. If, as is probable, from his account, he thought to rest his tired little legs by leaning against the machine, as he said he did, and, dropping asleep, he unconsciously flung his arm over the top to rest himself or to keep from falling, or if, as defendant contends, with the curiosity and lack of judgment nature makes incident to nine years of age, he climbed upon the machine "to see the wheels go round," and touched them, this (there having been, as he testifies, no instruction or warning from the employer as to the danger) would, upon the above authorities, justify the finding of the jury.

There is no exception presented as to contributory negligence, but it may not be inappropriate to recall that in *Ward v. Manufacturing Co.*, 128 N. C. 946, 38 S. E. 194, this court said (approving the charge of the court below, who was the same judge who tried this cause) that, if the immaturity and inexperience of a child of 11 years old was the cause of his exposing himself to danger, he was not guilty of contributory negligence, and added, "The factory superintendent put these children to work, knowing their immaturity of mind and body, and when one of them, thus placed by him in places requiring constant watchfulness, is injured, every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence." There was a dissent in the case, but not upon this point.

The court below did not charge in this case that employing a child of nine years of age in such dangerous work, especially without instruction, was *per se* negligence. Whether it would be error to refuse to so charge is not before us, and cannot be presented here, for the plaintiff is not appealing, and we can only pass upon exceptions to the charge or refusal to charge duly noted in apt time. But as it is a subject of growing importance to lawyers, as well as in public interest generally, it may be well to cite, as indicative of the conclusion to which the maturer judgment of mankind is tending, the age below which legislative construction in other states had made it illegal, and there-

fore negligence *per se* and irrebuttable, to employ any child in a factory, at the close of the year 1901. This list is taken from the official publications of the United States government. It is illegal to employ any child in a factory, under 15 years of age, in Florida, Rhode Island, Washington, and Switzerland, or under 14 years of age in Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, Oklahoma, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming, New South Wales, New Zealand, Ontario, Queensland, and Sweden. In Manitoba it is illegal to employ children in any factory under 16 years of age. In Ohio it is illegal to employ in a factory girls under 16 and boys under 15. In Louisiana, New Jersey, and Quebec the age limit is, girls 14, boys 12. In Pennsylvania, France, Germany, and South Australia the age limit is 13. In the following it is illegal to employ children in any factory, under 12 years of age: California, Maine, Maryland, North Dakota, Austria, Belgium, Holland, Norway, Russia, and Great Britain (in which children under 14 can work only 6 hours per day, and those under 21 are prohibited to work at night); and in Denmark 10 years. During the present year Kentucky, Maryland, and perhaps others, have enacted similar laws, making 14 years the limit, and Virginia has adopted the 12-year limit. In Porto Rico, no child under 16 years of age is permitted by law to work in a factory more than 6 hours in 24. With this consensus of opinion in nearly the entire civilized world, it might be that it would not have been error if the judge had held that it was negligence *per se* to put a child of the tender age of 9 years to work on a dangerous machine, which he had never seen before, without any instructions or warning, and to leave him there by himself without stopping the machine. But however that may be, it certainly was not error to leave the question of negligence to the jury, with the charge given in connection therewith, which was very favorable to the defendant. No error.

MONTGOMERY, J. (dissenting). The allegations of the complaint, substantially, stated are: First, that the defendant employed the plaintiff, a child of nine years of age, to work for it around a machine called a "sander," used for sandpapering lumber, and which consisted of a large iron frame "upon which were adjusted a system of drums covered with sandpaper, over which there revolved rapidly a system of iron rollers or cylinders when in operation, and which said rollers or cylinders were unguarded and uncovered, and exceedingly dangerous when operated by an experienced workman"; second, that the plaintiff was inexperienced in the use, and ignorant of the dangerous character, of said machine, and that the defendant, knowing of his youth and inexperience and ignorance, employed the plaintiff, and set him to assisting in sanding pieces of lum-

ber with the machine; third, that the defendant carelessly and negligently omitted to give the plaintiff instructions in relation to his work, or to caution him as to the dangers incident thereto. There is an allegation of the complaint in these words: "That the plaintiff, by reason of his tender years, lacked the capacity to understand and appreciate the dangers incident to his employment, and was unfit, by reason of his youth and inexperience, to be set at such work, which the defendant well knew, but carelessly and negligently so engaged him in it." There was another allegation that the child was badly hurt while he was engaged in his work, and that the injury was permanent. At the end of the plaintiff's testimony the following statement in the case on appeal appears: "The defendant here moved the court to dismiss the complaint under Acts 1897, c. 109, for the reason that the defendant was not shown, in any aspect of the testimony, to have been negligent. During the discussion of this motion the court stated to the plaintiff's attorneys that, unless it were negligence in the defendant to employ the plaintiff at all, the plaintiff had not made out a case." Upon a careful review of the evidence, we are of the opinion that his honor made no mistake in his conclusions upon the effect of the evidence, and yet he submitted the matter to the jury, and there was a verdict for the plaintiff. That was error. The jury should have been instructed that there was no evidence tending to show that the defendant was negligent as alleged in the complaint.

The following is the whole evidence in the case:

The plaintiff, being sworn, testified in his own behalf as follows: "I was eleven years of age the 1st day of August, 1901, and was hurt on Wednesday, the 3d day January, 1900. I went to work in the defendant's factory on January 1, 1900, and had never before worked in any factory. My father was not at home on Monday, Tuesday, nor Wednesday, the day that I was hurt. I went to the factory on Monday morning to get employment. I asked Mr. Redding if I could get work there, and he said 'Yes.' Mr. Grissom, the foreman of the factory, said he would give me 25c. per day, and I hired to him, and he put me to talling a molder and pulling sawdust to the furnace. I tailed the molder the first day, tailed a planer some the next day, and tailed the molder and planer some the day I went to work on the sander. I went to work on the sander about one o'clock. A sander is a machine with rollers, and sandpaper on the rollers, and is run by belts. The machine was running when I went to it. Ellison was running the machine, and stood at its front end, and I stood at the rear or back end. Ellison told me to go and take the planks as they came out of the machine. I worked there an hour and a half, taking the planks out of the machine,

before I got hurt. The planks were one foot wide, and one and a half feet long, and about an inch thick. I had never seen a sander before. The planks being sanded were safe doors. When I got hurt, Ellison had left the machine to go after more planks. This was the only time he left the machine. He did not stop the machine. When I took a plank out I was standing where I always stood. While Ellison was gone, I leaned up against the machine and laid my hand on it, and it was caught, and I hollered. Somebody came and raised up the machine and took my hand out. My hand was mashed up. Nobody explained the machine, or warned me where the dangerous places were. I hired for three weeks, and told the foreman I was a schoolboy. I was taken to Dr. Staunton, and my hand bled very much. My arm rose about a week after I was hurt. I had never before been in a factory to stay any time, but had been in furniture factories several times, but had not examined the machines. My hand was mashed between the rollers." On cross-examination plaintiff testified: "Mr. Redding did not tell me about the machine. I don't remember whether the machine was higher than my head. I was then four feet high. A sander is higher than a molder. I could stand on the floor and see on top of the sander, and could see inside of the machine, and see the rollers, with the sandpaper on them, running. I don't know whether I could stand on the floor and reach over the top of the sander, and put my hand down on the sandpaper. If I were to stand on the floor and lean up against the back of the machine, it would be safe, and I would not touch the machinery, and it would not hurt me. I was not hurt by the cogwheels on the side of the machine. I did not climb up on the machine. When standing on the floor I could lean up against the machine and could not touch the wheels, but could see the wheels running. I do not know how my hand touched the wheel. I was then four feet tall, and the plank came out of the end of the machine, about midway between the bottom and top of the machine. The end of the machine was covered up. The only place open was where the plank came out. I don't know where I put my hand, but don't think it was where the timber came out. There was no timber coming out when I was hurt. I was not expected to go up and touch the machine. I knew it would hurt me. I knew it would hurt to put my hand on the moving wheels. I could see the sandpaper running. I did not have to put my hand on the machine in order to take the plank away. The plank might fall on the floor, and I could then pick it up. When I see a wheel turning over, I know it would hurt. I would not have been hurt if I had stood off from the machine, and that was my proper place to stand. The timber was light. I would take two at a time and put them on the truck. It was better to wait

and take two at a time. I don't remember what I leaned against the machine for. I could see, if I put my hand between the rollers, it would get hurt. My hand could not get in the machine if I had not put it in there. I don't know how long it was after I took out the last plank before I was hurt. It was about two minutes, I reckon. I was not hurt while taking out plank and putting it on the truck. I don't remember what I leaned against the machine for. Just never thought of myself, I reckon, and leant up against it. It was a pretty dangerous place where I was working, as the timber would come out and push you backwards if you did not look. I got pushed against the truck that way one time. The distance from the sander to the wall was as far as from me to you (about 12 or 15 feet), and about the same distance from the sander to any other machine. The sandpaper on the rollers was going round as fast as it could. I could see, if I put my hand between the rollers, it would get hurt. If I had stood off where I ought to have stood, I would not have gotten my hand in. I don't think I put it in, but it would not have got in unless I put it in. It was better to stand away from the machine to take the plank out." On redirect examination plaintiff testified: "The plank was nearly the same length and width. One roller ran one way, and another, another. One roller was over the top of the other. I don't remember which roller had the sandpaper on it. I was standing on my feet when I got hurt. I did not get off of the floor. I am five feet high now. I don't know whether I have grown a foot or not."

E. H. Fitzgerald, father of the plaintiff, being sworn, testified for the plaintiff, in substance, that he lived in High Point; that he was father of the plaintiff; that he worked on a farm in the country; that he was not in town the day the plaintiff hired to defendant. And over defendant's objection he testified: That he did not hire the plaintiff to the defendant, and that he knew nothing about it. (Defendant's objection overruled. Exception.) That when he got back the plaintiff was in bed, with his arm dressed. That the doctor came to see him every day for a week or 10 days. That there was an abscess on his arm, from which plaintiff suffered. That plaintiff remained in bed till the first week in March. On cross-examination witness testified that the doctor's bill was paid by defendant.

H. B. Crouch, witness for plaintiff, being duly sworn, testified: That he was working for defendant the day the plaintiff was hurt, and that when he got to the machine the plaintiff had his hand out of the machine. That when he first looked round, on hearing the plaintiff "holler," Albion Sheperd was getting the boy out. "I have worked at sanders. The bed or frame on this sander was 36 inches wide, and 5 feet 9 inches long, and 3 feet and 10 inches high. There were

three sand drums in the machine, and the plank passes over the sand drum, and the rollers above feed the plank through. There are 6 or 8 rollers, which are about 3 inches in diameter. It is 10 inches from where the plank comes out at the end to the top of the machine. The sand drums run towards the front, and the rollers run towards the back, of the machine. From the place where the plank comes out to the floor is three feet. If the plaintiff stuck his hand far enough, it would reach the sand drum." On cross-examination witness testified: "The machine is 36 inches wide, 46 inches high, and 5 feet 9 inches long. If the plaintiff was only 4 feet high at the time he was injured, he could not stand on the floor and reach over and touch the rollers. If you look over the top of the machine, you can see the rollers turning over,—all of them,—if no timber was in the machine. I think the plaintiff would have had to get up on the machine to get to the rollers. Don't think he could stand on the floor and touch any roller that would hurt him. I don't think the plaintiff could stand on the floor and look into the machine. There is no danger in leaning up against this machine. It is about one foot from where plank comes out of the machine to the first roller, and this roller is ten inches from the top of the machine; and, when the plaintiff was standing on the floor, he would have to reach over the top of the machine, and towards the front one foot, and then down towards the floor ten inches, before the roller would be touched. It does not look to me like he could have got his hand in without climbing up. The machine has an iron casting all around it, from bottom to top, and he could not have got his hand in the place where the timber comes out. The sander was ten or fifteen feet from any other machine. All the wheels inside can be seen by looking over the top of the machine. There was no danger about this machine unless you put your hand in it. Boys are generally employed to do such work as the plaintiff was doing, and a boy the size and age of the plaintiff could do it in safety. There is an apron 6 or 8 inches wide projecting out across the end of the machine at a point about 10 inches from the top, so that one could not lean directly up against the casting, on account of this apron. The proper place to stand to tail this machine is about 2 feet from the back. There is no danger from belts in working near this machine, as they are at the front end, and run at an angle of 45 degrees or more." On redirect examination, witness testified: "Boys are employed to do this work because they are cheaper than men." Recross-examination: "If the plaintiff was as much as 4½ feet high when hurt, he could not have stood on the floor and touched a single roller that would have hurt his hand. The rollers next to back of machine do not revolve when there is no timber going through, and I do

not think the plaintiff could have been hurt by a feed roller." Re-redirect examination: "If the plaintiff looked over the top, he could see the feed roller running. The sand drums run all the time. They are about 18 inches in diameter."

From the evidence, it is clear that the defendant had taken every precaution to encase the machinery, and thereby to render it as safe as could reasonably be done to those who were employed about it, and that any danger connected with its operation was fully known and appreciated by the plaintiff. No instruction, therefore, was necessary to be given him. So far as the whole evidence goes, the defendant was not negligent either in the character of the machinery used, in the provision made for protection against harm to its employes, or in its failure to instruct the plaintiff as to any danger connected with his work.

There was testimony given by one of the employes of the defendant that little boys were employed to do the work which the plaintiff was engaged in when he was hurt because their labor was cheaper than that of men. If the writer of this opinion had the power to correct that evil practice and bad example, it would be corrected at once. The employment of children of the age of this plaintiff by manufacturing establishments is revolting to the sensibilities of all generous minds; and the personal injuries which often come to these little sufferers while engaged in such work arouse the sympathies and also the indignation of great numbers of our people,—of those who have children, especially. If the writer was a member of the legislative body, his vote would be to prevent, by stringent enactment, the employment of children under 12 years of age in connection with dangerous machinery. But it is the function of the judiciary—the duty of the court—to expound the laws, not to make them. According to the testimony, the plaintiff, at the age of 9 years, and employed because his labor was cheaper than that of a man, has been maimed for life, and yet we, as a court, in my opinion, can grant him no relief under the laws of the commonwealth.

FURCHES, C. J. I concur in the dissenting opinion.

(131 N. C. 509)

McCLURE v. FELLOWS et al.

(Supreme Court of North Carolina. Dec. 16, 1902.)

COMMENCEMENT OF ACTION—ISSUANCE OF SUMMONS—PUBLICATION—ATTACHMENT.

1. Under Code, § 199, providing for commencement of action by issuance of summons; and section 161, providing that an action is commenced when summons is issued; and section 348, providing that a warrant of attachment may be granted to accompany the sum-

mons, or at any time after the commencement of the action,—the order, by the clerk, of the publication of the summons and notice of attachment, and the actual publication thereof as required by sections 219, 352, do not give jurisdiction, the summons having been merely filled out, and not issued, and issuance not having been waived.

Clark, J., dissenting.

Appeal from superior court, Mitchell county; Hoke, Judge.

Action by W. K. McClure against C. A. Fellows and others. Judgment for plaintiff, and defendants appeal. Reversed.

S. J. Ervin, for appellants. J. T. Perkins, for appellee.

COOK, J. The defendants entered a special appearance, and moved to vacate the attachment and dismiss the action upon the ground that no summons had issued, and that the levy of the attachment was void, and of no effect. His honor overruled the motion, and defendants excepted and appealed.

From the facts agreed it appears that the summons was filled out and signed by the clerk, but never issued to the sheriff, or to any one for him, but remained in the office of the clerk. An order of publication of the summons and of the warrant of attachment was duly signed by the clerk, and the same was duly published. So the question raised by defendant's exception for our decision is, did the publication pursuant to the order of the clerk dispense with the issuing of the summons? There are only two ways by which a civil action may be commenced; (1) By issuing a summons (Code, § 199); (2) by submitting a controversy without action (Id. § 567). When the former method is resorted to, the action is commenced when the summons is issued (section 161), and not until that is done. But, if the defendant sees proper to do so, he may appear without a summons, and thereby waive its issuance. *Moore v. Railroad Co.*, 67 N. C. 209; *Middleton v. Duffy*, 73 N. C. 72; *Etheridge v. Woodley*, 83 N. C. 11; *Fleming v. Patterson*, 99 N. C. 404, 6 S. E. 396. However, no such waiver was made in this case. The summons was not issued. It did not pass from the hands of the clerk. It was never delivered to the sheriff, nor to any one for him, expressly or impliedly. Therefore it was never issued. *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912 (at page 471, 116 N. C., and at page 912, 21 S. E.). It was in process of issuance, and, had it been delivered to the sheriff, or to some one for him, its issuance would have then become complete, and been in force and of effect from the time of the filling out and dating by the clerk. The plaintiff contends that the order, by the clerk, of the publication of the summons and notice of attachment, and the actual publication thereof as required by statute (Code, §§ 219, 352), dispensed with the formality of issuing a summons to the sheriff, who would have (know-

¶ 1. See Attachment, vol. 5, Cent. Dig. §§ 338, 678.

ing the defendants to be nonresidents, and not within his county) to make a return of non est inventus, and that the defendants were in no way prejudiced by the fact that the summons was not issued from the clerk's office; that as full and actual notice was given to defendants by the publication when and where to come and defend their property as if the summons had in fact been issued; that the court acquired jurisdiction of the property levied upon under such order and publication, and that it would have been useless for the clerk to have handed to the sheriff the summons for him to enter thereon, "Not to be found in North Carolina after due search," and then to hand it back to the clerk, when the fact that defendants were not residents and could not be found in the state already appeared to the court by affidavit. This contention cannot be sustained, for it is contrary to the express requirements of the Code and the rulings of this court. Attachment is a provisional or auxiliary remedy, and derives its life and support from the action, which can exist only when constituted in one of the ways above stated. So, there being no summons to support the action, and no waiver of the same, all proceedings had were not only irregular, but void. *Marsh v. Williams*, 63 N. C. 371 (at page 373). The service attempted to be made by publication was a nullity, for no summons had been issued, and therefore none could be served. The warrant of attachment may be granted to accompany the summons, or at any time after the commencement of the action (Code, § 348), but not before. Here the attachment issued, but no summons. So it was void, and of no effect. *Marsh v. Williams*, *supra*.

Error.

FURCHES, C. J. After full consideration, I regret that I feel it my duty to concur in the opinion of the court written by Justice COOK, as it necessarily overrules the case of *Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923, an opinion in which I concurred. I agree with Justice CLARK that *Best v. Mortgage Co.* fully sustains the plaintiff's contentions, and under that decision the plaintiff's action should be sustained. But that case is in direct conflict with *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912, and *Marsh v. Williams*, 63 N. C. 371, and cannot stand, if they stand. They cannot stand together. *Best v. Mortgage Co.* is wrong, or *Webster v. Sharpe* and *Marsh v. Williams* are wrong. As this is so, I feel it my duty to agree with that opinion which seems to me to be sustained by reason and the necessary construction of statutes. The Code has abolished attachments as original actions, and made them only ancillary remedies, given in an action then subsisting. *Marsh v. Williams*, *supra*. And all actions must be commenced by issuing a summons (except in one instance, pointed out in the opinion of

the court). The issuance of a summons is more than simply filling it out. It must be issued as well. *Webster v. Sharpe*, cited in *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476. I am therefore satisfied that the opinion of the court (by Justice COOK) is sustained by reason, principle, the statutes, and the authorities cited, and that *Best v. Mortgage Co.* is not. It is said this objection is only technical, and it makes no difference whether the summons was issued or not; that, if it had been issued, it could never have been served, as the court had evidence before it that the defendant was a nonresident. If it be admitted that the defendant was a nonresident, still he might have been in the county, and liable to be served. But if it be conceded that the issuance of the summons in this case was technical, still it was fundamental in constituting the action in court, and must be observed. The action in *Marsh v. Williams* was dismissed for the reason that no summons had been issued. And, in my opinion, when the court finds that it has committed an error, and thereby brought its own opinions in conflict with each other, the sooner it is corrected the better, unless the opinion has become what is called *stare decisis*, and a rule of property.

DOUGLAS, J. I concur in the opinion of the court as delivered by Justice COOK upon the express words of the statute. Section 199 of the Code provides that "civil actions shall be commenced by issuing a summons." Section 218 simply provides for service of the summons by publication. It does not pretend to do away with the issuing of the summons, nor does it provide that the publication shall take the place of the summons. There can be no service of the summons unless there is an existing summons to be served. This, I think, clearly appears from section 219, which prescribes how the summons shall be served by publication, and ends with the following provision: "And no publication of the summons, nor mailing of the summons and complaint, shall be deemed necessary." It does not say that no issuing of the summons shall be necessary, and yet it could just as easily have said so if such had been the intention of the legislature. I think there is a material difference between this case and *Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923. That case holds (Syl. 2) that: "The Code (section 218) does not require the issuing and *return of summons not served* as a basis for publication of summons." The italics are mine, and emphasize the effective words of the decision. There may be some unguarded expressions in the opinion, but these must be construed with regard to the facts of the case.

CLARK, J. (dissenting). The appellee not having filed a brief, as required by rule 36 (as amended at this term), we could not permit oral argument by him, and hence were

without the benefit of hearing from that side. The rule requiring printed briefs experience has demonstrated to be an absolute necessity for the careful consideration and dispatch of the steadily increasing volume of business in this court, and must be strictly and impartially adhered to. Notice has long been given that the court would be forced to adopt such rule, which we believe is in force in the highest courts of all our sister states. Fortunately for appellee, however, the only point presented on this appeal has been recently and clearly decided by this court in an opinion (*Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923), which was followed by the judge below. It having been made to "appear to the satisfaction of the court" by affidavit that the defendants were nonresidents of the state, that a cause of action existed against them, and that after due diligence they could not be found in the state, service was ordered to be made by publication as provided, on that state of facts, by Code, § 218. That section does not require that nonresidence should be made to appear by issuance to the sheriff and a return "Not to be found in my county," but requires that it shall appear "by affidavit to the satisfaction of the court that he cannot be found within the state," which course was followed in this case. It appears from the "facts agreed" that this "action was begun by publication of summons returnable to April term, 1899, Mitchell superior court"; that "the affidavits for attachment and publication were in due form, and sufficient in form under the laws of North Carolina for the purposes for which they were intended, to wit, to procure an order for the publication of summons and the issuance of attachments." It further appears in detail by the case agreed that the attachment of property and publication and affidavits and every step required in such proceedings were regular from start to the return term, save that the defendants contend that there was no summons issued in said case; and this is a motion at that term to dismiss the action and dissolve the attachment on that ground. The authorities and the statute are, of course, uniform that an attachment is ancillary, and can only be granted when there is an action pending,—that is, begun by issuing a summons. *Marsh v. Williams*, 63 N. C. 171. There was a regular summons in this case, and it was regularly served by publication, instead of by personal service, since the latter could not be had, the defendants being nonresidents, and it appearing to the court "by affidavit to the satisfaction of the court" (as the statute requires) that, "after due diligence, defendants could not be found in this state." Why, then, issue thereafter a summons to the sheriff? The statute does not require it, and the precedents say it is not necessary, and nothing could be accomplished by doing so. The summons in such case is "issued" when it is ordered to be published, and is sent to the printer to be

served by publication, as truly as when it is handed to the sheriff to be served personally. The "service is by publication," and that was regularly had, and jurisdiction was obtained by attachment of the property, and that was also regularly had in this case. The cases of *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699, and *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912, relied on by defendants, hold merely that, as to the statute of limitations, the summons is "issued" in cases where there is personal service, when it leaves the clerk's office to be handed to the sheriff. They do not hold that that is the only mode of "issuance" of summons. On the contrary, when the service is to be by publication, the summons is issued when it leaves the clerk's office to be served in that way. In both cases the actual service is later in publication at the end of the prescribed time, and in personal service when the defendant is found and served by reading the summons to him and leaving him a copy. In the late case of *Best v. Mortgage Co.*, 128 N. C. 353, 38 S. E. 923, this identical point was decided by a unanimous court, after full consideration, and it is said: "The Code (section 218) does not require the issuance and return of summons not served as a basis of publication of summons. It provides merely, 'Where the person on whom service of summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit, to the satisfaction of the court,' etc., then an order for publication of summons may be made." And it is also said in the same: "As the affidavit then filed sets forth that the defendant was a nonresident and that fact is not denied, it could have served no purpose to have issued a summons merely to be returned with an indorsement of the fact of nonservice by reason of nonresidence of defendant." The statute requires such fact to be shown "by affidavit to the satisfaction of the court," and not by such perfunctory presumption as that the defendant is a nonresident of the state, because the sheriff may return "Not to be found in my county," when there are 96 other counties in the state. The statute is more just to the defendant, and was strictly followed in this case. Our precedent, above cited, is not only recent, by a unanimous court, and directly in point, but it is supported by the rulings in other states exactly "on all fours." *Bannister v. Carroll*, 43 Kan. 64, 22 Pac. 1012; *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487; *Green v. Green*, 7 Ind. 113; *Wood v. Bissell*, 108 Ind. 229, 9 N. E. 425; *Mills v. Corbett*, 8 How. Prac. 500; *Bank v. Richardson*, 34 Or. 536, 54 Pac. 359, 75 Am. St. Rep. 664; *Goodale v. Coffee*, 24 Or. 354, 33 Pac. 990; *Easton v. Childs*, 67 Minn. 242, 69 N. W. 903; *Hoffman v. Brungs*, 83 Ky. 400; and there are many others. In equity a subpoena was not necessary when nonresidence was made to appear by affidavit and publication was made. *Erwin v. Ferguson*, 5 Ala. 167. The

law presumes that every man is in possession of his property, either in person or by some agent, and that the actual levy and seizure of the property will give him notice of the attachment or seizure, and the publication of the summons is for the sole purpose of notifying him when and where he may come and defend his property. *Cooper v. Reynolds*, 10 Wall. 309, 19 L. Ed. 931; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

The defendant further objects that this attachment was not at that time indexed on the judgment docket, as required by chapter 435, Laws 1895. That is not a pertinent objection on this motion, and can only arise on a contest for priority of liens between creditors.

(131 N. C. 533)

GREEN v. GREEN.

(Supreme Court of North Carolina. Dec. 18, 1902.)

DIVORCE FROM BED AND BOARD—INDIGNITIES—EVIDENCE.

1. A divorce from bed and board, under Code, § 1286, for indignities to the wife, rendering her condition intolerable and life burdensome, is warranted, where the husband, without cause, denied the paternity of her children, withdrew all marital intercourse from her, cursed her, and struck at her.

2. In an action for divorce from bed and board for indignities, evidence of an indignity within six months of the bringing of the action should be excluded.

Appeal from superior court, Jackson county; Justice, Judge.

Action by Maggie V. Green against John A. Green. Judgment for defendant. Plaintiff appeals. Reversed.

Walter E. Moore, for appellant. Coleman C. Cowan, for appellee.

CLARK, J. This is an action for divorce from bed and board. The complaint alleges, in substance: That on or about September 4, 1900, the defendant cursed and abused the plaintiff, drawing back his fists to strike her, which plaintiff avoided by stepping back, and told her to leave his house; that he did not respect or love her; and this in the presence of a neighbor,—and states her conduct, to show that she did not provoke it. That the defendant was jealous, and if she spoke to any man or went to any neighbor's house, the defendant would get mad, and would not speak to her for several days, and that she did nothing to cause jealousy; stating her conduct. That for at least six months prior to September 4, 1900, the day the plaintiff was driven from the defendant's house, he had slept in the storehouse, and refused to stay in the dwelling house and sleep with this affiant, though she had often begged him so to do, and had withdrawn during that time all marital intercourse from the plaintiff, and had denied his

being father of their children, whereupon she avers that such indignities have rendered her condition intolerable and life burdensome. Code, § 1286. The plaintiff testified that she was 25 years old, and the defendant 59; that they had been married 6 years, and had two children,—and testified somewhat more in detail to the state of facts above set out, and introduced, without objection, a long letter from the defendant written in November, 1900, soon after the separation, in which, among other insulting things, he repeats that the children were not his, and charges that they were begotten by the plaintiff's uncle. Upon demurrer to the evidence, the court gave judgment of nonsuit. In this there was error. In *Coble v. Coble*, 55 N. C. 392, it is said that it is not necessary that, to render the plaintiff's condition intolerable and life burdensome, there should be a striking or even a touching of the body, but foul and unjust accusations, often repeated, with a withdrawal of intercourse and refusing to bed with his wife, and (in that case) threats of deadly violence, were sufficient. Here we have all these except the last, and in addition we have here the offer to strike, and the express charge of the illegitimacy of the children. Would it be reasonable, should these facts be sustained by a verdict, to compel the plaintiff to again bed and board with the defendant, by refusing a judicial separation and alimony for her support? The defendant, according to the allegation and evidence, has already given himself such separation from bed and board, by abandoning the plaintiff, living separate and apart from her, and refusing conjugal relations, and, it appears, is defending this action simply to avoid contributing to her support. In *Erwin v. Erwin*, 57 N. C. 82, the facts were almost identical with those in this case. The complaint states the circumstances specifically, giving time and place, as required (*Martin v. Martin*, 130 N. C. 27, 40 S. E. 822, and *Ladd v. Ladd*, 121 N. C. 118, 23 S. E. 190, and numerous cases cited therein); also, specifically, her conduct on the occasions referred to, that it may be seen that her allegation that there was "no provocation on her part" was not a conclusion of law or fact drawn by herself. *Jackson v. Jackson*, 105 N. C., at page 438, 11 S. E. 175, and cases there cited, and *O'Connor v. O'Connor*, 109 N. C. 139, 13 S. E. 887. The answer denies the allegations of the complaint, but sets up no counter allegations of conduct on the part of the plaintiff in bar to a divorce notwithstanding the complaint.

The letter of November, 1900, it is true, was written within six months of bringing the action, and, it may be (which we do not decide), should have been ruled out if excepted to; but it was only a reiteration of what was already in evidence, save the charge that the plaintiff's uncle was specifically named as the father of the children, whose paternity he had before disclaimed, according to the

¶ 1. See *Divorce*, vol. 17, Cent. Dig. §§ 86, 94.

plaintiff's evidence. This additional indignity, having been within six months before action brought, was clearly incompetent, and that part of the letter should have been excluded by the court *ex mero motu*; but in withholding the case from the jury there was error.

(131 N. C. 586)

HENRY v. McCOY et al.

(Supreme Court of North Carolina. Dec. 20, 1902.)

GRANT FROM STATE—FRAUD—RIGHT OF JUNIOR GRANTEE.

1. When land was regularly entered, and the person making the entry died before payment for or taking out a grant of the land, but within the time required by Code, § 2780, payment was made by the sister of the deceased enterer, and a grant was made in his name, as permitted by the statute, a subsequent grantee of the same land, who made his entry after the first entry, but prior to the first grant, could not contest the validity of the first grant on the ground that fraud was practiced on the state by the sister of the first enterer, or on the ground that the surveyor and chain carriers were not qualified and sworn, since Code, § 2786, authorizing suits by any party aggrieved by the issuance of a patent by the state, obtained by false suggestions, etc., applies only to prior grantees, no others being "aggrieved parties."

Appeal from superior court, Macon county; Justice, Judge.

Action by J. S. Henry against William McCoy and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Horn & Mann, for appellant.

MONTGOMERY, J. It appears from the complaint that on the 1st day of April, 1899, H. H. McCoy entered in the entry taker's office of Macon county a tract of land; that he died in 1899, without having paid the state, and without having taken out a grant for the land; that within the time required by the statute his sister, Perlle McCoy, on the 31st of December, 1901, paid for the land entered by her brother, and procured a grant from the state to be made out in his name. It appears further in the complaint that the plaintiff, J. S. Henry, on the 8th of September, 1900, entered in the same office the same tract of land, and on the 14th of March, 1892, obtained a grant from the state for the same. This action was brought by the plaintiff against the defendants, who are heirs at law of H. H. McCoy, to have the grant issued to H. H. McCoy declared void, and for possession of the tract of land. The grounds assigned by the plaintiff for his action are fraud on the part of Perlle McCoy in procuring the warrant, and that Ammons, who made the survey for McCoy, was not the surveyor, and was neither bonded nor sworn; that he was not a deputy surveyor, and that the chain carriers were not sworn. There was a demurrer to the complaint, in the following words: "(1) That plaintiff's

complaint does not state a cause of action. (2) That from said complaint it appears that the defendants have the oldest grant, as well as the oldest entry, for the land described in the complaint. (3) For that a state grant cannot be attacked for the reasons, or any of the reasons, mentioned in said complaint. (4) That said complaint fails to show where in any fraud was practiced on plaintiff by defendants." His honor sustained the demurrer, and the plaintiff appealed.

We see no error in the ruling. The defendants have the oldest grant. The entry was regularly made, and within the time allowed by law. The price of the land was paid by the sister of H. H. McCoy, who was then dead, and the grant made in the name of the deceased enterer, which was the proper course. Code, § 2780. The plaintiff made his entry of the land before the grant was issued to McCoy, but he did not procure his grant until after the McCoy grant had been issued. If there was any fraud practiced by Perlle McCoy upon any one, it was upon the state, and not upon the plaintiff. If Ammons was not the surveyor duly sworn and qualified, or if the chain carriers were not sworn, they are matters that the plaintiff cannot complain of, he being a junior grantee. This action was brought under section 2786 of the Code. In *Carter v. White*, 101 N. C. 33, 7 S. E. 474, the action was brought under the same statute. The court said there: "In the construction of the statute, it is held that the remedy is open only to the senior against a junior grantee, inasmuch as none can be aggrieved unless he has an interest in the subject-matter of the obnoxious grant when it issued, which a junior grantee has not, and the purpose is to remove a cloud overshadowing a previously acquired title. This question was before the court for the first time in *Crow v. Holland*, 15 N. C. 417. In that case the court said: "Did the legislature, when it passed the act of 1798 (section 2786 of the Code), suppose that a junior patentee could be aggrieved because the state had been imposed on or defrauded by an elder patentee? Was not the tenth section enacted for the benefit of those persons who held patents from the king, lord proprietors, or the state, and should be aggrieved by their titles being clouded or endangered by a color of title which might be set up under a junior grant for the same land, obtained since the 4th day of July, 1776?" The court then cited numerous authorities from the English and American courts to the effect that a junior patentee could not be aggrieved because the state had been imposed on or defrauded by an elder patentee, and concluded the opinion by saying: "Considering these authorities as decisive; satisfied that it is the established rule of the common law that no one is prejudiced by the king's grant but he who had a prior grant for, or an ancient vested right in, the same thing; that no other subject could have a *scire facias* to repeal

king's grant; that in all other cases the scire facias must be brought by the king, jure regio, himself, to repeal his own grant,—it seems to us demonstrable, on examining the whole act of 1798, that this broad, ancient, wise, and well-established distinction is observed and kept up by the general assembly." The remedy is for the state, when the state has been defrauded, and a scire facias may also be sued out by an individual when such individual is aggrieved. To the same effect is the case of *Ray v. Castle*, 79 N. C. 580.

No error.

CLARK, J. (concurring). In *Crow v. Holland*, 15 N. C. 417, it is held that a grant can only be set aside at the suit of the state (see Code, § 2788), or of a prior grantee (see Code, § 2786). In the present case the court merely holds that a grant cannot be set aside at the suit of a junior grantee on the ground of fraud practiced on the state; citing *Carter v. White*, 101 N. C. 33, 7 S. E. 473. But as the plaintiff cites and relies upon *State v. Bland*, 123 N. C. 739, 81 S. E. 475, it is well to note that that case has no bearing here. It held that since Code, § 177, "requiring all actions to be brought by the party in interest," Code, § 2788, authorizing the state to bring actions to annul grants, applies "only to those cases in which, upon the cancellation, the title to the realty would revert in the state, which is thus the party in interest," which was the case in *State v. Bevers*, 86 N. C. 588, which is cited. It is further said: "If this were not so, parties contesting the validity of grants alleged to be junior could overwhelm the state with costs of litigation in which it has no interest." In that case, accordingly, it being "averred in the complaint and admitted by the demurrer that the state has no interest in the land," but that the action was brought for the benefit of the senior grantee, the court held that he, having a right to bring a direct action under Code, § 2786, "should have sought it at his own cost and charges, as required by Code, § 177," and dismissed the action which had been brought by the state. There is nothing therein contained which tends to support the plaintiff's contention that a junior grantee can maintain an action to set aside a senior grant for fraud practiced on the state.

DOUGLAS, J., concurs in result.

(131 N. C. 505)

BOND et al. v. WILSON.

(Supreme Court of North Carolina. Dec. 16, 1902.)

BILLS AND NOTES—LIMITATIONS—INDORSEMENT OF PAYMENTS—EVIDENCE—TRIAL—VERDICT—CORRECTION.

1. Where, in an action on notes, the jury allowed defendant certain credits, not indorsed, but the verdict omitted to mention the dates the credits should bear, it was not error for the

court to direct the jury to retire and find the dates of the credits.

2. Where plaintiff's agent had indorsed certain payments on defendant's notes to plaintiff, and had also acted as agent for defendant in the sale of certain real estate, the proceeds of which the agent had held, a letter written by defendant to the agent, referring to an account, and showing credits entered on the note, was admissible to show that payments indorsed by the agent were by defendant's authority, and to rebut defendant's plea of limitations.

Appeal from superior court, Burke county; Council, Judge.

Action by Lou N. Bond and others against James W. Wilson. From a judgment in favor of plaintiffs, both parties appeal. Affirmed.

John. T. Perkins, A. C. Avery, and E. J. Justice, for plaintiffs. Thomas N. Hill and Avery & Ervin, for defendant.

Plaintiffs' Appeal.

MONTGOMERY, J. The defendant claimed several credits on account of payments made by him upon the notes sued on, but which were not indorsed upon the notes themselves. One was for the amount of \$800, which the defendant averred he had paid for a mill wheel at the request of the agent of the plaintiffs; and another was for the amount of \$240, freight bill on the wheel. When the jury brought in the verdict, and it was read by direction of the court, it was seen that, while the jury had allowed the two credits, they had omitted to mention the dates the credits should bear, whereupon his honor directed the jury to retire and state in writing the date upon which the payment of the \$1,040 for the mill wheel and freight should be entered. They returned with their verdict, finding the credit as of the 1st of January, 1876. The plaintiffs excepted to the direction of the court requiring the jury to amend their verdict, insisting that "the verdict as at first rendered was, in contemplation of the law, a finding by the jury that the said \$1,040 should be credited as of the first day of the term; that, instead of that, the court interfered with the province of the jury and the rights of the parties, in violation of the law, in directing a finding of a specific time for entering said credit." We are unable to see any just ground for complaint on the part of the plaintiffs in the particular mentioned. It was an imperfect verdict as at first rendered, but the finding of the date of the payment made it complete, and in no sense was it contradictory. It was the proper thing to have done, as well as the just thing, if the verdict was right in the first instance. Juries are constituted for the very purpose of finding the material facts in a case, and, when the court discovers a failure on their part to find all of the material facts, it can direct the jury to retire and amend the verdict. In *Wright v. Hemphill*, 81 N. C. 33, the jury returned their verdict to the clerk, and had separated for the night, and, upon his honor coming

upon the bench in the morning, he ordered Tate to retire and complete their verdict. That was an action for the recovery of personal property, and the verdict, as handed to the clerk, fixed the property in the defendant, but there was an omission to find the value of the property and assess the damages for detention. There the court said: "It is always proper for the judge, when the jury return their verdict in open court, to see that it is responsive to every material issue of fact submitted to them, and, if it be not so, to refuse to receive it, and direct a jury to retire and make up and bring in a complete verdict." In *Willoughby v. Threadgill*, 72 N. C. 438, the jury returned a verdict to the clerk at dinner recess in favor of the plaintiff for a sum certain, without interest. When his honor resumed his sitting, the verdict as rendered and entered by the clerk was brought to his attention; and, the jury being in the courtroom, his honor directed them to take their places, and, after instructing them in the law as to the rule of interest, asked them to retire and to amend their verdict according to his instructions. That course was approved by this court. Of course, as was said in that case, such a course would not be admissible in criminal actions. The other exceptions are without merit.

No error.

CLARK, J., did not sit on the hearing of this appeal.

Defendant's Appeal.

MONTGOMERY, J. This case is exactly like it stood when it was here before (129 N. C. 387, 40 S. E. 182), except that the plaintiffs offered in evidence a certain letter written by the defendant to Samuel McD. Tate after the commencement of this suit, bearing on the question of the alleged payments made by the defendant on the notes sued on, in addition to the evidence on that point at the first hearing. The letter, dated at Raleigh, January 18, 1897, is in the following words and figures:

"When at home, wd. have called to see you, but was too unwell. I find the bonds are largely overpaid. Had no idea of the payments made by you, except the first, and did not know how much it was. Is there anything you could possibly hold onto until it is adjudicated?"

My books show cash pd. for Walton	
House	\$2,800
Credited by and paid at sale \$	644 56
Credited by amt. entered on	
notes	509 94
Credited by	154 90
Credited by	310 03
Credited by	258 21

\$1,877 58"

The above was an account between Tate and Wilson (the defendant) of a fund in the hands of Tate belonging to Wilson, the proceeds of the sale of a piece of real estate in

Morganton. The second credit given to Tate, of \$509.94, Wilson admitted was placed by Tate on Wilson's notes due to the plaintiffs by direction of Wilson. That credit was made on the 3d of June, 1884, on the \$3,000. The third credit of \$154.90 was made, by direction of Wilson, by Tate on the \$2,000 note on August 12, 1884. The fourth amount, \$310.03, is indorsed as a credit on the \$3,000 on September 11, 1890; and the fifth amount, \$258.21, is indorsed as a credit on the \$2,000 note in August, 1883. The last two amounts, if entered on the bonds by Tate with the authority of the defendant, defeat the defendant's plea of the statute of limitations. Considering the business relations between Tate and Wilson, we are inclined to the opinion that the letter was some evidence to be submitted to the jury of the payments. Several years had elapsed between the sale of the Walton property by Tate for the defendant, and the entries made by Tate (they were in his handwriting) on the notes; and even up to the letter, written in 1897, no protest had been made against the disposition of the fund in Tate's hands, or inquiry made of the fund. The evidence was submitted to the jury under proper instruction by his honor, together with that of the defendant, and the weight of it was for them. It was more than a scintilla or suspicion. The instruction prayed for by defendant, that the notes were barred by the statute of limitations, on the evidence, was properly refused.

No error.

CLARK, J., did not sit on the hearing of this appeal.

(131 N. C. 491)

JOHNSTON et al. v. CASE et al.

(Supreme Court of North Carolina. Dec. 16, 1902.)

EXECUTION SALE—MIXED EQUITABLE ESTATE—ADVERSE POSSESSION—INTERRUPTION—EXTENT.

1. An owner of land made a mortgage deed thereof to another party, who subsequently conveyed the land to H. Held, that a sale of the land on an execution against H. passed no title.

2. A party claiming title to land by adverse possession cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title.

3. Possession by any one of several tenants in common of land would be sufficient to defeat the claim of adverse possession of the land by a third party.

4. Possession of land under color of title, so as to ripen into title by adverse possession, only extends to the boundaries marked by the color, and they cannot be enlarged so as to extend the color of title by showing what was intended to be conveyed.

Clark, J., dissenting.

Appeal from superior court, Buncombe county; M. H. Justice, Judge.

Ejectment by Thos D. Johnston and oth-

¶ 2. See *Adverse Possession*, vol. 1, Cent. Dig. § 214.

ers against Jesse Case and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Jones & Jones and Reed & Van Winkle, for appellants. Merrimon & Merrimon and G. A. Shuford, for appellees.

FURCHES, C. J. This is an action of ejectment, and it is alleged by the plaintiffs and admitted by the defendants that James Case, the ancestor of the defendants, at one time was the owner of the land in controversy; and the plaintiff undertook to show that he had acquired the title of James Case, and is now the owner of the land. He undertook to do this by a mortgage deed from James Case to William Case, dated December 24, 1850; a deed from William Case to W. L. Henry, dated March 15, 1855; a deed from Sumner, sheriff, to George Brooks, dated September 11, 1869; a deed dated the 13th November, 1882, from parties claiming to be the heirs of George Brooks, to Samuel Brooks; a deed of trust from Samuel Brooks and wife to H. B. Stevens, dated February 4, 1893; and a deed from H. B. Stevens, trustee, to Thos. D. Johnston, the plaintiff, dated April 8, 1896. And the plaintiff further claims that, if he has failed to show that in this way he has acquired the title of James Case to the land in controversy, then by color of title and adverse possession; that he has shown color of title to said land and such adverse possession as to ripen into title, and that he is entitled to recover on that account. During the progress of the trial the defendants noted many exceptions, as appear of record, and, upon judgment being rendered against them, they appealed.

We do not propose to consider all the exceptions taken, but only such of them as are necessary to a disposition of the case on appeal. The court properly held, and instructed the jury, that no title passed to George Brooks by the sale and deed of Sheriff Sumner. *Sprinkle v. Martin*, 66 N. C. 55. This being so, all the evidence offered for the purpose of tracing the title from James Case to W. L. Henry, and all the conversations alleged to have taken place between James Case and said Henry, or any one else, as to whether he held under Henry, and as his being Henry's tenant, were irrelevant, incompetent, and improperly allowed as evidence. It may not have appeared to be so when it was offered, as the case may not have been sufficiently developed at that time to show its irrelevancy. But if this were so, when it appeared that the sheriff's deed conveyed no title, as he was attempting to sell a mixed equitable estate (as in *Sprinkle v. Martin*, supra), he should have excluded it, and should have so charged the jury. This he did not do, but erroneously charged the jury, if they found that James Case ever held under W. L. Henry, the plaintiff would be entitled to have counted such time so

held by him as adverse possession. This was error. The plaintiff could only have had the benefit of such adverse possession of those who held under him, or those under whom he derived his title. And, as he derived no title from Henry, he could not have the benefit of Henry's possession, nor of any one holding possession under him. If there was such holding under Henry, it would tend to strengthen Henry's title; but the plaintiff does not connect himself with Henry, and gets no support from any title Henry may have had. The plaintiff must recover upon the strength of his own title, and it would be as fatal to his action to show that the title is in Henry as it would be to show that it was in the defendants, as the plaintiff has failed to connect himself with Henry's title. The plaintiff having failed to connect his title with that of Henry, the defendants are entirely disconnected with the plaintiff's title, if he has any, and free from any estoppel on account of their being the heirs at law of James Case. That may have existed as between them and Henry's title, but not between them and the plaintiff's title. And the court erred in charging the jury that the defendants, who were *femes covert*, or infants, were estopped and barred by adverse possession, the same as if they were *femes sole*, or of full age.

The plaintiff being unable to connect himself with the Henry title (if he had one), or any other title derived from James Case, the common source of title, he must fail unless he can recover upon color of title and adverse possession. And, as the defendants are the heirs at law of James Case, they are tenants in common, and the possession of any one of them would be sufficient to exclude the claim of adverse possession on the part of the plaintiff if they have been in possession, and have not agreed to hold under the plaintiff, or those under whom he claims, since the date of the sheriff's deed. But color of title is not title. It is only a shadow, and not a substance. But for the purpose of quieting titles, and to prevent litigation about state claims, the law has provided that, where one enters into the open, notorious possession of land under color of title,—this shadow,—and remains continuously in said adverse possession for seven years claiming it as his own, the law will protect such possession; that such long possession under color of title, in the eyes of the law, ripens such color into title. But that shadow or color only extends to the boundaries marked by the color,—the deed,—and can extend no further, though they may be circumscribed, as they will not even cross another line unless there is actual possession across that line, or "lappage," as it is called. And if there is a general description, and also a particular description or boundary lines, they will control, and the general designation will only be considered for the purpose of identifying the land. This is so where the land is

actually conveyed, and the title passed under the deed. *Midgett v. Twiford*, 120 N. C. 4, 26 S. E. 626. And certainly it must be so where the deed is not a title, but only a color of title. *Smith v. Fite*, 92 N. C. 319.

The paper writing without a seal, called a "deed," dated as of 1869, but written in December, 1887, as contended, and not denied, and registered on the 8th of December, 1887, was improperly admitted in evidence. It was not a deed, and conveyed nothing. *Patterson v. Galliher*, 122 N. C. 511, 29 S. E. 773. And, if it was color of title,—and we do not think it was,—it should not have been allowed in evidence, as it was to W. L. Henry, with whose title (if he had any) the plaintiff's chain of color had no connection, if he ever had any; and, if any one could have gotten any benefit from this paper, it would be the W. L. Henry estate, which has no connection with the plaintiff's chain of colorable title or deeds. As we have stated, the benefit of possession for the purpose of ripening title can only be claimed when it is held by or under the plaintiff, the party claiming its benefit, or those under whom they claim; and, as we have also stated, to establish Henry's title (if that could be done) would be to defeat the plaintiff's action. But this paper was not a deed. Its registration was not authorized, and it could amount to no more than an unauthorized statement of William Case, not under oath, and should not have been admitted in evidence. But if it had been proved in such a way as to have been admissible in evidence (if that could have been done), it could not have the effect to enlarge the lines of the plaintiff's color. The deeds of the plaintiff did not convey the title,—indeed, they conveyed nothing; and he now claims it by color and adverse possession. This color only extends to the boundary lines, and they cannot be enlarged so as to change the color by showing what was intended to be conveyed. It is the color and adverse possession that gives title. But we will not discuss this matter further, as we have shown that this paper has nothing to do with the plaintiff's claim of title or color of title.

There was error in the respects pointed out in this opinion, for which the defendants are entitled to a new trial.

OLARK, J. (dissenting). The deed from Sheriff Sumner to George Brooks (1869) has been before this court, and has been expressly adjudged to be color of title. *Manufacturing Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456. The plaintiffs and those under whom they claim have been in continuous possession thereunder until the intrusion of the defendants upon the locus in quo recently. The title of the plaintiffs needs no strengthening. The alleged defect is as to the boundaries. Tract No. 2 conveyed in said deed is described as "a tract lying on both sides of Bent creek, and beginning on a maple tree, and runs

west 100 poles to a small chestnut tree; thence west ten poles to a stake; thence east 100 poles to a stake; thence north 100 poles to the beginning,—containing 100 acres, more or less." A description "100 poles west to a stake, thence 10 poles west to a stake, thence 100 poles east to a stake," is palpably an error, and the surveyor testified that such boundaries would not connect, of course. The court thereon charged correctly: "In arriving at the boundary of a tract of land, when you come to consider all the evidence, if you are satisfied that a mistake has been made in the call of a deed from all the evidence, then it will be your duty to correct that mistake. For instance, if the call of the deed is for 'north,' when it is manifest that it ought to be 'south,' it is the duty of the jury to correct the mistake, and run south; and so with any other call as to course and distance. It is the duty of the plaintiff to satisfy you, when he claims under color of title, not only of his possession, but of the extent of his possession; and the deed is the evidence of the extent of that possession there as it is written in the face of it, or as the same may be corrected upon the evidence, in accordance with the principles I have already laid down to you." This charge is fully sustained by *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256, and cases there cited. The evidence here relied upon to correct these boundaries is the following: In the above deed from Sumner, sheriff, to Brooks (1869), there is, besides the above defective description (which, being specific, would control, were it not defective), this further description, "Being the land sold by William Case to W. L. Henry." The specific description being unintelligible, and plainly deficient, we can clearly resort to the boundaries of said tract as set out in the deed from Case to Henry, which are thus referred to and made a part of a conveyance from Sumner, sheriff, to Brooks. This does not make the deed of Case to Henry any part of the plaintiffs' chain of title, but the reference thereto incorporates the boundaries therein into Sumner's deed to Brooks. "Id certum est quod certum reddi potest." If Case's deed to Henry had been registered, there would be no trouble, but, being lost, it was competent for any one who knew the boundaries to testify what they were. The said deed from Case to Henry having been lost, William Case, the grantor therein, re-executed the same, adding the following memorandum: "The above is a duplicate of a deed heretofore executed by me to William L. Henry and his heirs for the said lands, which deed was lost before it was registered. This is a duplicate of the same tenor and date (15 May, 1855), as near as I can make it. Wm. Case." This deed was duly probated and registered in 1887, and is set up by defendants' answer. Upon the above evidence his honor charged: "If you find that the deed from William Case to W. L. Henry was made

and executed in 1855, and that the deed that has been introduced as a true copy or duplicate is a deed of re-execution of the boundaries contained in the deed of 1855, then the description in the deed from Case to Henry would be incorporated in the deed from Sumner, sheriff, to Brooks. It is the duty of the plaintiffs to satisfy you that this is the deed, or a duplicate of the deed, of 1855, before you can incorporate the boundaries in the sheriff's deed." This is supported by *Hemphill v. Annis*, 119 N. C. 516, 26 S. E. 152; *Bulliss v. McAdams*, 108 N. C. 511, 18 S. E. 162; *Farmer v. Batts*, 83 N. C. 87; *Cox v. Hart*, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. Ed. 741. Now that, since the act of 1885, a deed is not color of title till registered, the reference in a deed to boundaries contained in an unregistered deed of course cannot be incorporated into the registered deed by such reference. But in 1869, when the deed of Sumner, sheriff, to Brooks, was executed, an unregistered deed was color of title, and therefore a reference to boundaries in such unregistered deed could be made part of a subsequent conveyance of the same land. It was incumbent upon the plaintiffs to satisfy the jury that such were the boundaries in the lost deed. It is not a question of title, but of boundaries, and hence a decree of re-execution was not necessary; nor is it material that there is no seal to the re-execution of the paper. It is pleaded in defendants' answer. The boundaries of this tract No. 2 set out in the re-executed deed are: "Lying on both sides of Bent creek, and beginning on a maple, and runs west 100 poles to a small chestnut tree; thence south 100 poles to a stake; thence east 100 poles to a stake; thence north 100 poles to the beginning,—containing 100 acres, more or less." The only difference between this boundary and that in the deed of Sumner, sheriff, to Brooks, is "thence south 100 poles to a stake," in lieu of "thence west 10 poles to a stake." The acreage is the same, and the surveyor testified that this description from the re-executed deed of Case to Henry would exactly correspond with the boundaries of the tract claimed by the plaintiffs. Such corrections have been often allowed.

(131 N. C. 814)

STATE v. RAY.

(Supreme Court of North Carolina. Dec. 16, 1902.)

MUNICIPAL CORPORATIONS—ORDINANCES—CLOSING OF STORES.

1. An incorporated town may not, in the absence of any other authority than that in Code, § 3799, to make by-laws for the better government of the town, pass an ordinance requiring groceries and dry goods stores to close at 7:30 p. m. except on Saturdays.

Clark, J., dissenting.

Appeal from superior court, Halifax county; Geo. A. Jones, Judge.

J. D. Ray was convicted of violating an ordinance, and appeals. Reversed.

W. A. Dunn, for appellant. E. L. Travis and the Attorney General, for the State.

FURCHES, C. J. The defendant is the owner of a dry goods and grocery store (not of liquors) in the town of Scotland Neck, Halifax county. Scotland Neck is an incorporated town, and on the 4th of July, 1902, the commissioners of said town passed this ordinance: "It shall be unlawful for bar-rooms, groceries, dry goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to keep open later than 7:30 o'clock p. m. except Saturdays. Any one violating this ordinance shall be fined five dollars for each and every violation." The defendant admits that he is the owner of a dry goods and grocery store in the town of Scotland Neck, and that he has kept it open later than 7:30 p. m. since the 7th day of July, 1902, the date at which said ordinance was to go into effect, but pleads "Not guilty," and a special verdict was returned, finding the facts as above.

It is admitted that the charter of said town gives no special authority for the passage of such an ordinance, and that the commissioners had no authority for the passage of said ordinance, except the general powers incident to municipal corporations. This presents squarely the question of corporate power to pass and enforce such an ordinance without any legislative authority to do so, except the fact that it is a chartered municipality. It is therefore not necessary that we should discuss the power of the legislature to pass such an act, or to authorize a municipality to pass such an ordinance, and we do not enter into the consideration of that matter.

It must be admitted that the enforcement of this ordinance would be to deprive the defendant of his natural right,—would be to interfere with the free use and enjoyment of his property, used in such a way as not to interfere with the rights of others. It is not shown, nor is it suggested, that defendant's keeping his store open after 7:30 interfered with the rights of any one else. It was said that the other merchants in Scotland Neck were willing to close their stores at 7:30, but the defendant was not, and the ordinance was passed to compel him to do so, for the reason that if he kept open the others would be compelled to do so, or to give the defendant the benefit of the trade of the town after that time. But did this give the commissioners the right to close the defendant's store?

It would seem that no legislative power exists, under our form of government and our ideas of personal liberty, as to allow such interference with one's rights of ownership and dominion over his own property, except such interference be exercised for the protection and benefit of the public. When such inter-

ference is authorized, it is under the doctrine of eminent domain, or what is known as the "police power of the government." The attempted exercise of the power in this instance is clearly not under the doctrine of eminent domain, but it is said to be under the police power of the government. If the state could exercise such power (and we do not say it could), can a municipal corporation do so without express authority from the state? The general rule is that a municipal corporation can only exercise such powers as are expressly given in its charter, or such as are necessarily implied by those expressly given. This doctrine is well expressed by 1 Dill. Mun. Corp. § 89, which is copied by Justice Avery in *State v. Webber*, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920, and is approved and adopted by this court in that case: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the exercise is resolved by the courts against the corporation, and the power is denied." The same doctrine is probably more pointedly stated, as applicable to the case now under consideration, in *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, as follows: "An ordinance, says Dillon (1 Mun. Corp. § 325), cannot legally be made, which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such rights, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit. If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creating them, with the incidental grant embodied in section 3799 of the Code, to give them equal authority with the legislature itself to restrict and regulate the rights of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the legislature to be given to the statute, and its attempted exercise was therefore unlawful." It seems to us that these authorities settle the question, and plainly show that this ordinance was unlawful and cannot be enforced.

It is said that towns are constantly exercising such power over barrooms where liquors are sold. This power, so far as our investigation goes, is expressly given in the charters. But if there is any case where it is not, it must be understood that it stands on a very different footing to the sale of dry goods and

family groceries. Liquor itself is regarded as an evil,—an enemy of civilization and of good government. *Bailey v. City of Raleigh*, 130 N. C. 209, 41 S. E. 281; *State v. Barringer*, 110 N. C. 525, 14 S. E. 781. Its sale without a license is condemned and prohibited by law, and the regulations closing such shops might well be put upon the implied power, as being for the public good. But however that may be, that is not the question before the court, and what has been said to the sale of liquors has only been said to meet an argument of the state.

It is also said that the state of California has exercised such power without express legislation, and that the supreme court of the United States affirmed the judgment of the California court. But when those cases are examined, it will be found that they were cases where the business of ironing was carried on all night in a thickly settled portion of the city of San Francisco, consisting of old wooden buildings near the Sound, where the wind usually blew hard, which made it very dangerous to carry on such work at late hours of the night, on account of fire. And the opinions rest upon the ground that it was for the public good—the protection of the public from the danger of fire—that the city was allowed to prevent such persons from carrying on such work at such late hours of the night. But the supreme court of the United States only affirmed the ruling of the state court, which is the rule of that court where there is no federal question involved. So it amounts to no more than a decision of the supreme court of California against the repeated decisions of our own supreme court. And were we to admit that the distinction does not exist between the California case and this case, which we have pointed out, the question then is, shall we adhere to our own decisions, when we are not able to see any error in them, or shall we adopt the opinion of the court of California? We prefer to follow our own decisions, and are of the opinion that the corporate authorities of Scotland Neck were not authorized to pass the ordinance under consideration, and it is void.

There is error, and under the special verdict the defendant was entitled to an acquittal and discharge. The judgment of the court below is reversed.

CLARK, J. (dissenting). On July 4, 1902, the town of Scotland Neck passed an ordinance prohibiting "barrooms, groceries, dry goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only), to" be kept "open later than 7:30 p. m. except Saturdays," under penalty of \$5 for each violation; and it was made the duty of the chief of police to ring the town bell at 7:30 p. m. every day, except Saturdays and Sundays, as notice. The ordinance prescribed that it was to be in force from 7th July to 1st October. The defendant admits that he

came within the class specified, and did not comply with the ordinance, but kept open his store for the sale of dry goods and groceries later than 7:30 p. m., and conducted his business just as if the ordinance had not been passed. The sole defense is that the ordinance is invalid. The judge below sustained the action of the mayor, who imposed a fine of \$5, and the defendant appealed. The object of the ordinance, as was stated on the argument, and as is readily apparent, was to give the clerks and other employes of stores a rest from toll in the hot months of July, August, and September after 7:30 p. m. At that season the days are hot and long, business is dull, and purchases can readily be made by the community without inconvenience before 7:30 p. m. To avoid any reasonable objection, Saturday night is excepted, and the "early closing" is limited to the three hottest and dullest months in the year. It seems strange that any one should object to this modest concession to the clerks and others who for small compensation are at work from sunrise till late at night the balance of the year. So reasonable is the regulation, that by common consent the merchants of most of the towns, probably, in the state, have for years, by voluntary agreement, adopted it. But as one merchant in a town, by holding out against it, can force all other stores to keep open, thus compelling all the clerks and other employes to forego this small concession, the commissioners had no other means to secure this cessation of work, so beneficial to the health and comfort of a large and useful class in the community, than by the passage of this ordinance. There can be no question of the reasonableness of such an ordinance, and if this action of the local legislature did not correctly express the wishes of their constituents, or did not prove satisfactory, public sentiment would soon cause its repeal, or at least the matter would be corrected by the election of a board of commissioners of a different cast. *Hellen v. Noe*, 25 N. C. 499. Certainly, if the power to pass the ordinance exists, the propriety of its passage is a matter that can be better determined by the commissioners elected by the people of the town, and conversant with the surroundings and the wishes of their constituents, than by five lawyers assembled in a public building in Raleigh.

The ordinance being a reasonable one, the only possible question is that of the power to pass the ordinance. The charter of the town (*Priv. Laws* 1901, c. 342, § 15) broadly gives its commissioners the usual powers conferred on towns and cities by Code, c. 62. Among the powers conferred expressly by that chapter are—Independent of the inherent and incidental powers of every municipal corporation—those of Code, § 3799, "They shall have power to make such by-laws, rules and regulations for the better government of the town as they may deem necessary; provided the same be not inconsistent with this chap-

ter or the laws of the land," and section 3802, "They may pass laws for . . . preserving the health of the citizens." In *Hill v. City of Charlotte*, 72 N. C., at page 58, 21 Am. Rep. 451, the court says: "We conceive that nothing can be clearer than that when a general authority is given to a municipal corporation, to be exercised through its proper legislative officers, to make ordinances for the good government, health, and safety of the inhabitants and their property, it is thereby left entirely to the discretion of those authorities to determine what ordinances are proper for those purposes." In *State v. Austin*, 114 N. C., at page 856, 19 S. E., at page 919, 25 L. R. A. 283, 41 Am. St. Rep. 817, Burwell, J., speaking for the court, after setting out in full the above section 3799 of the Code, says emphatically: "This is an express grant of authority to the officers of this municipal corporation to exercise within the territory made subject to their control the police power of the state, the only expressed restriction upon their action being that the rules and regulations made by them shall not be inconsistent with the laws of the land." There is no law forbidding a regulation giving clerks and other employes "in stores, barrooms, and groceries" a breathing spell after 7:30 p. m. on five days during the three hottest and dullest months of the year. If the legislature can confer such power on any municipality, as is admitted, the above decision holds that it has been done. It is a most reasonable regulation, a humane and just regulation, and in the interest of the public health and comfort, and detrimental to the interest of no one. As was well said by Daniel, J., in *Hellen v. Noe*, 25 N. C. 499, with that confidence in the capacity of the people for self-government and ability to regulate for the best their own local matters which marked the utterances of that court: "If a majority of the citizens of the town deem the ordinance impolitic or injurious to the people of the corporation, they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is either against the general law, or is in itself unreasonable." The people are the best judges of their own interest and wishes, and, as Judge Daniel says, the correction should be left to them, unless an ordinance is on its face in violation of some statute enacted by the will of the lawmaking power of the whole state, or is so unreasonable in its nature as to be beyond the police power confided to the municipality by virtue of the general statute.

A case almost on all fours with this, in the terms of the ordinance, and presenting certainly the very question of the power of the town to pass such an ordinance as this, has been held in favor of the power by the supreme court of the United States. *Barbler v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 23 L. Ed. 923. An ordinance of the city of San Francisco closed all laundries and wash-

houses "from 10 o'clock at night till 6 o'clock in the morning." Those opposing the measure argued that the motive was to discriminate against the Chinese. Those defending it said it was because such occupation was dangerous on account of liability from fire. The court, adhering to the settled ruling that the motive in passing a statute or ordinance cannot be considered, unless it appear on the face thereof, held: "The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies. * * * The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced. * * * This is a matter for the determination of the municipality in the execution of its police powers." The validity of the same ordinance was again presented in *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; and was more fully and elaborately discussed, and the following points, having no reference whatever to the danger from fires, were decided: "The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times is equally without force. However broad the right of every one to follow such calling, and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty that is guaranteed to each. It is liberty regulated by just and impartial laws. Parties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing, and what may be verbally made, and on what days they may be executed, and how long they may be enforced if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops, and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the states."

After these two explicit and unanimous decisions of the highest court known to our laws that any town "possessed of the ordinary powers" has the right to pass "such beneficent and merciful" ordinances for the health and comfort of the toilers "in the

heated rooms" of our towns and cities, by "prescribing hours for closing at night," no one has ever since contested the validity of such ordinances in that court, and the state courts have been as humane. Not till now has any court recorded a decision to the contrary. The above cases began in the United States circuit court, and went thence to the federal supreme court. But the supreme court of California has cited those cases, and heartily indorsed the principles therein laid down, in *Re Hiang Kie*, 69 Cal. 132, 10 Pac. 327, quoting with approval: "The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies." In *Missouri*, under a statute worded like our Code, § 3799, above cited, a city ordinance closing stores, shops, and other places of business at 9 a. m. on Sunday was held valid. *City of St. Louis v. Cafferata*, 24 Mo. 94. It seems there was no state prohibition as to opening stores on Sunday. In *State v. Freeman*, 38 N. H. 426, it was held that a town ordinance prohibiting restaurants from being kept open after 10 o'clock at night was valid and authorized by a statute not so broad as our Code, § 3799. And there are other authorities to the same effect, as Judge Field says in *Soon Hing v. Crowley*, *supra*, and none to the contrary. The validity of an ordinance closing barrooms at a specified hour is impliedly recognized as valid and authorized by Code, § 3799, in the discussion in *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, which holds invalid, not the requirement to close the bar, but the prohibition of the proprietor to remain in it after it was closed.

If the town commissioners of the progressive and growing town of Scotland Neck thought it would conduce "to the better government and aid to preserve the health of many of its citizens" (Code, §§ 3799, 3802) to close the places of business, except for sale of drugs and medicines, at 7 p. m. on five days in the week during July, August, and September, and that in so ordering they were executing the wishes of a majority of their constituents, are they not the best judges thereof, subject to correction only at the ballot box when a new board is chosen? Our system of government favors local self-government. Whenever any effort is made in the interest of humanity to lessen the hours of toil, and give a breathing spell,—a chance, however small, for the enjoyment of life to the employed,—a protest is almost always made on the ground stated by Judge Field (113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145), that "it deprives a man of the right to work at all times." This objection means simply that it deprives the objector of the right to work "the other fellow" at all times, without stint or limit. Some one has said, with more force than truth or elegance, that "civilization is held to the under dog." On the contrary, civilization consists in greater humanity and consideration for the comfort, the con-

venience, the health, of those who are not able to compel or to buy that which should be conceded them voluntarily or guaranteed by law. The purpose of a government of law is the protection of the weak, for the strong can take care of themselves. The brief recreation and surcease from toll given by this ordinance during the hot summer evenings to the clerks and other employes of the stores in their town is an act which reflects credit upon the commissioners of Scotland Neck. Their action is warranted by the decisions of the highest court in the Union and of several states, and their power to do so has not till now been denied in any.

(131 N. C. 532)

WORTH v. CITY OF WILMINGTON.

(Supreme Court of North Carolina. Dec. 16, 1902.)

APPEAL—DISMISSAL—DELAY IN FILING TRANSCRIPT—TIME.

1. Rule 5 of the supreme court (128 N. C. 634, 39 S. E. v) requires an appellant to docket his transcript on appeal seven days before the beginning of the call of the docket of the district to which it belongs, and, if he fails to do so, appellee, under rule 17 (128 N. C. 638, 39 S. E. vi), may move to docket and dismiss. *Held*, that appellee may move to docket and dismiss under rule 17 at any time before appellant docket his transcript, and need not do so at his first opportunity.

2. Where the trial judge has not settled a "case on appeal" so as to permit appellant to docket the transcript within the time required by rule 5 of the supreme court (128 N. C. 634, 39 S. E. v), appellant, in order to protect his appeal from dismissal on appellee's motion under rule 17 (128 N. C. 638, 39 S. E. vi), must docket so much of the record as he can obtain, or if none is obtainable make affidavit of that fact, and move for certiorari.

Action by W. E. Worth against the city of Wilmington. Plaintiff, after the docketing and dismissal of his appeal on motion of appellee, moves to reinstate the same. Motion denied.

E. K. Bryan, for appellant. Meares & Ruark, for appellee.

CLARK, J. The appellant failed to docket his transcript on appeal seven days before the beginning of the call of the docket of the district to which it belongs. Rule 5 (128 N. C. 634, 39 S. E. v). The appellee might have then moved to docket and dismiss. Rule 17 (128 N. C. 638, 39 S. E. vi). The appellee did not move to dismiss at this, his earliest, opportunity, but he subsequently made the motion before the appellant docketed, and the appeal was dismissed. The appellant now moves to reinstate:

1. Because the appellee did not move to dismiss at the first opportunity. But he could so move at any subsequent time, provided it is done before the appellant docket his appeal; just as the appellant can docket at any time during that term subsequent to the required time, provided he does so before

the appellee moves to docket and dismiss under rule 17. *Benedict v. Jones* (at this term) 42 S. E. 909, and cases there cited.

2. The appellant moves to reinstate, because, as he alleges, the judge had not settled the "case on appeal" in time to permit the same to be sent up and filed seven days before beginning the call of the docket of the district to which the appeal belongs. But in such case it was the duty of the appellant to docket the rest of the record, or all that he could obtain (or, if none obtainable, with affidavit of that fact), and move for a writ of certiorari. This has been uniformly held, and numerous cases are cited in *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782, upon which the court said, "There are some matters, at least, which should be deemed settled, and this is one of them;" and several cases since are cited in *Norwood v. Pratt*, 124 N. C. 747, 32 S. E. 979; since which last case the court has followed the rule therein settled without deeming it necessary to add any opinions to those already published and reiterated so often.

The motion to reinstate is denied. Motion denied.

(131 N. C. 590)

THOMAS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 20, 1902.)

CARRIERS—BAGGAGE—DESTRUCTION—PRESUMPTION OF NEGLIGENCE.

1. The presumption of negligence arising from the derailment of a train, by reason of which a passenger's baggage was destroyed, is not rebutted by the fact that the derailment and wrecking of the train were caused by a slide of dirt and rocks on the track.

Cook, J., dissenting.

Appeal from superior court, Haywood county; Justice, Judge.

Action by Josephine Thomas against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

G. F. Bason, for appellant. Crawford & Hannah and R. D. Gilmer, for appellee.

CLARK, J. The "facts agreed" are defective, in that the essential element of negligence upon which the validity of the contract depends is not determined and stated. The law is well settled and thus summed up in 2 Fet. Carr. section 580: "A common carrier of passengers is an insurer of the passenger's baggage against all loss or damage, except for that caused by the act of God or by the public enemy." Section 627: "A common carrier of a passenger's baggage may by express contract relieve himself from his common-law liability as insurer; but, by the weight of authority, he cannot exempt himself from liability for negligence of himself or his servants." In *Capehart v. Railroad Co.*, 81 N. C., at page 444, 31 Am. Rep. 505, *Ashe, J.*, citing *Smith v. Railroad Co.*,

64 N. C. 235, and Glenn v. Railroad Co., 63 N. C. 510, and other authorities, says that the common carrier cannot stipulate against any loss caused by negligence. To same purport, Wood v. Railroad Co., 118 N. C., at page 1063, 24 S. E. 704. Brown v. Telegraph Co., 111 N. C., at page 191, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793, citing from Cooley, Torts, 687, says: "The old principle that one cannot provide by contract against liability for negligence applies to every species and degree of negligence or tort." The facts here agreed admit the destruction of the trunk "by fire in a wreck of the train caused by a slide of dirt and rocks upon the track." There is a presumption of negligence from the fact that the train was derailed by running into a pile of dirt and rocks upon the track. 2 Fet. Carr. § 482. "Res ipsa loquitur." This presumption is not rebutted in the facts agreed. It is not agreed that there was no negligence, and the plaintiff contends that the defendant admits negligence by submitting the case upon the validity of the contract on that state of facts. The validity of such contract, as applied to the facts of any case, depends upon whether there was negligence on the part of the defendant; and, upon the facts agreed, if there were not a presumption of negligence, there is certainly no presumption to the contrary, and the case should go back, that this may be ascertained by a jury, if not agreed upon by the parties.

Error.

DOUGLAS, J. (concurring). I concur in the opinion of the court that this case should be remanded in order that the essential fact of negligence may be found by verdict or agreement. In fact, I am somewhat inclined to think that the plaintiff is entitled to judgment on the facts agreed, under the decision of this court in Marcon v. Railroad Co., 126 N. C. 200, 35 S. E. 423, where it is said: "The principles governing the case at bar are well settled. It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence per se. * * * As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a failure to perform a positive duty imposed by law. The burden of proving such a failure of legal duty rests upon the plaintiff, but, when that fact is proved or admitted, the burden of proving all such facts as are relied on by the defendant to excuse its failure rests upon the defendant. Its plea, then, is in the nature of confession and avoidance." If it be contended that no presumption of negligence arises against the defendant from the naked fact of obstruction stated by the case agreed, there is certainly

no presumption in its favor. The landslide may not originally have been caused by the negligence of the defendant, but that would not excuse the failure of proper inspection, or negligently permitting the roadbed to remain in a dangerous condition, without repair and without warning, after its condition was or might have been discovered by due diligence. In the view most favorable to the defendant, its negligence is an open question.

COOK, J. (dissenting). Upon the facts stated in the case agreed, plaintiff is bound by her special contract with defendant company, and can recover only the sum of \$100 for the baggage destroyed by fire in the wreck. There is a distinction between a passenger ticket in the ordinary form, which is regarded as a mere voucher or token, and a ticket which is, and purports on its face to be, the entire contract between the carrier and passenger. Am. & Eng. Enc. Law (2d Ed.) 560. The regular local first-class fare was three cents per mile; but in buying a 1,000-mile ticket, paying for that much mileage at one time, which could be used from time to time, at convenience, until exhausted, plaintiff obtained transportation at a reduced rate, — $2\frac{1}{2}$ cents per mile, — and defendant received the lump sum, which was an advantage to both parties. The right to make such a special contract is too well settled to be controverted. It was founded upon a valuable consideration, which consisted in a reduction of the fare. The limit of \$100 for liability on account of the baggage was a reasonable and valid one. Compensation for the carriage of baggage is included in the passenger's fare (Railroad Co. v Cox, 95 Am. Dec. 640; Warner v. Railroad Co., 92 Am. Dec. 389), so that which was being taken by plaintiff in excess of the amount agreed upon was not covered by the contract and fare paid, but was being carried without compensation. Plaintiff's failure to read the ticket was not the fault of the defendant. She knew that she was obtaining transportation at a reduced rate, and, being required to sign the ticket in the presence of the witness who attested her signature, had express notice that she was obligating herself in some way. It does not appear that she did not understand the contract, nor that she did not read it after signing it, and before boarding the car. She had it in her possession and could have done so. This being a special contract, as distinguished from an ordinary passage ticket, and in writing, and signed, there was no obligation resting upon defendant's agent to read it, or to notify her of its conditions and limitations. Counsel for plaintiff argue, orally and by brief, that defendant cannot contract against its negligence, and therefore a recovery should be had for the full value, and cite the authorities to sustain that proposition of law. But the facts in the case agreed do not show that the destruction of the trunk

was caused by defendant's negligence. The sliding of dirt and rocks upon the track, causing the wreck of the train, nothing else appearing, does not show or raise presumption of negligence, and this is the only fact as to the wreck submitted to us.

(131 N. C. 544)

LOVE et al. v. ATKINSON et al.

(Supreme Court of North Carolina. Dec. 18, 1902.)

CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS—UNILATERAL SIGNATURE—ENFORCEMENT.

1. A contract for the sale of land, reduced to writing and signed by the vendor, but not signed by the vendee, and under which the vendee has gone into possession, is within the statute of frauds, and the vendor cannot recover the price of the vendee.

Appeal from superior court, Jackson county; Moore, Judge.

Action by W. B. Love and others against E. C. Atkinson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Walter E. Moore and D. L. Love, for appellants. W. B. & H. R. Ferguson, for appellees.

MONTGOMERY, J. This action was brought to enforce the collection of a balance due on a contract to pay the purchase money for a tract of land bargained to be sold by the plaintiffs to the defendants. The contract was in the nature of a bond for title, properly executed by the plaintiffs, but not signed by the defendants, or either of them, or by the lawfully authorized agent of either of them. The statute of frauds was pleaded in bar of any recovery by the plaintiffs. The plaintiffs offered evidence tending to show that, at the time of the execution of the bond for title by the plaintiffs, the defendant Atkinson accepted the same, paid \$75 in cash of the purchase money, and had it registered; that the plaintiffs surrendered the possession of the premises to the defendants, and that the defendants have been cutting lumber from, and building a railroad and houses upon, the same; that the defendants are still in possession, and have refused to pay the balance of the purchase money, although the plaintiffs in proper time had tendered a proper deed for the land and premises; and that the defendants have never given notice to the plaintiffs of any intention to abandon the contract or to surrender the possession of the land to the plaintiffs. The evidence was refused by his honor, and, upon intimation by the court that the plaintiffs could not recover, they took a nonsuit and appealed.

The question presented for decision is this: Can the vendor who has executed a written contract for the sale of land enforce the con-

tract for the sale of land, and compel the vendee, who has partly performed the contract and who has been put in possession of the premises, but who has not himself signed the contract, to pay the purchase money? It is not now an open question. In *Rice v. Carter's Adm'r*, 33 N. C. 298, where there was a written contract for the sale of land executed by the vendor but not signed by the vendee, the defendant relied on the statute of frauds. The court said there: "The contract in this case was for the sale of land. The defendant signed no memorandum or note in writing whereby he can be charged; and we are at a loss to see any ground, at all plausible, to support an action against him upon a mere verbal promise. *Laythoarp v. Bryant*, 2 Bing. N. C. 744. The defendant there had signed a written contract to convey land. The plaintiff (like the defendant in this case) had only made a verbal promise to pay the price, and it was urged for the defendant that he ought not to be held liable under his written promise, inasmuch as the plaintiff was not bound by his verbal promise; but, said the chief justice, 'whose fault was that? The defendant might have required the plaintiff's signature.' It was taken for granted, and as a thing not debatable, that the party who did not sign the memorandum or note in writing was not liable, and the idea of his being liable was not even suggested." In *Simms v. Killian*, 34 N. C. 252, the court, through Chief Justice Ruffin, said: "It was argued at the bar that the policy of the act was to protect owners of real estate from being deprived of it without written evidence, under their own hands, and that a promise to pay money for land is not within the mischief. But the danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it as that by similar means a feigned contract of sale should be established against the owner of land. Hence, the act in terms avoids entirely every contract of which the sale of land is the subject in respect of a party—that is, either party—who does not charge himself by his signature to it after it has been reduced to writing." In that case the writing was signed by the vendor, but not by the vendee, the purchase money paid, and possession taken of a large portion of the land. In *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744, Pearson, J., for the court, said: "So, if the vendor binds himself in writing and is content to take the verbal promise of the purchaser to pay the price, it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound, but the other party cannot be charged if he chooses to insist upon the statute." To the like effect are the cases of *Wade v. City of Newbern*, 77 N. C. 460; *Edwards v. Kelly*, 53 N. C. 69; *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16. This has not always been the rule in North Carolina. The first case under the statute

§ 1. See *Frauds, Statute of*, vol. 22, Cent. Dig. §§ 246, 262, 312.

was that of *Ellis v. Ellis*, 16 N. C. 180, where it was decided that our statute ought to receive the same construction with the English statute. The English courts had decided that a substantial part performance of a parol contract would take the case out of the statute, as where the purchaser had been put in possession of bargained premises, upon the ground that it would be a fraud in the party refusing to execute it under such circumstances. This case, however, was reviewed very soon thereafter and reversed. 16 N. C. 341. In *Barnes v. Teague*, 54 N. C. 277, 62 Am. Dec. 200, the court said that the case of *Ellis v. Ellis* was reviewed and the decree reversed in 16 N. C., at page 341. The court went on to say: "Our courts having discarded the construction of the English courts as to part performance, * * * we have no hesitation in saying that a defendant may in his answer admit the parol contract without depriving himself of the protection of the statute by his plea or answer, and that the court cannot, under such a state of things, decree a specific performance."

It does not alter the case to say that the present contract was in writing and signed by the plaintiff, the vendor; that it was not altogether in parol. It was a parol contract so far as the defendant vendee is concerned, and cannot be enforced against him; he pleading the statute of frauds, although admitting the contract. In *Dunn v. Moore*, 38 N. C. 364, the same principle is announced, the position of the parties plaintiff and defendant, however, being reversed. In that case (a parol contract for the sale of land) the plaintiff alleged that he had agreed to buy the land from the defendant, had paid a part of the purchase money, and had been given possession of the premises, and that, upon his desiring to pay the balance of the purchase money and procure a deed, the defendant refused to receive the money or make the deed. The object of the bill was twofold,—either to compel the defendant to make a deed for the land to the plaintiff, or for a decree for an account for the value of the improvements and for the money paid. The court said: "The plaintiff is not entitled to any decree for the conveyance of the land claimed, neither is he entitled to an account, and that the land should be held as security as for what might be due to him. If the defendant Moore had admitted the contract as set forth in the bill, and that he had put the plaintiff into possession, on the authority of *Baker v. Carson*, 21 N. C. 381, and of *Albea v. Griffin*, 22 N. C. 9, we should, upon the plaintiff's substantiating by evidence his payments and improvements, have referred the case to the master for a report; and this upon the ground, not that this court could in a case of this kind give the plaintiff anything by way of damages for the violation of a contract, but because the defendant, after making the contract and putting the plaintiff

into possession, ought not to be allowed to put him out without returning the money he had received and compensating him for his improvements. It would be against conscience that he should be enriched by gains thus acquired to the injury of the plaintiff." In *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783, it was held that one who had entered upon land and placed thereon improvements, under a parol contract to convey, can recover from the vendor who refuses to execute the contract the value of the improvements, though the contract be denied by the vendor; and to that extent the case of *Dunn v. Moore*, 38 N. C. 364, was overruled. *Luton v. Badham*, supra. But that question is not involved in this appeal.

No error.

(131 N. C. 549)

RAVENEL v. INGRAM.

(Supreme Court of North Carolina. Dec. 18, 1902.)

COVENANT OF WARRANTY—BREACH—OUSTER — DEFECTIVE ALLEGATION — PLEADING — RIGHT OF ACTION—ASSIGNMENT—REAL PARTY IN INTEREST.

1. A judgment against a grantee of land for possession thereof is not sufficient to constitute a breach of a covenant of warranty; an actual ouster, or a disturbance of possession equivalent to an ouster, being necessary.

2. An allegation in an action for breach of a covenant of warranty in a deed that a judgment for the land has been recovered against plaintiff, whereby he has been disturbed and deprived of possession, though a defective statement of ouster, will be treated as stating a good cause of action, where defendant has not demurred or taken any special exception to the averment.

3. In an action for breach of a covenant to defend the title to certain land against all persons claiming under the covenantor, a failure to allege that the party stated to have recovered the land from plaintiff claimed under the covenantor renders the complaint essentially defective.

4. A defect so vital may be taken advantage of at any time,—even in the supreme court.

5. A grantee without warranty of title from his immediate grantor can maintain an action against a prior grantor with warranty on eviction by a title paramount to that of the warranting grantor.

6. A right of action on a covenant of warranty cannot be assigned without assigning the land.

7. An agreement assigning the right to sue for breach of a covenant of warranty, and providing that the assignee shall, after repaying himself for the expense of the suit, and a certain sum paid the assignor on the date of the agreement, pay over the surplus to the assignor, is champertous and void.

8. The assignee is also prevented from suing by Code, § 177, requiring all actions to be brought in the name of the real party in interest.

Appeal from superior court, Macon county; M. H. Justice, Judge.

Action by S. P. Ravenel, Jr., against Charles Ingram, as executor of John Ingram,

¶ 1. See *Covenants*, vol. 14, Cent. Dig. §§ 157, 164.

deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

H. G. Robertson, for appellant. F. S. Johnston, for appellee.

FURCHES, C. J. This is an action for breach of covenants contained in three deeds made by John Ingram, the defendant's testator,—one contained in a deed to T. J. Corbin, one in a deed to D. N. Evitt, and one in a deed to H. E. Gibson. The plaintiff is a subsequent purchaser of the land mentioned in the two first-named deeds, which he holds under deeds without warranty. The plaintiff then alleges that one Henry Stewart, at spring term, 1899, of Macon superior court, recovered a judgment for said land, and thereby the plaintiff has been disturbed and deprived of his possession. It requires more than the judgment of court to constitute a breach of warranty. There must be an ouster, or a disturbance of the possession equivalent to an ouster. *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927. And no right of action accrues upon a covenant of warranty until there is such ouster or disturbance. *Mizzell v. Ruffin*, supra. The plaintiff's complaint is very defective in its statement of ouster; but as it says that, owing to the action of Stewart, he has been disturbed and deprived of his possession, and the defendant seems to have treated this as a sufficient averment, by not demurring or by not taking any special exception to said averment, we will treat this part of the complaint as a defective statement of a good cause of action, and not as a statement of a defective cause of action. *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190.

But there is another defect in the complaint, which is much more serious. The warranties in the two deeds mentioned, to Corbin and Evitt, are special warranties, and are as follows: "Do hereby covenant to warrant and defend the title to the aforesaid described land against the claim or claims of any and all persons claiming through or under us." Therefore, to create a breach of the warranty, it was necessary to aver and show that Stewart recovered upon a title derived from the said John Ingram, the grantor. This the plaintiff does not allege, and we must suppose that it was not true, or it would have been alleged, as it was the crucial point in his case. If they had been general warranties, although the complaint would then have been defective, we will not say but what it might have been sustained as a defective statement of a cause of action, under our liberal practice, Code, § 260. But as liberal as our practice is, a complaint so vitally defective as this is cannot be sustained; and such defect may be taken advantage of at any time,—even in this court. *Mizzell v. Ruffin*, supra.

From the brief filed, it would seem that the principal question intended to be presented was whether a grantee without warranty could maintain an action against a

prior grantor with warranty. This doctrine seems to be well settled in this state,—that he can. Where one conveys with general warranty, another without warranty, another with warranty, and still another without warranty, and the last vendee is evicted by title paramount to the warranting grantor's, he may sue either of the warranting grantors, but not both of them. *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230; *Pears. Law Lectures*, 185. But under the plaintiff's defective complaint, this point in the case is not reached.

This disposes of the action so far as the two first warranties are concerned. But the plaintiff includes in his action a claim for damages on account of a breach of warranty in the deed to Gibson. This he cannot maintain, whatever rights Gibson may have. The plaintiff does not claim to have a deed for this tract, but bases his action and claim to recover on the following contract: "Highlands, N. C., 8 Feb'y, 1898. I, H. E. Gibson, covenant and agree that, if the suit brought against me by Henry Stewart should be decided against me, that I will grant and will assign to S. P. Ravenel, Jr., my right to sue John Ingram on the covenant of warranty contained in the deed of conveyance from him to me: provided, however, that S. P. Ravenel, Jr., will pay over the surplus recovered from John Ingram to me, after repaying himself the amount he shall have to expend in the defense of said suit, and the \$10 paid me this day. Witness my hand and seal this 3 day of February, 1898. H. E. Gibson. [Seal.]" The plaintiff does not claim to be the owner of this tract of land, and Gibson could not assign the covenant of warranty without assigning the land. The warranty is a covenant real, and runs with the land (the estate), and cannot be assigned or separated from it. *Markland v. Crump*, supra. But this deed also contains a covenant of seisin, which is a personal covenant, and does not run with the land, and was broken when the deed was made, if the grantor, Ingram, did not then have the title. *Pears. Law Lectures*, 185. But this agreement does not convey this chose to the plaintiff, if it could be conveyed, but only says if Stewart succeeds in his suit he will give the plaintiff a right to bring a suit on it, upon condition that the plaintiff will pay him all he recovers, except the costs of the action and the \$10 the plaintiff paid him that day. So the plaintiff was to get nothing out of the suit, except the pleasure of having a lawsuit with the defendant. It is clearly a champertous transaction of the first water, and is void. *Barnes v. Strong*, 54 N. C. 100; *Munday v. Whissenhunt*, 90 N. C. 458. Besides, the statute requires all actions to be brought in the name of the true owner or party in interest. Code, § 177. And so the plaintiff could not maintain this action, even were it not champertous; but as the contract un

der which he brought the suit is champertous and void, he certainly cannot do so.

For the reasons we have stated, the plaintiff cannot succeed in this action, and the judgment of the court below is affirmed.

(121 N. C. 653)

LEWIS v. GLYDE S. S. CO.

(Supreme Court of North Carolina. Dec. 20, 1902.)

REMOVAL OF CAUSES — CORPORATIONS — DIVERSE CITIZENSHIP — PETITION — SUFFICIENCY — TIME OF FILING — CONTRACTS — ULTRA VIRES — NATURE OF DEFENSE.

1. A petition for removal to a federal court which merely states that defendant corporation, the petitioner, is a citizen of a certain state, and a nonresident of North Carolina, where the action was brought, is not sufficient; an allegation that defendant is a corporation existing under the laws of a certain other specified state being indispensable.

2. Where the summons in an action against a foreign corporation was returnable to the March term, but no complaint was filed at that time, and an entry of "time to file pleadings" was made, defendant was not thereby entitled to an extension of the time limited by statute within which to file a petition for removal, on the ground that such petition could not be filed till after the filing of the complaint, because the right to removal depended on the sum demanded in the complaint, as defendant could have moved to dismiss upon failure to file the complaint within the first three days of the March term, and lost its right to removal by failing to so move.

3. In an action on a contract, to recover for saving a stranded vessel, evidence considered, and held to justify submission to the jury of the issues as to whether the parties contracted for its salvage, as alleged, and whether defendant had some substantial interest in the vessel.

4. In an action against a corporation on a contract, the defense that the contract is ultra vires is in the nature of confession and avoidance.

Furches, C. J., and Montgomery, J., dissenting.

Appeal from superior court, Carteret county; Winston, Judge.

Action by A. J. Lewis against the Clyde Steamship Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rountree & Carr, for appellant. A. D. Ward and D. L. Ward, for appellee.

DOUGLAS, J. This was an action to recover salvage or compensation for saving a vessel called the "City of Jacksonville," which was stranded on Whalebone Inlet Beach. The summons in this case was issued returnable to the March term, 1901, of the superior court for Carteret county, and, as no complaint was filed at that term, an entry was made as follows: "Time to file pleadings." On the 31st day of July, 1901, the plaintiff filed his verified complaint, demanding judgment for \$2,444.74; and on the 17th day of August, 1901, the defendant filed its petition and bond for the removal of said cause to the United States circuit court, and served notice on the plaintiff that

at the next term of the superior court of Carteret county a motion would be made to have said cause removed. At the September term, 1901, of said court, the defendant made its motion to have said cause removed, which motion was refused. The defendant filed its exception.

The motion was properly refused on two grounds, either of which would have been sufficient. The petition states that the defendant petitioner "was at the time of the commencement of this suit, and still is, a citizen of the state of Delaware, and of no other state, and a nonresident of the state of North Carolina." It is well settled that a petition for removal must, in addition to the allegation that the defendant is a nonresident of the state of North Carolina, specifically state that the defendant is a corporation existing under the laws of another state; giving the name of the state by which it was created. *Springs v. Railway Co.*, 130 N. C. 186, 41 S. E. 100; *Thompson v. Same*, 130 N. C. 140, 41 S. E. 9; *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. 553, 19 L. Ed. 998. Moreover, the petition was not filed within the time limited by the federal statutes of removal. *Howard v. Railway Co.*, 122 N. C. 944, 29 S. E. 778.

It is contended that the defendant was not required to file its petition for removal until after the filing of the complaint, inasmuch as the right of removal would be governed by the sum demanded. This does not alter the effect of the statute. If the complaint had not been filed within the first three days of the term to which it was returnable, the defendant could have moved to dismiss. If it failed to do so, and, on the contrary, consented to an extension of time for the filing of pleadings beyond the return term, it lost its right of removal.

The answer alleges that the defendant was misled by the statements of the plaintiff's counsel as to the sum that would be demanded in the complaint, but we cannot find any proof of this allegation. In our view of the case, it resolves itself almost entirely into an issue of fact. The plaintiff alleges that he was employed by defendant company, acting through its duly constituted officers; that he faithfully performed the services required of him, and earned the compensation demanded. He testified, among other things, that he went to the general office of the defendant, in New York City, where he made the contract declared on, with men whom he knew to be officers of the company. He further testified that the vessel in question wore the Clyde colors; that there was a large "C" on the flag, fastened to the flag-staff; that the life preservers, buckets, bed-clothes, table ware, boats, and oars were all marked "C. S. C." He also said he had some correspondence with the Clyde Steamship Company, the defendant in this action.

This was at least some evidence tending to prove that the plaintiff made a contract with the defendant as alleged, and that the defendant had some substantial interest in the vessel. The defendant denies these allegations in its answer, but fails to offer any proof, except two papers from the records in the United States customhouse in New York, tending to show that the vessel belonged to the De Bary Bays Merchants' Line of New York, of which Marshall Clyde was president. The credibility and weight of this evidence were for the determination of the jury, who found that the plaintiff did contract with the defendant to render the services set out in the complaint, and that the defendant was indebted to the plaintiff on account of such services, in the sum of \$2,000. They also found that the defendant did not own the vessel at that time, and that the contract was not in writing. Under the view taken of the case in the court below, in which we concur, these latter issues do not seem to be material.

The defendant's counsel contend that the contract sued on was ultra vires of the defendant. Even if the evidence had tended to sustain this contention, we think that such a defense is in the nature of confession and avoidance. There are various exceptions to the evidence, as well as to the charge of the court, none of which can be sustained. In the absence of essential error, the judgment is affirmed.

FURCHES, C. J. (dissenting). The defendant offered evidence that it was not the owner of the vessel called the "City of Jacksonville," but that it belonged to the De Bary Bays Merchants' Line of New York, and the jury found that the defendant was not the owner of the City of Jacksonville. It also appears that the defendant never had any benefit from the plaintiff's services on said vessel. This being so, the plaintiff could only recover upon his contract, if he could recover at all. He could not recover on the doctrine of quantum meruit, as he got no benefit. It is admitted that the defendant is a corporation, and, as such, could only contract by deed through its agents, and they could only make a contract which would bind the defendant when made within the line and scope of the business of the corporation. The officers could not make a contract with the plaintiff to repair a vessel, which the defendant company did not own and had no interest in, that would be binding upon the defendant company. Such a contract, if made (and this is denied), was ultra vires, and had no binding force or effect on the defendant. This is shown from the facts and testimony in the case, and it is found by the jury that the defendant was not the owner of the City of Jacksonville, the vessel wrecked, and received no benefit from the plaintiff's labor. And the court calls this a plea in confession and avoidance,

and a matter of fact for the jury. This is new to me,—that ultra vires is a question of fact to be found by the jury. The evidence and findings that the defendant was not the owner of the vessel, and never received any benefit from the services of the plaintiff, I think, showed the ultra vires of the contract, if ever made, and presented a question of law for the court, and not for the jury. The plaintiff makes out his case,—must recover upon his right of action; and, if he made out a case for the defendant, that was sufficient. The defendant need not show anything.

MONTGOMERY, J., concurs in the dissenting opinion.

(131 N. C. 692)

In re TAXATION OF SALARIES OF JUDGES.

(Supreme Court of North Carolina. Dec. 18, 1902.)

TAXATION—SALARIES OF JUDGES.

1. Under Const. art. 4, § 23, which provides that "the salaries of the judges shall not be diminished during their continuance in office," the salaries of the chief justice and associate justices of the supreme court are exempt from taxation, either direct or otherwise.

To Thos. S. Kenan, Clerk of the Supreme Court:

Dear Sir: I herewith hand you the correspondence between Attorney General Gilmer and myself with regard to the right of the legislature to tax the salaries of the judges. And in doing so I wish to say that it is a full, able, and indeed an exhaustive, discussion of the subject involved, and, in my opinion, a correct decision of the question. It has been read to the court, sitting in conference, and approved without a dissenting voice. It was then ordered by the court that the attorney general's opinion, together with my letter to him and this letter to you, be filed and preserved among the records of your office, and be published in the 131st volume of the Supreme Court Reports. It was then resolved that the court would consider this opinion of the attorney general as settling the matter therein discussed, to the same extent as if it were the opinion of this court.

Very respectfully,

D. M. FURCHES,
Chief Justice.

December 18, 1902.

North Carolina—Supreme Court.

Raleigh, Nov. 19, 1902.

Hon. Robert D. Gilmer, attorney general of North Carolina:

Dear Sir: The members of this court have heretofore been of opinion that their salaries were not subject to taxation, and for that reason (except one judge for the last two years) have not listed them for that purpose. But the corporation commission has decided

that they are, and has directed the county commissioners to proceed to collect the same. And as all the members of this court, as are also all the judges of the superior courts, are interested in the question, which would make it embarrassing, if not incompetent, for them to sit upon its hearing, therefore, as you are the legally constituted adviser of the government, the court has decided to ask your opinion upon this important question. And for that purpose the court has requested me to write you this letter, and, whatever your opinion may be, it will be filed for the guidance of this court in the matter.

Hoping you will favor the court with such opinion at as early a day as it may suit your convenience, the court respectfully awaits the same.

Very respectfully, etc.,
D. M. FURCHES,
Chief Justice Supreme Court N. C.

Dec. 16, 1902.

To the Honorable David M. Furches, Chief Justice of the Supreme Court of North Carolina, Raleigh, N. C.:

Dear Sir: I beg to acknowledge the receipt of your favor of recent date, in which my opinion is asked upon a question involving the liability of the official salaries of the chief justice and the associate justices of the supreme court of this state to taxation. In discharge of the duty imposed upon me by section 3363, subsec. 4, of the Code, I have the honor to submit the following:

The doctrine that the power to tax is an essential element of government, and that the legislature, in its exercise, is limited only by constitutional provisions, is elementary and fundamental. The power to tax the salary of a state officer is admitted, unless there is some provision in the organic law forbidding it. Such a prohibition upon legislative authority, if any exists, must appear in the constitution of the state. Section 23, art. 4, of that instrument, is in the following words: "The general assembly shall prescribe and regulate the fees, salaries and emoluments of all officers provided for in this article, but the salaries of the judges shall not be diminished during their continuance in office." Section 21 of the constitution of 1776 provided "that the governor, justices of the supreme courts of law and equity * * * shall have adequate salaries during their continuance in office." Rev. Code, p. 16. In the amended constitution of 1835 the constitutional provision with reference to the salaries of judicial officers was changed, and the following article enacted: "The salaries of the judges of the supreme court, or of the superior courts, shall not be diminished during their continuance in office." 1 Rev. St. p. 23, § 2. And the same inhibition against diminution appears in the article quoted above from the constitution adopted in 1868. Under the constitution of 1776, it will be observed that the judges were to receive "adequate salaries." "What was

an adequate salary," remarked Atty. Gen. Bachelor, in 1856, in passing upon a question similar to the one submitted, "was, ex necessitate to be determined by the legislature, which had the power of fixing it. As this was a discretionary power, that body could declare an 'adequate salary' to be any sum it thought proper. This power was liable to abuse, and, though it would have been a violation of the spirit of the constitution to have fixed these salaries at a sum clearly inadequate, yet the legislature, being unchecked by any other department of the government in the exercise of this discretion, could violate at will the spirit of this part of the constitution. By it the power of reducing the salaries of the judges during their continuance in office is taken away. They may be increased, but cannot be diminished. But to secure them effectually against diminution, this provision should extend to indirect as well as to direct legislation. The power to lessen these salaries by direct legislation is now nowhere claimed, yet the passage of this act is an assertion by the legislature of the power to diminish them indirectly; and, if the legislature has such power, it can be used to any extent to which, in its wisdom, it may see proper to carry it." While Atty. Gen. Bachelor, in his opinion, made no reference to the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, his argument is sustained by the reasoning of Chief Justice Marshall, who delivered the opinion of the court in that case, "that the power to tax involves the power to destroy." This doctrine is exemplified in many cases decided by the supreme courts of other jurisdictions, declaring that the internal revenue acts of the federal government requiring stamps on processes of state courts are unconstitutional interferences with their proceedings. *Smith v. Short*, 40 Ala. 385; *Craig v. Dimock*, 47 Ill. 308; *Warren v. Paul*, 22 Ind. 276; *Fisfield v. Close*, 15 Mich. 505; *Walton v. Bryneth*, 24 How. Prac. 357; *Jones v. Keep's Estate*, 19 Wis. 369; *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *Forchelmer v. Holly*, 14 Fla. 239; *Latham v. Smith*, 45 Ill. 29; *Wallace v. Cravens*, 34 Ind. 534; *Pargoud v. Richardson*, 30 La. Ann. 1286; *Sporrer v. Elfer*, 48 Tenn. 633; *Carpenter v. Snelling*, 97 Mass. 452; *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732. The principle announced in *McCulloch v. Maryland*, supra, has been affirmed by the supreme court of this state. In *King v. Hunter*, 65 N. C. 612-613, 6 Am. Rep. 754, Reade, J., says: "It has been considered how far an office or officer may be taxed. And it is considered as settled that the state has no power to tax an officer of the United States, or vice versa, because 'the power to tax includes the power to destroy,' as was said by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. And if a state were allowed to tax a United States officer one dollar, it might tax him to the full amount of his salary, and thus 'arrest all

'the measures of the government.' And so the United States cannot tax a state officer for the same reason." Upon a similar principle the federal courts have held that the United States government cannot tax the income of state officials. The case of *U. S. v. Ritchie*, Fed. Cas. No. 16,168, involved the right of the federal government to tax the income of the state's attorney for the county of Frederick, in the state of Maryland. The court held that "the United States has no more right to tax these agencies than the state government has to tax the means and agencies to carry on the federal government." In *Day v. Buffinton*, Fed. Cas. No. 3,675, Clifford, Circuit Justice, held that "the salary of a judge of the court of record, payable out of the treasury of a state, is not legally taxable as income under the internal revenue laws of the United States." This ruling was affirmed by the supreme court of the United States. *Buffington v. Day*, 78 U. S. 113, 20 L. Ed. 122. In *Freedman v. Sigel*, Fed. Cas. No. 5,080, it was held that "the United States cannot impose a tax on the salary of a judge of a superior court of the city of New York by imposing a tax upon such salary as the income of such judge." In *Dobbins v. Erie Co.*, 16 Pet. 450, 10 L. Ed. 1022, Mr. Justice Wayne, speaking for the supreme court of the United States, says: "Does not a tax by a state upon the office, diminishing the recompense, conflict with the law of the United States which secures it to the officer in its entrenchment? It certainly has such an effect." In the foregoing cases the decisions of the courts rest upon the principle that the government of the United States has no right to tax the means, agencies, and instrumentalities of the state government, and neither has the state government the right to tax the means, agencies, and instrumentalities of the federal government. In the case of *Sweatt v. Railroad Co.*, Fed. Cas. No. 13,684, Clifford, Circuit Justice, says: "By the word 'means' is meant the revenue, taxes, and public securities, as applied both to the United States and the several states, and the prohibition extends to the salaries of the * * * judicial officers. * * *"

Section 8, art. 1, of the constitution of North Carolina, provides that "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other," that each shall act within its own sphere just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." The constitutional provision hereinbefore recited effectually removes from the domain of legislative authority the enactment of any statute the effect of which is to diminish, either directly or indirectly, the official salary of a judicial officer during the continuance of his term. When the constitution imposes a limitation upon legislative action, it must be assumed that the people who framed the instrument, through their representatives, re-

garded the matter as sufficiently important to be removed from the control of their agents, unless sitting as members of a body of equal dignity with that which enacted the constitutional provision. The convention of 1868 seems to have had in mind that principle, recognized from the beginning by our courts, that the unrestrained right to tax involves in law the right to destroy. The word "unrestrained" is used with due regard to its significance. If the power to tax is conceded, the barriers erected by the constitutional limitation are swept away, and one branch of the state government is placed at the mercy of another. If the general assembly has the power to impose a tax of 1 per cent. on the official salary of a judicial officer, upon the same principle it could lay a duty which would cripple, if not completely paralyze, the whole system of the administration of justice in state tribunals. It is freely admitted that, in the absence of dire political revolutions, the exercise of such destructive power on the part of one branch of the government toward another is not likely to be invoked, but the improbability of the nonexercise of the power does not affect the principle. Upon this point I quote the following language from the supreme court of Michigan: "The argument that such prohibitory action [the power to tax] is improbable has no force whatever in determining the existence or nonexistence of the power. There is no legislative power possessed by any legislature which it may not lawfully carry to an extreme, where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred, it is always possible that it may be exercised, although it may be very improbable." The foregoing citation is from the case of *Fifield v. Close*, supra, and that learned jurist, Judge Cooley, concurred in the opinion of the court.

The federal constitution contains a provision similar to that appearing in the constitution of our own state,—that the salaries of the judges shall not be diminished during their continuance in office. Under an act of congress imposing a tax of 3 per cent. on the salaries of all the officers in the employment of the United States government, the treasury department held that judicial officers were embraced within its terms. On February 16, 1863, Judge Taney, who was then chief justice of the supreme court of the United States, addressed a letter to the honorable the secretary of the treasury, and from it the following paragraph is taken:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent.; and, if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature."

It is true that in the act of congress passed upon by Chief Justice Taney, as well as in the case of *Com. v. Mann*, 5 Watts & S. 403,

cited by Atty. Gen. Bachelor (Appendix, 48 N. C.), the tax levied was deducted from the compensation fixed by law, and retained in the treasury. But in what way the method of collecting the tax imposed upon the salary affects the question involved, I am utterly unable to perceive. The principle announced by Chief Justice Taney, as well as by the supreme court of Pennsylvania in *Com. v. Mann*, supra, operates upon the power to tax, and not upon the incidental means employed to collect.

In *City of New Orleans v. Lea*, it is held by the supreme court of Louisiana (14 La. Ann. 197) that "the article of the constitution which declares that the judges, both of the supreme and inferior courts, shall at stated times receive a salary which shall not be diminished during their continuance in office, exempts the salary of a judge from taxation." The case of *McCulloch v. Maryland*, supra, is cited, and the court says: "If the right to tax the salary of judges be conceded, there would be no limitation, but the discretion of the legislature, to do it to such an extent as virtually to abolish the means of conducting the judicial department. Its existence ought not to depend upon the will of a co-ordinate department."

I find only one case which holds that the salary of a judge, protected by a constitutional provision similar to ours, is liable to taxation, and that is the case of *Commissioners v. Chapman* (decided by the supreme court of Pennsylvania in 1829) 2 Rawle, 73. The opinion is brief, and no authorities are cited. The doctrine laid down is not in consonance with the reasoning employed by the same court 14 years later in *Com. v. Mann*, supra.

Two, at least, of my predecessors in office, have held that the official salary of a judge is not liable to taxation.—Atty. Gen. Bachelor, supra, and Atty. Gen. Walser (Pub. Doc. 1899, document 8, p. 95). And as far as I am advised, this administrative construction of the constitution has until recently been accepted as the correct interpretation of the constitution.

Following the paragraph hereinbefore cited from *King v. Hunter*, supra, Mr. Justice Rende, speaking for the supreme court of our state, says:

"It is not doubted, however, that the state may tax any other property; the object being revenue, and not the destruction of the office. But the people have been so jealous even of this power that it is provided in the constitution that the salaries of the most important officers shall not be altered during their term of office; and this is understood to exempt their salaries from taxation, because to tax is to diminish, or, it may be, to destroy."

The learned justice was considering the question how far an office or officer may be taxed, and the paragraph, viewed in its set-

ting, has more than the force of a mere dictum.

Chancellor Kent says: "We look essentially to the state courts for protection. They touch, in their operation, every chord of human sympathy, and control our best destinies. It is their province to reward and to punish. Their blessings and their terrors will accompany us to the fireside, and be in constant activity before the public eye." In view of these important functions abiding in our judicial tribunals, we must conclude that when the people, in convention assembled, declared that the salaries of the judges should not be diminished during their continuance in office, they meant to withdraw from taxation, either directly or indirectly, such salaries, "because the power to tax is to diminish, or, it may be, to destroy."

Very respectfully,

ROBT. D. GILMER,

Atty. Gen.

(21 N. C. 553)

HARRIS v. BALFOUR QUARRY CO.

(Supreme Court of North Carolina. Dec. 18, 1902.)

INJURY TO EMPLOYE—NEGLIGENCE OF EMPLOYER—INCOMPETENCY OF BOSS—PLEADING AND PROOF—VARIANCE.

1. Under a complaint against a master for injury to an employé, alleging negligence, in that the injury was caused by the incompetency of defendant's superintendent, B., in directing the execution of the work in an unsafe manner, and in ordering plaintiff to do a hazardous act, not so known to be by B., on account of his incompetency, evidence that B. was a vice principal, and, while not incompetent, was negligent, is not admissible.

2. A complaint, to show an employer liable for injury to an employé through the incompetency of its boss, should allege that it knew of such incompetency when it hired him, or kept him in its employ after learning of it.

3. After two holes, from 6 to 12 feet deep, in a quarry, had been drilled and charged, and the battery had been applied, and an explosion had occurred, the boss and F. and E., two competent and experienced workmen, being in doubt as to whether there was an explosion in one of the holes, an examination was made by F. and E. under the supervision of the boss; and, in their judgment, it had exploded, and they so announced, whereupon, with plaintiff (another workman), they, at direction of the boss, commenced to clean it out in the usual manner, and without negligence, when an explosion occurred. *Held*, that the accident was not caused by neglect of duty, but by mistake, for which plaintiff could not recover.

Douglas and Clark, JJ., dissenting.

Appeal from superior court, Henderson county; Council, Judge.

Action by I. G. Harris against the Balfour Quarry Company. Judgment for plaintiff. Defendant appeals. Reversed.

Merrick & Barnard, for appellant.

COOK, J. There is error in the admission of the evidence to which exceptions 1, 2, 3,

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. § 535.

6, and 7 are taken. The negligence complained of and alleged in the complaint is that defendant company required him to work under a boss, captain, or superintendent, and that it was its duty, under their contract, to furnish a boss or superintendent to look after, to see to, and protect the safety of its employes, and to guard them against dangers incident to the business of blasting rocks by the use of dynamite, gunpowder, and other explosives, which was dangerous, and that on the occasion of plaintiff's injury the defendant company's boss or superintendent informed plaintiff that it was safe and free from danger to drill out a hole that had been drilled, loaded with explosives, tamped, and attempted to be fired, saying at the time that said explosive had fired, and that there was no danger, and ordered plaintiff and others to drill out the hole; and he, relying upon the skill, knowledge, and judgment of said boss, obeyed the order, and in doing so the explosion took place, doing him great injury, which directly resulted from the gross negligence and carelessness of defendant company in having failed and neglected to furnish a man, as it agreed to do, who was skilled and experienced, and who possessed the requisite knowledge and ability to protect the plaintiff from such injury, as it should have done, and as it had contracted and agreed to do. So the gravamen of the alleged negligence is that the injuries were caused by the incompetency of the defendant's boss or superintendent, in directing the execution of the work in an unsafe and dangerous manner, and in ordering the plaintiff to do a hazardous act, which was not so known to be by the boss, Burgess, on account of his incompetency, inexperience, and lack of skill. The evidence excepted to was introduced for the purpose of showing, and did show, that Burgess was a foreman and vice principal, and that he had authority to employ and discharge hands and employes, and had control over them, but did not tend to show that he was incompetent, inexperienced, and unskilled. There is no allegation in the complaint that plaintiff's injury was caused by the negligence of defendant company, acting through Burgess as its vice principal, or that he was such vice principal, having authority to employ and discharge hands, and to control them in their work. So the evidence was incompetent, and should have been excluded. Proof without allegation is equally as ineffective as allegation without proof. Therefore "the court cannot take notice of any proof unless there is a corresponding allegation." *McKee v. Lineberger*, 69 N. C. 239; *McLaurin v. Cronly*, 90 N. C. 50. Hence "a plaintiff is not allowed to declare on one cause of action and prove another, because, if such variances are tolerated, however diligent the defendant may be, he cannot so prepare his defense as to meet surprises." *Smith v. Association*, 116 N. C., at page 111, 21 S. E. 85;

Willis v. Branch, 94 N. C. 142; *Conley v. Railroad Co.*, 109 N. C. 692, 14 S. E. 303.

The only evidence offered to show that Burgess, the boss, was incompetent or unskilled and inexperienced in his business was that of the witness Holdert, which was erroneously admitted over defendant's objection (exceptions 4 and 5), for the reason that the witness failed to show any such special knowledge as would render him competent as an expert. But had he qualified himself as an expert, it would not have been of any advantage to plaintiff, as he had failed to allege in his complaint that defendant company knew of such incompetency when he was hired, or kept him in its employment after acquiring such knowledge. *Hagins v. Railway Co.*, 106 N. C. 537, 11 S. E. 590; *Hobbs v. Railroad Co.*, 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838.

There are many other exceptions which are unnecessary to be considered, as there was error in not sustaining defendant's motion to nonsuit, to which exceptions 9 and 10 were taken. The evidence of plaintiff and defendant, taken separately and together, fails to show negligence upon the part of defendant company. After the two holes had been drilled, varying in the estimate of depth from 6 to 12 feet, they were charged with powder, and at the word "Fire" the battery was applied, and an explosion occurred. Whether the explosion took place in one of the holes was a matter of doubt by Burgess, Fowler, and Edney, the two others engaged with plaintiff. But after going around and looking down, talking about it, and making an examination, Fowler and Edney came to the conclusion that both holes went off, and said to Burgess that they had gone off. Then Burgess told them, if they thought it had gone off, to clean it out. Edney and Fowler got ready to do so, and needed the help of plaintiff, who, under Burgess' order, went to help them; and, while cleaning it out with the drill, the explosion took place, doing the injury to plaintiff. The testimony fails to show any neglect of duty. The manner of cleaning out by "churning" was the usual way, and is not contended to have been done negligently. An examination had been made by Fowler and Edney (the latter having been killed, and the former badly injured), who were competent and experienced workmen, as shown by the evidence, under the supervision of Burgess, the foreman; and, in their judgment, from what they saw while investigating, the "hole did go off," and they undertook to clean it out. But in fact the explosion had not taken place in this hole, but it had in the other. They were mistaken. So the evidence shows an accident caused by mistake, and not by neglect of duty, for which the plaintiff cannot recover.

New trial.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court, as it seems

to me to establish a dangerous innovation in pleading, and a most unjust discrimination between the plaintiff and defendant. Section 260 of the Code provides that, "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." Of course, the plaintiff must state the material facts constituting his cause of action, so as to give the defendant reasonable notice of what it will be called upon to answer; but it would be equally useless and impracticable to set forth in detail each particular fact constituting the alleged negligence. The entire system of code pleading is intended to effect substantial justice, without regard to immaterial technicalities. This is evident from a bare citation of the Code. Section 269 says: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it has *actually misled the adverse party, to his prejudice* in maintaining his action upon the merits. Whenever it shall be alleged that a party has been misled, that fact *shall be proved to the satisfaction of the court, and in what respect he has been misled*; and thereupon the judge may order the pleading to be amended upon such terms as shall be just." Section 270 provides: "Where the variance is not material and provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Section 271 provides that: "Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in the *entire scope and meaning*, it shall not be deemed a case of variance within the preceding section, but a failure of proof." Section 276 provides that: "The court and the judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected, by reason of such error or defect." The italics are my own. In the case at bar there does not seem to be any variance in the pleading, but simply a want of particularity. Can it be contended that in the case at bar it has been alleged or proved to the satisfaction of the court that the defendant has been actually misled by the complaint, or that the cause of action is unproved, in its entire scope and meaning? And yet these are the absolute requirements of the statute, before such an exception can be entertained. Was it not the duty of the defendant to move in the court below; and if it was silent there, where the objection, if valid, might have been remedied, can it now be heard? It is not denied that the complaint states a cause of action, and, if the defendant wanted more particulars, why did it not ask for them?

My second objection is the unjust discrimination between the plaintiff and the defendant. In damage suits, why should the plaintiff be required to set forth in full every particular fact relied on to show the negligence of the defendant, and yet the defendant be permitted to show any act within the range of human conduct under the bare allegation that the negligence of the plaintiff contributed to his own injury? In *Cogdell v. Railroad Co.*, 130 N. C. 313, 41 S. E. 541, this question was distinctly raised, in relation to which this court says, on page 319, 130 N. C., and page 543, 41 S. E.: "In its answer, defendant avers 'that the death of the intestate was not caused by any negligence of defendant, but was caused by the negligence and fault of the plaintiff's intestate himself.' This is a strict compliance with the statute (Acts 1887, c. 33), and put plaintiff upon notice as to that defense, as fully appears from the fact of her being prepared with evidence to meet the charge of going upon the car in a drunken condition. However, if plaintiff had not anticipated, and could not with reasonable certainty have anticipated, the defense, it would have been proper for the court, upon application, to have ordered that a bill of particulars be furnished, as prescribed in the Code." The plea of contributory negligence is an affirmative defense, in the nature of confession and avoidance, which, by express statutory provision, must be alleged and proved. Why should the plaintiff be held to a stricter rule than the defendant under similar circumstances? Why cannot an equal measure of right be given with an impartial hand?

My view of the merits of this case is briefly this: If the defendant employed a skillful and competent superintendent, and he used all the means which would have been employed under the circumstances by a man of ordinary prudence and equal skill to determine whether the second blast had been fired, the defendant would not be liable; but this is a fact for the determination of the jury.

CLARK, J. (dissenting). In addition to what is so well said in the dissent of Mr. Justice DOUGLAS, it should be noted that there was strong evidence of negligence upon the testimony offered by the defendant. Burgess, a witness for defendant, testified that he was in charge of the work,—"the only boss there"; that, when there was any doubt about a hole having been fired, it was unloaded with a spoon, which he says was reasonably safe; that, when there was no doubt of its having gone off, then the hole would be "churned." According to all the evidence, there was the gravest doubt about the hole having been fired; but instead of having it unloaded with a spoon, or boring another hole, Burgess, according to the plaintiff's evidence, ordered him to assist Edney and Fowler, who were churning it, which

Burgess says was only an admissible process when it was sure that the charge had been fired. These parties "lifted the drill up pretty high, and dropped it down pretty hard" in the hole, which exploded the cap in the powder charge, blowing off the plaintiff's arm, putting out an eye, and otherwise seriously injuring him, besides killing Edney and wounding Fowler. Burgess was in sole charge of the work,—the vice principal; and it was gross negligence in him, if, as was in evidence, he put the men to churning the hole without ascertaining whether it had been fired, especially when he had just stated that he did not think it had been fired; and there is evidence that Fowler kept saying he thought the hole had not been fired. It was negligence, under those circumstances, if he ordered the plaintiff to assist in churning. When called upon by Edney and Fowler, the plaintiff says he did not go to their aid till ordered to do so by Burgess. The principle laid down in *Hagins v. Railway Co.*, 106 N. C. 537, 11 S. E. 590, and *Hobbs v. Railroad Co.*, 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838, applies only where an employé is injured by the negligence of a fellow servant. At that time, prior to the passage of the fellow servant law (chapter 56, Priv. Laws 1897), a railroad company (as is still the case with other employers) was not responsible for the injury to an employé caused by the negligence of a fellow servant; but those cases point out there was an exception if the employer knew the fellow servant was incompetent when he was hired, or kept him in its employment after acquiring such knowledge. Those cases have no application whatever when, as in this instance, the negligence is alleged to be the negligence of a vice principal,—an alter ego,—for his negligence is the negligence of the master. The liability of the employer for injury caused by the negligence of a fellow servant being an exception to the general rule, it was held that the exception must be pleaded, so that the employer would be prepared to meet such allegation. But here the sole question is whether the vice principal (whether he was competent or incompetent) acted with due care in examining whether the charge had been fired, or whether, without due care as to such examination, he negligently ordered the plaintiff to assist in churning a hole which should have been unloaded, as Burgess himself states, with a spoon, unless he was sure it had been fired. Whether there was such due care, causing the horrible explosion which occurred, killing one man and severely wounding another and the plaintiff, was an issue of fact, which only a jury could determine. As was well said by Furches, J., in *Coley v. Railroad Co.*, 128 N. C., at page 542, 39 S. E. 46, "The questions of prudence, and the ideal prudent man, are always a matter for the jury." There being evidence tending to show that Burgess, the vice principal, was

not as prudent as the defendant's duty to the plaintiff required him to be, we have but one tribunal which has the legitimate power to decide the fact whether he was negligent or not. The constitution (article 1, § 13) guarantees the right of trial by jury in criminal cases; and section 19 of the same article, guarantying it in civil actions says: "The ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." There is no exception as to actions for negligence. There is no intimation that in such cases juries are incompetent either to grasp the facts, or to impartially determine them. In my judgment, appellate courts, sitting out of hearing and sight of the witnesses, without knowledge of their character or their bearing on the stand, and of the other incidents of the trial, cannot be too careful, lest, under the guise of holding that there is no evidence, they may not infringe upon the constitutional right guarantied to the plaintiff and all others in similar cases. The trial judge and the 12 jurors have been of opinion not only that there was evidence, but the jury have been unanimous that the preponderance of evidence was in favor of the plaintiff. The majority of this court, laboring under the disadvantage of not hearing the testimony as actually delivered, may think the preponderance the other way. But when the facts are controverted, negligence—the rule of the prudent man—is always a question for the jury, not a matter of law for the court. *Montgomery, J.*, in *Ellerbe v. Railroad Co.*, 118 N. C., at page 1030, 24 S. E. 810; *Williams v. Railway Co.*, 119 N. C. 750, 26 S. E. 32. It is only when there is no scintilla of evidence for the plaintiff that this court can rightfully hold that the case should not have been submitted to a jury. An appellate court, composed of five judges, and with the benefit of usually more elaborate argument, and with greater leisure, is provided to review errors of law alleged to be committed by a single trial judge on the circuit; but the constitution is careful to restrict our jurisdiction "to review, upon appeal, any decision of the courts below upon any matter of law or legal inference." There is no power lodged here to review the findings of fact by a jury upon disputed matters of fact. The incompetency or negligence of the boss, unlike the incompetency or negligence of a fellow servant, is the incompetency or negligence of the defendant.

(121 N. C. 616)

SMITH v. ATLANTA & O. AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 20, 1902.)

APPEAL—MATTERS REVIEWABLE—QUESTIONS NOT CONSIDERED BELOW.

1. On appeal in a personal injury action, questions as to the speed of the engine which caused

ed the injury, and as to certain rules of the defendant railroad company, which were not submitted to jury as evidence of negligence, will not be considered.

Clark and Douglas, JJ., dissenting.

On petition for rehearing. Affirmed.
For former opinion, see 42 S. E. 139.

MONTGOMERY, J. The argument of the plaintiff's counsel on the rehearing was addressed to three alleged errors made in the decision on the former hearing: (1) It was contended that the court erred in treating the plaintiff as if he were a trespasser on the track of the defendant, instead of as an employé. (2) That the speed of the train was an important fact in the case, and that we gave it no consideration. (3) That the rules which were prescribed by the company for the operation and regulation of its trains in respect to its employés were not considered for any purpose in the former opinion. It was argued that, if those errors had not been made, the erroneous conclusion which the court arrived at could not have been reached. For all practical purposes, the facts necessary for a proper consideration of the case are set out in the former opinion. 130 N. C. 344, 42 S. E. 139. In the discussion which is to follow, we will leave the first alleged error to be treated with the question of the defendant's negligence. As to the second assignment of error,—concerning the speed of the engine in connection with the plaintiff's hurt,—it is sufficient to say that on the trial below it had no significance. The defendant's fourth prayer for instructions was as to its right to run its engine, so far as the plaintiff was concerned, at any rate of speed it chose. His honor read the prayer to the jury, and said, "there was no evidence that the rate of speed caused the injury, and therefore the rate of speed would be excluded from the consideration of the jury as evidence of negligence on the first issue." In reference to the third alleged error on the part of this court,—that we did not give consideration to the rules of the company,—it is sufficient to say that in the charge to the jury his honor neither recited these rules, nor made any reference to them as bearing upon the plaintiff's rights or the defendant's negligence, and there was nothing for us to consider about them.

The only question, then, which remains for consideration is whether or not the court was in error in the conclusion it arrived at in the former opinion. That part of the charge of his honor which we thought was erroneous is set out in full in the former opinion, and it is not, therefore, necessary to insert it here. The plaintiff was not employed to do work which required him to go upon the track of the defendant company, and, so far as the evidence discloses, he did not put his foot upon it. He was employed to do the simplest of all mechanical work,—

42 S. E.—62

to paint some switch targets in the defendant's shifting yard at Charlotte. The targets were four feet from the railroad, and the position was perfectly safe if the plaintiff had remained at the outside of the target. The track was perfectly straight for about 600 feet, and there were no obstructions of any kind for that distance along the way. The plaintiff placed the paint bucket between the rail and his feet, and in the act of a second, stooping over to dip his brush in the paint, his head was struck by a passing engine, and he was badly hurt. He said that there was no signal given by bell or whistle. Under these facts we are of the opinion, as we were when the case was before us last, that the engineer had a right to assume that the plaintiff would have stepped out of danger if he had peradventure gotten too near the track, or that he (the plaintiff) would not put his head in danger by leaning over to dip his brush in the paint as the engine was passing by. It seems to us no reasonable man could have thought that the plaintiff, under the circumstances of this case, would need any caution or signal. This view of the conduct of the defendant's engineer is fully sustained in *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. There the plaintiff was a repairer of tracks in the switch yard of the defendant. The tracks were straight, and without obstructions in either direction. He was at work, at the time of the accident, in the yard, when a switch engine pushing two cars moved slowly along the track upon which he was at work, the speed of the engine being that of a man walking. The plaintiff stood with his back to the approaching cars, engaged in his work, without looking backward or watching for the engine, until he was run over by the first car. The plaintiff there was an experienced man in work about the yard, as was the plaintiff in the case before us. They both knew all about the shifting of cars and the general work about switch yards. The differences in the main facts of the two cases are that in the case of *Aerkfetz v. Humphreys*, supra, the engine was moving at a slower speed than was the engine in our case, and the plaintiff there was engaged in working on the track, while in the present case the plaintiff was not employed to work on the track. The speed of the engine, as we have seen, does not have any bearing, as we have pointed out. The court decided in *Aerkfetz v. Humphreys* that the defendant was not negligent. It is not necessary for us to go so far as the court went in that case, and we do not undertake to decide that there would be no negligence on the part of a railroad company for one of its engineers, without signal or warning, to run down its employés who are engaged in work on its tracks. When such a case is presented, then will be the proper time to consider it.

The counsel of the plaintiff referred us to numerous decisions from the courts of other states in which it has been held to be negligence on the part of railroad companies to run over with their engines or cars their employes while engaged in work upon their tracks, without having given proper warnings; that is, that the employes have the right to expect warning. They are not cases like the one before us.

The petition to rehear is dismissed. Petition dismissed.

CLARK, J. (dissenting). The plaintiff was not a trespasser, but had been ordered by his superior to paint the switch target between the two tracks, where he was working when struck by the engine. While this target was 4 feet (less 7 or 8 inches for the fans or wings) from the rail, the projection of the car and steps, 29 inches, left but a few inches (11 or 12) of space. The defendant's engine and cars came down one track, and passed to plaintiff's rear, and then came rapidly up another track, moving backwards, with a car in front, without ringing the bell, and running at a high rate of speed,—10 or 15 miles per hour according to the defendant's own witness, and 25 to 30 miles an hour according to the plaintiff's witness,—and struck him on the back as he leaned over to dip his brush in the paint, cutting a hole in his back, and lacerating his shoulders and head, and paralyzing his right arm. The plaintiff was preoccupied with his work, and could not be expected to look both to the front and rear and keep up his work, too. It is in evidence that the rules of the company required the bell to be rung to give notice to those at work on or near the track, and that this notice was customary. The plaintiff had a right to rely upon the observance of the rules and the custom, both of which were known to him, and, of course, to the engineer, too. The engineer, approaching from the rear, could see the plaintiff 600 feet away on a straight track, preoccupied with his work. Under such circumstances, the rapid speed and the failure to observe the rules and the custom by ringing the bell, were evidence of negligence to go to the jury. The court charged the jury that, if the plaintiff was not put at work in a dangerous place, but was comparatively safe, and suddenly turned and got in the way of the engine when it was too late to stop it, the jury should answer the first issue "No." The jury answered the first issue "Yes," thereby finding that the engineer was negligent in not avoiding the injury by giving the signal required by the rules for the safety of those working on or near the track. The rules of the company were in evidence, and require the engineer, if any person is on or so near the track as to be in danger, to ring the bell of his engine when shifting, and to blow the whistle if necessary, and to use every possible means to prevent an accident. There

was also evidence that it was the custom always to ring the bell while running the engine for shifting at this passenger station. The former opinion of the court (130 N. C., at page 346, 42 S. E. 139) says that the only error found in the trial below was in leaving it to the jury to determine whether the engineer, seeing the preoccupation of the plaintiff, and not giving signal to warn him, was negligent, and the proximate cause of the injury. But surely all the above circumstances, the evidence of running 25 to 30 miles an hour, the failure to observe the rules, and the custom to ring the bell, the sight by the engineer of the plaintiff 600 feet away, intent on his work, were properly submitted to the jury, especially when coupled, as they were, with the instruction that if the plaintiff was not at work in a dangerous place, but suddenly turned and got in the way of the engine when it was too late to stop it, to answer the first issue "No." The target, according to the evidence, was 4 feet from the middle of the rail, and the fan which the plaintiff was painting when struck extended 7 or 8 inches toward the rail, leaving the space 40 or 41 inches, while the step of the car extended 29 inches from the rail, reducing the space to 11 or 12 inches. The plaintiff, a tall man, when he leant over to dip his brush in the paint, occupied, he says, more than that space to the right. Relying upon the regulation and custom of shifting engines to ring the bell, he was struck from behind, while thus stooping, by an engine, which, by some of the evidence, bore down on him at the rate of 25 miles an hour, and without giving any signal as required. The plaintiff's work was between two tracks, and he could not look both ways at once. That we have not direct precedents in our courts is due to the fact that till recently an injury caused by the negligence of a fellow servant was not actionable. But there are many precedents elsewhere, cited in the very able brief of the defendant's counsel. In *Erickson v. Railroad Co.* (Minn.) 43 N. W. 332, 5 L. R. A. 786, it was held that one rightfully in close proximity to the track, employed by the defendant, was not required to look out for passing engines, as in the case of trespassers or licensees, but that the company owed him the duty of "active vigilance" in giving proper signals and warnings of the approach of engines and trains. The court says: "The plaintiff had the right to rely on the continued performance of this duty, without the necessity, while engrossed in his work, of keeping constant lookout for approaching trains." There are numerous cases to same effect which might be added. That the plaintiff had a right to rely upon the custom to ring the bell is held in *Stanley v. Railroad Co.*, 120 N. C. 514, 27 S. E. 27; *Norton v. Railroad Co.*, 122 N. C. 938, 29 S. E. 886; *Beach, Contrib. Neg.* § 67. The plaintiff was rightfully at his place, and, even if he had not been, the defendant should

have sounded its usual warning. *McLamb v. Railroad Co.*, 122 N. C. 862, 29 S. E. 894; *McCall v. Railway Co.*, 129 N. C. 298, 40 S. E. 87. I think Judge Hoke committed no error in leaving the matter to the jury, and that the petition should be allowed. The whole evidence is not set out in this dissent, for it can very rarely be appropriate, since this court has no power to review the action of the jury. All that is necessary is to set out only such part of the evidence as, taken most strongly for the plaintiff, would justify or not the submission of the disputed matter to the only tribunal which is authorized to decide issues of fact.

DOUGLAS, J., concurs in the dissenting opinion.

(131 N. C. 623)

DARGAN et ux. v. CAROLINA CENT. R. CO.
(Supreme Court of North Carolina. Dec. 20, 1902.)

RAILROADS—RIGHT OF WAY—COMPENSATION—REMEDY—LIMITATIONS.

1. Under Acts 1854-55, c. 225, authorizing a railroad company to acquire a right of way, but exempting gardens from invasion by the company, if lands on the right of way are not used as a garden at the time the company completes its road thereon, and thus acquires constructive possession of the whole strip, it is immaterial that they are used for a garden when the company subsequently takes actual possession.

2. Where land is taken by a railroad company under Acts 1872-73, c. 75, or Acts 1854-55, c. 225, authorizing it to acquire a right of way, and providing for the assessment of compensation by application to the clerk of the superior court and the appointment of commissioners therefor, the compensation cannot be recovered by an action of ejectment.

3. Under Acts 1872-73, c. 75, and Acts 1854-55, c. 225, authorizing a railroad company to acquire a right of way, and providing that, unless the owner applies for an assessment of compensation within two years after the part of the road on his land is finished, he or those claiming under him shall be barred from recovering the land or compensation therefor, his wife, to whom he conveys the land after he is barred by such two-years limitation, has no right of recovery against the company.

Douglas, J., dissenting.

Appeal from superior court, Union county; Robinson, Judge.

Action by Milton Dargan and wife against the Carolina Central Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Redwine & Stack, for appellants. Adams & Jerome and J. D. Shaw, for appellee.

MONTGOMERY, J. The defendant, the Carolina Central Railroad Company, was chartered in 1873 under chapter 75 of the Acts of 1872-73. By the provisions of the act of incorporation, and also under chapter 225 of the Acts of 1854-55, the defendant being the purchaser of the Wilmington, Charlotte & Rutherford Railroad, the defendant was authorized to procure a right of way by

either purchase or proceedings in condemnation. In both acts of assembly it was also provided that, in the absence of any contract in relation to the land through which the railway might pass, it would be presumed that the land over which the road might be constructed, together with a space of 100 feet on each side of the center of the railway, had been granted to the company by the owners, and that, unless the owner at the time that part of the railway which might occupy the land, or those claiming under him, was finished, should apply for an assessment of the value of the land so taken within two years next after that part of the road which might be on the land was finished, the owner, or those claiming under him, should be forever barred from recovering the land, or having any assessment or compensation therefor. By section 9 of the Acts of 1872-73 the dwelling house and burial ground were exempted from invasion on the part of the railway company without the consent of the owner or the order of the superior court, and by the Acts of 1854-55 the exemption was the residence and garden. The evidence in this case shows that the land which was actually taken possession of by the defendant in 1892 or 1893 was within 100 feet from the center of the track, and was then used as a garden by the plaintiffs; and it was admitted by the plaintiffs that the garden which is the subject-matter of the dispute was used for railroad purposes, and was necessary for the conducting of its business and the enjoyment of its rights under its charter. But it was not attempted to be shown that the land was used as a garden when the road was finished upon the lands of the plaintiffs. It is immaterial, therefore, the constructive possession of the whole of the strip of land by the completing of the railroad track being in the defendant, whether the actual possession in 1892 or 1893 was under the Acts of 1854-55, or the Acts of 1872-73, as the land was not at the time of the construction of the track used either as a garden or as a burial ground. The use made of the land by the plaintiffs subsequent to the completion of the railroad track was subject to the after-necessity of the use of the whole 100 feet, including the part which is the subject of this action, wherever it became necessary to be so used by the company for the purposes granted under the charter. When it became necessary for the defendant to take the land for the purposes averred in the answer and admitted by the plaintiff,—that is, for the purpose of conducting the defendant's business,—it was authorized to do so. *Railroad Co. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779; *Shields v. Railroad Co.*, 129 N. C. 1, 39 S. E. 582. The plaintiffs, in the brief of their counsel, contended that, if the plaintiffs were not entitled to recover the land, they ought to be allowed compensation for the value of the land, as under condemnation proceedings. The

complaint set forth simply the cause of action in the nature of ejectment, but there was a prayer for general relief. We think, however, that, as there was a provision in both the acts referred to contemplating the assessment of damages and furnishing the means of assessment, that remedy must be pursued, and that the plaintiffs were not entitled to it in the present action. In cases involving the right of eminent domain the common-law remedy is superseded by the statutory remedy, and aggrieved parties are compelled to seek redress under provisions of the statute. *McIntire v. Railroad Co.*, 67 N. C. 278; *Land v. Railroad Co.*, 107 N. C. 72, 12 S. E. 125. The provision for the assessment in the way of compensation for lands taken by the defendant under the acts referred to was by application to the clerk of the superior court of the county in which the land is situated, and the appointment of commissioners for that purpose. It is better for us to say further that the plaintiffs in this case cannot recover in any form of procedure. Under both of the acts referred to, married women and infants are not affected until two years after the removal of their respective disabilities; but when the railroad was completed through the land the land was the property of the husband of the feme plaintiff, and his right to have assessment as for compensation was barred at the end of two years from the completion of the road. His conveyance to his wife, the feme plaintiff, was of date of 1893, long after the road was completed. The ruling of his honor, which resulted in a nonsuit, was proper, as was the judgment.

No error.

DOUGLAS, J. (dissenting). This is an action for the recovery of real estate and damages for its detention. The plaintiffs, in support of their title, offered in evidence a deed from J. S. Helms to Milton Dargan, executed January 6, 1871, and registered on the 28th of December, 1885, in Book 16, page 677; and also a deed executed by Milton Dargan to Nora Dargan, his wife, on the 7th day of March, 1893, registered on the 9th day of March, 1893, in the office of the register of deeds of Union county, in Book 23, page 685. The plaintiff introduced witnesses tending to prove that the feme plaintiff had been married to her co-plaintiff for 30 years; that she and her husband had been in possession of the lot described in the complaint, claiming the lot under the deeds, until the erection of a stock pen by the defendant, which, it was admitted by the plaintiffs, was within 100 feet of the railroad track of the defendant; that plaintiffs were in the actual possession of said lot, under known and visible boundaries, at the time of the entry of defendant, and forbade the entry; that the defendant took possession of the lot in 1893, about the last of the year; that the piece of land was used as a garden and or-

chard at the time the defendant entered and took actual possession of the lot by the erection of the stock pen; and that the rental value of the lot was some \$15 to \$20 per year. The plaintiffs offered in evidence the Acts of the General Assembly passed in 1854-55, c. 225, the Public Laws of 1871-72, c. 131, and the Laws of North Carolina, 1872-73, c. 75, and the Acts of 1881, c. 5. The plaintiffs also introduced the summons in the case. There was evidence offered by the defendant tending to show that the defendant took possession of the lot, which is the land described in the complaint, and wholly within the right of way of defendant, in December, 1892; that it was necessary for the defendant to use the lot for the purpose of erecting a stock pen, where horses and other animals could be unloaded and fed or loaded on its trains, and that this place was especially suited for that purpose; that the stock pen was erected in December on the right of way; that plaintiff admitted on the trial that the stock pen was on the right of way; that the rental value of the land was \$5 per year. Upon the admission of plaintiffs that the stock pen was within 100 feet of the railroad track, and was used for railroad purposes necessary for the proper enjoyment of its rights under its charter, and that the lot sought to be recovered by the plaintiffs is that covered by the stock pen, his honor intimated an opinion that plaintiffs were not entitled to recover in this action, and plaintiffs submitted to a nonsuit and appealed. Judgment of nonsuit as set out in the record, to which the defendant excepted, and appealed to the supreme court.

The complaint is in the nature of ejectment. The answer denies the essential articles of the complaint, and proceeds as follows: "The defendant further answering, and for a further defense alleges: (1) That it is admitted that the defendant is in the possession of so much of the said lot of land described in article 2 as lies within 100 feet of the center of the track of the defendant, and has been in possession of the same, exercising acts of ownership on it as its right of way, claiming it and using it as necessary to the operation of defendant's railroad for more than five years before the commencement of this action, and since the defendant entered upon said 100 feet of said land for the purpose of constructing its road; and the plaintiff ought not to be allowed to maintain this action, and the same is barred by the statute of limitations. (2) That the defendant, under its charter, is entitled to 100 feet on each side of its track from the center thereof for right of way, and has been in the use, occupancy, and possession of so much of the land described in article 2 of complaint as is situated within said 100 feet on the south side of its track, using, occupying, and possessing the same as its right of way for more than five years since defendant entered upon said land for the

purpose of constructing its road, and for more than five years before the commencement of this action, and for more than two years since defendant's road was in operation, and more than two years before the commencement of this action; and the same is barred by the statute of limitations. (3) That more than five years had elapsed before the commencement of this action after plaintiffs' cause of action accrued, and same is barred by the statute of limitations. (4) That more than two years had elapsed before the commencement of this action after plaintiffs' cause of [action] accrued, and the same is barred by the statute of limitations."

The plaintiffs appealed from the judgment rendered.

Upon the foregoing facts I am of the following opinion: This is an action for the recovery of land, but it appears from the argument that the real question at issue is whether the defendant shall be permitted to keep the land without compensation. The defendant company was incorporated under chapter 75 of the Laws of 1872-73, and claims also as the successor by purchase of the Wilmington, Charlotte & Rutherford Railroad Company, incorporated under chapter 225 of the Laws of 1854-55. It is well settled that private property cannot be taken, directly or indirectly, even for a public purpose, without just compensation. *Railroad Co. v. Davis*, 19 N. C. 451; *State v. Glen*, 52 N. C. 321; *Cornelius v. Same*, Id. 512; *Johnston v. Rankin*, 70 N. C. 550; *Staton v. Railroad Co.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. It has been expressly held that under the fourteenth amendment to the constitution of the United States a state cannot appropriate private property to public use without compensation. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. It is equally well settled that the denial of an adequate remedy for enforcing the right is a denial of the right itself, and the adequacy of the remedy must be determined by its practical results. In *Dargan v. Railroad Co.*, 113 N. C. 596, 18 S. E. 653, this court has said: "The right of the state to take private property rests upon the ground that there is public necessity for such appropriation, and can be exercised only where the law provides the means of giving adequate compensation to the owner." That case, decided in favor of the plaintiff, was between the same parties as the case at bar, and construed the same statutes. In *Henderson v. Mayor, etc.*, 92 U. S. 259, 23 L. Ed. 543, the court says: "In whatever language the statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect." In *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, the court says: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed

by the substance of things, and not by mere form." In *Chicago, B. & Q. R. Co. v. City of Chicago*, the court says, on page 236, 166 U. S., page 584, 17 Sup. Ct., 41 L. Ed. 979: "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of his property without compensation." In *Brickett v. Aqueduct Co.*, 142 Mass. 394, 8 N. E. 119, the court says that "a statute which attempts to authorize the appropriation of private property for public uses without making adequate provision for compensation is unconstitutional and void." As there is no contention that the plaintiffs have ever received any compensation for the land in suit, an affirmation of the judgment would have the effect of taking the land away from them, and giving it to the defendant against their will, and without just compensation. We would also deny to them the due process of law allowed as of common right to the citizen when suing a natural person. Before we can allow to a corporation this privilege of exemption from the ordinary law of the land, we must find (1) that the statute gives the plaintiffs a remedy exclusive in terms or by direct implication, and (2) that such exclusive remedy is complete and adequate.

We are met at the threshold of this case by a difficulty appearing upon the face of the record. While it was argued upon the provisions in the statutes of incorporation, these statutes are nowhere pleaded in the answer; and, as they are private statutes, the defendant cannot rely upon any special exemption therein contained. In *Durham v. Railroad Co.*, 108 N. C. 399, 12 S. E. 1040 13 S. E. 1, this court says: "It is not questioned that private statutes must be pleaded (Code, § 264), and that they must be proved when they become necessary as evidence." The Code (section 264) prescribes how they shall be pleaded as follows: "In pleading a private statute or right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its ratification, and the court shall thereupon take judicial notice thereof." 20 Enc. Pl. & Prac. 596. This would determine the result of this appeal, but, as the answer may be amended upon a new trial, we will proceed to discuss the statutes as if they had been pleaded.

The next question is, do the statutes provide a remedy, adequate and exclusive, to which the plaintiffs may resort to obtain just compensation for their land? The only provisions for condemnation proceedings that we can find in either act are in section 26 of the Acts of 1854-55, and section 9 of the Acts of 1872-73, which are substantially similar. The material words of the latter section are as follows: "Sec. 9. That when any lands or rights of way may be demanded by said company, or condemned, * * *

and for want of agreement as to the value thereof, or from any other cause the same cannot be or is not purchased from the owner or owners, the same may be taken at a valuation to be made by three commissioners, or a majority of them, to be appointed by the clerk of the superior court of the county where some part of such land or right of way is situate: * * * provided that on any application for the appointment of commissioners under this section it shall be made to appear to the satisfaction of the court that at least ten days previous notice has been given by the *applicant* to the *owner* of the land so proposed to be condemned," etc. (The italics in quoting these statutes are ours.) The same section provides that "the proceedings of said commissioners, accompanied with a description of said land or right of way, shall be returned, under the hand and seal of the commissioners, to the court from which the commission issued, there to remain a matter of record, and the lands or right of way so valued by said commissioners *shall thenceforth vest* in the said company as long as the same shall be used for purposes of said railway or branches, *whenever and so soon as the amount of said valuation may be paid or tendered.*" From these sections it appears that: (1) The right to demand the appointment of such commissioners is given exclusively to the railroad company; (2) such commissioners cannot be appointed until the land has been demanded or condemned by the railroad company; (3) nor can they be appointed until after the said railroad company has given 10 days' notice to the owner of the land; (4) that said land shall not vest, even for the purposes of an easement, until its assessed value has been paid or tendered to the owner. None of these conditions precedent appear in the case at bar, and hence the land has never vested in the defendant. As the plaintiffs are given no remedy at all under the acts in question, they are entitled to the ordinary process of law. Mills on Eminent Domain (section 88) says: "While the statutory remedy is not complete, the common-law remedy remains. For an entry on land, or the taking or destruction of property of another, the common law gave the injured party the remedies of trespass, trespass on the case, or ejectment. These remedies gave the owner complete compensation for the invasion of his rights of property. The statutory remedy which is provided must be complete in ascertaining the damages and securing their payment, or the common-law remedy may be pursued. The provision of a specific mode of ascertaining damages confers no right which did not exist before. The omission of a specific mode leaves the party his common-law right. If the statute only provides a partial remedy, there is a remedy for the remainder at common law. The payment of damages must be secured; and if, after condemnation, there is a refusal to

pay, trespass or ejectment, with mesne profits, may be maintained." For each of these propositions the learned author cites authorities of the highest respectability. See, also, Rand. Em. Dom. §§ 227-231; Lewis, Em. Dom. §§ 364-366, 456; Enc. Pl. & Prac. pp. 481, 486, 528, 544, 545, 623, and especially pages 691, 694, 715, 716; Black. Const. Law, § 130; Cooley, Const. Lim. 449, 664, 665, 692; 4 Thomp. Corp. §§ 5590, 5621.

We come now to consider the effect of section 28 of the Acts of 1854-55 and section 11 of the Acts of 1872-73, which are substantially similar. The latter section is as follows: "Sec. 11. That in the absence of any contract or contracts in relation to the land through which said railway or any part of its branches may pass (signed by the owner thereof or his agent, or some claimant, or person in possession thereof, and which may be confirmed by the owner thereof) it shall be presumed that the land over which said road or any of its branches may be constructed, together with a space of 100 feet on each side of the center of said railway and the additional space provided for in the foregoing section, has been granted to said company by the owner or owners thereof; and said company shall have good right and title thereto, and shall hold and enjoy the same as long as the same shall be used for the purposes of said railway, unless the person or persons owning the land at the time that part of said railway, which may occupy said land, was finished, or those claiming under him, her or them, shall apply for an assessment for the value of said lands as heretofore directed within two years next after that part of the road, which may be on said land, was finished, and in case the same owner or owners or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she or they shall forever be barred from recovering said land or having any assessment or compensation therefor; but nothing herein contained shall affect the rights of femes covert or infants until two years after the removal of their respective disabilities." We have seen that the acts do not give the owner of the land the right to have it assessed, but, if we assume that they do so by implication, we must hold that such remedy is simply cumulative, and does not deprive the owner of his common-law remedies. In other words, we cannot, by mere implication, write into a statute words that exempt a corporation from the ordinary process of law. But even supposing that this may be done, the statute must be at least reasonably construed, and it is evident from the face of the acts that such a presumption is intended to apply only to such land as is "occupied" by the said railroad. This is the word used, and its meaning is further illustrated by the provision that the railroad company "shall hold and enjoy the same as long as the same shall be used for the purposes of said railway." It is there-

fore evident that it was not intended that the two-year statute of limitation should begin to run until after the railroad company had taken possession of the land. How can it be otherwise? As long as the plaintiffs remained in the undisturbed use and enjoyment of their land, what cause of action did they have? They could not bring trespass or ejectment, because no one had trespassed and they themselves were in undisputed possession. They could not ask to have the value of the land assessed against the defendant, because the defendant had never "demanded" the land; and surely a man cannot make a railroad company buy his land simply because it is within 100 feet of its track. The act does not require the defendant to condemn 100 feet on each side of its track, but simply fixes that as the maximum limit. Where land is valuable, it is highly probable that the company would not care to pay for more than it needed. It is well settled that no statute of limitation can run against the owner in possession. There must first be an ouster. In *Lewis v. Covington*, 130 N. C. 541, 41 S. E. 677, this court says: "And the rule is, to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. This is said to be the test [citing authorities]. Suppose the defendant had been sued for the possession of the land in dispute, the action would have failed, as it would have been necessary to show that the defendant was in the possession of the land sued for." In the case at bar, suppose the defendant had been sued by the plaintiffs 20 years ago, it could have said: "If you sue me in ejectment, I am not in possession of your land; if you sue me for trespass, I have never been on your land; if you seek to make me pay for it, I do not want it." No action could have been maintained by the plaintiffs until the ouster in 1893, which, according to their testimony, was after the land was conveyed to the feme plaintiff. As she has constantly been under coverture, no statute of limitations has ever started to run against her.

There is another fatal defect. The act provides that such a presumption shall arise only in the absence of any contract in relation to the land. Such absence of contract is a condition precedent to the presumption, and must be averred and proved by the defendant before it can avail itself of any such presumption. This it has failed to do. If there was any such contract, it would have been in the possession of the defendant, who might have recorded it, have kept it, or have destroyed it. The last course would have best subserved its own interest. In any event, the defendant alone had the proof, and we cannot say that it can remain silent, and take the plaintiffs' land under a naked presumption founded upon an implication in a private statute that has never been pleaded.

There is another question that has neither

been raised nor argued in this case. Section 3 of article 8 of the constitution provides that "all corporations shall have the right to sue, and shall be subject to be sued in all courts, in like manner as natural persons." A decision of this question is not necessary to a determination of this appeal, but, being of constitutional obligation, it is worthy of most serious consideration.

(131 N. C. 536)

WATKINS v. KAOLIN MFG. CO.

(Supreme Court of North Carolina. Dec. 18, 1902.)

ACTION BY TRUSTOR—PHYSICAL INJURY—PLEADING—FRIGHT.

1. One who has given a deed of trust on property may maintain an action for injury to the property, it still being sufficient to secure the debt, so that the loss falls on her.

2. A complaint alleging that plaintiff was greatly disturbed in body, to her great damage, states a physical injury.

3. An action will lie for physical injury or disease resulting from fright or nervous shock, caused by negligence of defendant in blasting at a distance of 60 paces from plaintiff's house, throwing rocks on and through it, after being asked by her to direct the blasting so that it would not do this.

Appeal from superior court, Jackson county; Moore, Judge.

Action by Flora J. Watkins against the Kaolin Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Coleman C. Cowan, for appellant. Walter E. Moore and Shepherd & Shepherd, for appellee.

COOK, J. The substantial questions raised by the defendant's assignments of error are: (1) Could the cause of action for damage done to the house and land be maintained by plaintiff trustor? (2) Does the complaint state a cause of action for physical injury to plaintiff? (3) Does a cause of action lie for physical injury resulting from fright and nervousness caused by negligent acts?

As to the first question: It is clear that the plaintiff had the right to bring this action for damages done to the freehold. She owned the premises in fee, subject to a deed of trust executed thereon to secure a debt. The conveyance of the title to the trustee did not disturb her possession or ownership as to trespassers and tortfeasors. So long as the property was of sufficient value to secure the payment of the debt, the trustee and cestui que trust could sustain no loss or injury by reason of damage done to the premises. Therefore the loss by reason of the damage would fall upon the trustor, the equitable owner, and she, being the party really injured, had a right to maintain the action. She was in possession of the land, and, being the equitable owner, had the right to recover

¶ 1. See *Mortgages*, vol. 35, Cent. Dig. § 539.

in an action of ejectment, although the legal title was in the trustee. *Murray v. Blackledge*, 71 N. C. 492; *Farmer v. Daniel*, 82 N. C. 152; *Coudry v. Cheshire*, 88 N. C. 375; *Taylor v. Eastman*, 92 N. C. 601; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918. The trustee holding the legal title might have been made a party to the action, but his recovery would have inured only to the benefit of the trustor, which could be of no concern to the trespasser or tortfeasor. A judgment in an action between the equitable owner in possession and the defendant for damages to the premises would be a bar to an action by the trustee. So no loss could befall the defendant. Had defendant deemed the trustee a necessary party to the action, it should have demurred (Code, § 239, subsec. 4), or answered (section 241); otherwise it will be deemed to have been waived (section 242).

As to the second question: Plaintiff alleges that she "became so nervous and frightened from the negligent and careless conduct and blasting of defendant that she could not sleep at night, and was greatly disturbed in body and mind, as well for herself and the safety of her children as the destruction of her property, to her great damage in the sum of nineteen hundred and ninety-nine dollars." To sustain this allegation she was allowed to prove that the blasting rendered her almost helpless; that she could not go about her daily duties, and could not keep on her feet to attend to her children; that it has affected her ever since, and has caused her female trouble out of its regular course. Under the old system of pleading, this variance would be fatal, but under the provisions of the Code the rule is greatly modified, and pleadings must be liberally construed for the purpose of determining their effect with a view to substantial justice between the parties. Code, § 260. From a liberal construction of plaintiff's allegation, it appears that the alleged negligent blasting greatly disturbed her in body and mind, causing her to become so nervous and frightened that she could not sleep at night, causing her great damage; and, as the result, she proves that she was physically injured as above stated, to which defendant excepted, but did not allege that it was misled by such a variance. Therefore plaintiff was not called upon to amend her complaint so as to conform to the proof, and the variance is deemed immaterial. Code, § 269; *Lilly v. Baker*, 88 N. C. 151; *Patrick v. Railroad*, 93 N. C. 422; *Lawrence v. Hester*, Id. 79; *Usry v. Sult*, 91 N. C. 406; *Bank v. Burgwyn*, 116 N. C. 122, 21 S. E. 202. It appearing that the defendant was not misled, the variance between the allegation and proof must be deemed to have been immaterial. *Gibbs v. Fuller*, 66 N. C. 113. Plaintiff, in her complaint, did not allege that she had been rendered almost helpless in consequence of such fright and nervousness, or that she could not go about her daily duties, and has been af-

flicted ever since with female trouble out of its regular course. But if defendant had alleged that it had been misled by such proof, and had proved the same to the satisfaction of the court, the judge may have ordered that the complaint be amended (section 269, Code), for amendments to pleadings which further justice, speed the trial of causes, or prevent circuity of action and unnecessary expense, are allowed on proper terms. *Commissioners v. Blair*, 76 N. C. 136. It clearly appears from the language of the allegation that plaintiff intended to charge that physical injury was done to her,—“was greatly disturbed in body, * * * to her great damage,”—and we think it does state a cause of action for physical injury. If defendant was misled, and not put upon notice by it that plaintiff would offer evidence of injuries to her person resulting from fright, then it had its remedy under section 269 of the Code. Or, if defendant did not understand the precise nature of the charge made in the complaint, it had its remedy by applying to the court for an order to have it made more definite and certain. *Clark's Code*, § 261, and cases there cited. It does not appear from the record that any substantial rights of the defendant were affected by the failure to more fully set out plaintiff's cause of action, in which case the court properly disregarded the alleged defect in the pleadings. Code, § 276. Counsel having disagreed upon the issues, they were framed by the judge, and it is contended by the defendant that there was error in submitting the fourth and fifth issues, for that they were not raised by the pleadings (*Miller v. Miller*, 89 N. C. 209; *Christmas v. Haywood*, 119 N. C. 130, 25 S. E. 861); and that, where the pleadings do not distinctly and unequivocally raise an issue, it should not be submitted (*Sprague v. Bond*, 113 N. C. 552, 18 S. E. 704). But an issue was raised by the pleadings. Bearing in mind the requirement of the statute (section 260) that “in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties,” this contention cannot be sustained. Plaintiff's allegation is that she was “greatly disturbed in body, * * * , her great damage. * * * ” The fourth issue is, “Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?” and the fifth, “What compensatory damages, if any, is the plaintiff entitled to recover for her personal injuries?” Instead of alleging that she was “injured,” she alleged that she was “disturbed in body,” to her great damage. “Disturbed,” says Webster, primarily means “to throw into disorder or confusion; to derange; to interrupt the settled state of; to excite from a state of rest.” So, substituting the word “injured” for “disturbed in body,” and the words “for her personal injuries” for “the disturbance in body,” did not change the issue with re-

spect to the damage complained of in the sense in which the words "disturbed in body" coupled with "to her great damage" are used in the allegation, which we understand to be that her body was thrown into a state of disorder and thereby injured.

As to the third question: We are of the opinion that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts. From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the conditions, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences, when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases, it must appear that defendant must or ought to have known of plaintiff's perilous position or condition, against which he should have to exercise care, otherwise such injury could not be within the contemplation of the actor, and put him upon notice as to this special care. In the case at bar defendant company's servants acted with utter indifference to the plaintiff's safety, and knew that plaintiff was a woman, and that she and her little children lived and were in her house only 60 steps away, and exposed to the danger; and, after being asked by her to direct the blasting so as not to throw the rocks upon her house, continued to blast, throwing the stones from the size of a gallon bucket down to small stones upon and through her house and into her yard and garden (depositing as much as a wagon load of rock in her yard and several wagon loads in her garden), making it necessary for her and her children to secrete themselves in the basement behind a stack chimney, and even there they were in danger. From the fright and nervous shocks received from such blasting she testified that she was rendered almost helpless, and could not go about her daily duties, and could not keep on her feet to attend to her children, and has been affected ever since; that it has caused her female trouble out of its regular course. They, knowing that plaintiff was a woman, and knowing (or ought to have known of) the weaknesses of a woman, should have contemplated the effects likely to be produced upon her by such danger and fright. We do not wish to be understood as holding that an action in a case like this would lie for mental suffering and anguish from which no physical injury or disease

directly resulted, as that question is not squarely presented in this appeal. In *Bell v. Railway Co.*, L. R. 26 Ir. 428,—the leading case in support of such action,—it is held that, if such bodily injury (serious impairment to health) might be a natural consequence of fright, it might be an element of damage for which a recovery might be had. *Sedg. Dam.* (8th Ed.) § 861, in commenting upon it, says: "The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated." In *Purcell v. Railway Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, the plaintiff, a pregnant woman, was frightened by the negligent conduct of defendant in running its cars, miscarried, and suffered permanent injury. Held, that a cause of action would lie. In *Mack v. Railroad Co.* (S. C.) 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, the plaintiff threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person, and barely escaped being struck by the locomotive, and was terribly frightened and shocked, his mind was affected and partially destroyed, his reason unbalanced, and for a long time was made ill and sick, and suffered great mental anguish and physical pain arising from the terrible nervous shock and fright. Held, that an action would lie. *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, is cited as an authority, but does not apply to the principle involved. There the recovery was had for mortification, nervous effects, and injuries suffered by reason of the plaintiff being put off the car by the conductor after having purchased a proper ticket, which was taken up by the conductor before reaching the station to change cars, and he failed to give her a check to be used on the connecting line. Those which hold contra are *Halle's Curator v. Railroad Co.*, 9 C. C. A. 134, 60 Fed. 557, 23 L. R. A. 774, which holds that where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement and suffering resulting therefrom, the company is not liable in damages, since insanity is not a probable or ordinary result of exposure to railroad accidents. *Ewing v. Railway Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709: By negligence of defendant's employes a car was derailed and thrown against plaintiff's house, subjecting her to fright and nervous excitement, permanently weakening and disabling her. Exhibits no cause of action. Mere fright, occasioned by accident, producing permanent injury to the nervous system, is a result too remote to be actionable. *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604: Plaintiff was frightened by defendant's negligence in allowing its horses to nearly strike her, from the fright of which

she miscarried. Held no action lies where there is no immediate personal injury. *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, held that damages for a nervous shock or mental injury, caused by fright at an impending negligent collision, are too remote. *White v. Sander*, 168 Mass. 298, 47 N. E. 90: Rock thrown through a window, and frightened a woman, who suffered greatly from nervousness. Held not to be actionable. *Spade v. Railroad Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393: The conductor negligently put a drunken man off the car. Plaintiff became frightened by the row, and suffered mental and physical pain and anguish, and was put to great expense, but no physical injury or disease followed from it. Held, that the action would not lie. *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, is to the like effect; but the court adds that, "Whether fright of sufficient severity to cause physical disease would support an action, we do not now inquire."

After a careful examination of all of the defendant's assignments of error, we find no substantial error, and the judgment is affirmed.

(131 N. C. 596)

KISER v. HOT SPRINGS BARYTES CO.

(Supreme Court of North Carolina. Dec. 20, 1902.)

SERVANT-INJURIES—COMPLAINT—ALLEGATIONS—VARIANCE.

1. In an action by a servant for injuries from machinery, the complaint alleged that plaintiff's father made the contract with defendant for the employment of plaintiff, whereby it was agreed that plaintiff should not be required to work about dangerous machinery. The testimony of the father showed that his contract was with a former proprietor of the factory, and plaintiff and defendant's manager testified the contract of hiring in existence at the time of the accident was made between them, the father not being a party. *Held*, that a nonsuit was proper.

2. Where an employé knew that knives in the machinery upon which he was at work were dangerous, and where they were situated, it was unnecessary to instruct him as to the dangerous character of the machine by which he was injured.

Clark and Douglas, JJ., dissenting.

Appeal from superior court, Madison county; Council, Judge.

Action by Thomas A. Kiser against the Hot Springs Barytes Company. From a judgment for plaintiff, defendant appeals. Reversed.

Merrimon & Merrimon, for appellant. Gudger & McElroy and C. B. Mashburn, for appellee.

MONTGOMERY, J. The plaintiff in a civil action is required to set out in his complaint a plain and concise statement of the facts which constitute his cause of action.

On the trial he must make good his allegations by competent evidence. The defendant is supposed to state in his answer his defense to the allegations of the complaint, and to be prepared at the trial with evidence to make good his defense. It seems to us, from a careful reading of the complaint, that the plaintiff offered no evidence to sustain his allegations. The plaintiff (a young man 19 years of age), in the original complaint, alleged that he was employed by the defendant company in January, 1897, to operate what is known as the "drier," in the defendant's business of manufacturing lumber, and that he continued in that line of work until the 19th of April, 1899, when he was transferred, by the order of the superintendent, to work on the planer in the cooper's shop of said defendant's works; that the machinery was dangerous, and that he was ignorant of the dangers attending the operation of the machinery he was put to work upon; and that the defendant company "grossly and carelessly neglected to inform him of the danger connected with the operations of said planer, and carelessly and negligently permitted the said Thomas A. Kiser to attempt to run and operate said machinery as he had been ordered to do as aforesaid, without instructing him in regard to the correct manner in which the said machinery should be operated and managed." He further alleged in the complaint that, on account of the said negligence of the defendant, he, while attempting to carry out the instructions of his employer, received a severe and dangerous wound in his hand, to his great damage. In the complaint there was the further allegation that the defendant had permitted, carelessly and negligently, the planer to become incumbered and choked with shavings, so that it concealed from view the knives of the planer and impeded its operation, and that while in that condition the defendant, through its superintendent, ordered the plaintiff to aid in its operation, and negligently failed to instruct the plaintiff in the manner of operating the machinery, and to point out its dangers; and, further, that the plaintiff was ignorant of the manner of operating the planer, and unable to see the dangerous parts of the machine, on account of the accumulation of shavings, and that the plaintiff received his injury through the negligent failure of the company to instruct him and inform him in the operation of the machinery, and in negligently failing to point out its dangers. Afterwards the plaintiff filed another complaint, with two causes of action, the first of which contained the same allegations as were set forth in the original, but with the addition that the father of the plaintiff made the contract with the defendant company for the employment of his son, the plaintiff, and that it was expressly stated at the time of the contract of employment that the plaintiff should not be required

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. § 308.

ed to work in any department of the said defendant company's establishment where there was danger of receiving injury from the operation of the machinery; that under that agreement and contract the plaintiff entered the service of the defendant, and operated the drier until the 19th of April, 1899, when he was transferred to the cooper's shop, to work on the planer, and received the injury of which he complained. The second cause of action was for damage for a violation of the contract of employment, the breach complained of being the transferring of the plaintiff to the work on the planer from the work at the drier. All of the evidence tended to show that the plaintiff was not put to the work of manipulating or operating the planer, but was engaged in bearing off to a convenient place the dressed lumber as it came from the machine. In fact, it does not appear clearly that the plaintiff was directed to work at the machine. In his own testimony he says: "I went up to help make barrels, and that [getting out some timber with which to make the barrels] was the first thing I saw that needed to be done. I saw that there was no lumber planed, and that Mr. Sowers was back there. I could see that there was no lumber planed when I went up, and that is why I went to work at the planer. My brother did not tell me to go to the planer, and Terry did not tell me anything, only to go up to the factory and help make barrels. I never had any order from any one to work at this particular machine. I never talked to my brother or Terry about any machine in the cooper shop. I can't be mistaken about this. I do not remember that Terry was in the factory that day or the evening before. I did not go to the machine voluntarily and commence work, exactly." His own testimony showed that no instructions about the dangerous character of the machine were necessary. He knew the knives were there, and that they were dangerous. It would have been of no service to him to have been told by the company's superintendent to be careful and not come in contact with the knives. This is not a case like that of Sims v. Lindsay, 122 N. C. 678, 30 S. E. 19, where the plaintiff, a young girl, wholly inexperienced, and not having been instructed in the care of the machine, on being required by her employer to operate with her hands an ironing machine, which was dangerous in its construction and operation, was injured in the performance of her work.

As to the allegations that the contract was made with the defendant by the father of the plaintiff, the proof was all the other way. The father testified that the contract he made was with another operator of the machinery,—a man by the name of Dougherty,—although, as we have already stated, it had been alleged in the complaint that he had made the contract with the present de-

fendant. His exact language was as follows: "Never had any contract with any one but Dougherty about how my son was to be worked. Contract with Dougherty on or about January, 1897, as near as I can recall. Contract was, my son was not to be put anywhere where skill was required. No doubt about this. Do not know that the word 'skill' was used, but he was not to be put anywhere where there was any danger of being hurt. I knew the concern changed hands. My son continued to work after the change. I made no contract, except with Dougherty. Son got 75 cents or 80 cents under him. After the change, got little more, —85 cents to 87 cents." On that point the plaintiff testified as follows: "Terry paid me 87 cents, and Dougherty 75 cents, per day. I was working at the mill when it was sold, and after sale was off two or three months. I then went back and commenced work for Terry. I engaged to work for him myself. First work was unloading ore off of railroad cars. This lasted a day or two. I made no special contract to run the drier." Terry said: "When I took charge as manager, I found William Kiser there, and continued him in his work. I employed Thomas Kiser, the plaintiff, at the instance of his father and brother William. Both asked me to give him work. Think William told me Tom had worked at the mill before. Won't be positive. Tom was not employed for any specific work." The plaintiff and the manager of the company at that time, months after Dougherty had ceased to control, and the business had been discontinued, both agreed that the contract was made by and between them, the father not being privy to it. This view of the case makes it unnecessary to discuss the question as to the defendant's being negligent, or whether the plaintiff contributed to his own injury, so ably argued by the counsel. There was no evidence going to support the allegations of the complaint, and judgment as of nonsuit ought to have been entered against the plaintiff, agreeably to defendant's motion.

Error.

CLARK, J. (dissenting). The complaint alleges: That the plaintiff, a minor at the time of the injury, was employed by the defendant under a contract with his father that he was "to operate the drier,—a position in which no special skill or knowledge of machinery was required,"—and that it was expressly agreed "that the plaintiff should not be required to work in any department * * * where there was danger of receiving injury from the operation of machinery; * * * the defendant being informed that he was unskilled in the use of machinery, and ignorant of the dangers attending its operations." That the defendant had a planer, which it failed to provide with proper appliances to insure the safety of its employes,

which was also defective and out of repair, so that it became clogged, and that the defendant negligently ordered the plaintiff to assist in operating said planer, and negligently failed to inform him of its defective and dangerous condition, or to instruct him in its use; and plaintiff, being ignorant thereof, and of the dangers attending its operation, and knowing if he refused to obey he would be discharged, began work at said planer when ordered, and, his right hand becoming caught in the machine, all the fingers and part of the thumb were cut off, permanently disabling the plaintiff. This is the substance, somewhat condensed, of the complaint. J. A. Kiser, the plaintiff's father, testified that his contract was that his son was not to work where there was any danger from machinery, and that his son was moved, without his knowledge or consent, and put to work in the cooper shop, where his fingers were cut off by the knives of the planer. William Kiser testified that he was ordered by Superintendent Terry to make 32 barrels that day, and asked for more help, and two men were sent him and commenced work,—one of them, the plaintiff; that he knew the plaintiff did not know anything about the machine, and he started to him, to show him about the machine, but the plaintiff was cut before he got there; that shavings were piled about the machine, so plaintiff could not have seen the knives if he had known they were there; that he had been trying for several days to get the shavings moved out of the way, and had told Superintendent Terry this ought to be done; that there was a protector or hood over the knives in front, but none over the rear knives, and, if there had been, it would have prevented any one getting hurt; that the shavings cut by the front knives fall over the under knives; that, if this machine had had the same appliances that are on other planers, he knows that it would not have clogged. The plaintiff testified that he had been working at the drier; that Terry ordered him to go up and help in the barrel factory; that he was injured while trying to get the shavings out of the way so the plank would come through the machine; he tried to knock the shavings away, and his hand was cut while doing this; that he had no instructions prior thereto about operating this machine; that he could not see the knives which cut his hand,—the shavings being in the way; besides, he could not see them without getting down and looking; that there was a rake in the mill, but it could not be used to any advantage because the shavings were piled up. W. H. Sowers, witness for the defendant, said on cross-examination that he did not see the rake there that morning; it may have been covered up in the shavings; that this was a dangerous piece of machinery for an inexperienced man to work at without instructions, and he does not know of any instructions being given to the plaintiff as to this

machine; that the accumulation of shavings would have something to do with preventing a party from seeing the danger of the machine; that the evening before the accident he heard William Kiser tell Terry that a good many shavings had accumulated, and he would like to have them removed; that the accumulation of shavings increased the danger of all who came around the planer; that, when the plaintiff was injured, the shavings were piled up all around the planer two or three feet deep, except where the feeder and off-bearer stood, some four feet away; that this machine was not one with modern appliances, or it would not have been necessary to rake the shavings from it; that these modern appliances take away the shavings by suction, and also protect the hands from exposure to the knives; that such modern appliances have been in use, to his knowledge, six or eight years; that the plaintiff, prior to the evening before, had never worked in the shop. This was in cross-examination of one of the defendant's witnesses. There was other evidence for the plaintiff, and evidence in contradiction by the defendant; but, on a motion to nonsuit, it is only necessary to consider if there is any evidence tending to show negligence. If so, its weight is for the jury.

There is both allegation and evidence, as above appears, that the defendant agreed that the plaintiff would not be put to work at dangerous machinery; that the plaintiff, a minor, was inexperienced and unaware of the danger attendant upon a planer which the defendant's witness says was a dangerous machine for an inexperienced worker, and that suddenly, in violation of the contract, the defendant's superintendent ordered the plaintiff to work at said machine, without giving him any instructions, and when the machine was clogged by shavings, concealing the knives underneath, which besides had no guards upon them; that the machine was unprovided with modern appliances, which the defendant's witness stated had been in use, to his knowledge, six or eight years, and which he says would have prevented any accumulation of shavings, and have also protected the plaintiff's hands. The same witness further said he saw no rake there that evening, and it may have been covered up in the shavings, which were piled up two or three feet deep all around the planer. This was certainly testimony tending to prove negligence, which the judge properly submitted to the jury. That under these circumstances, not seeing the knives underneath, and seeing guards on the knives above, and being wholly uninstructed as to this machine, which was entirely new to him, and seeing no rake around, the plaintiff should have attempted to clear the shavings away with his hands,—the only method he knew,—does not present such a state of facts that the court can declare, as a matter of law, that the defendant's allegation of

contributory negligence was proved. Contributory negligence is an affirmative defense, and, if there is no evidence, the jury must answer it "No." *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19. Here, there being conflicting evidence, the jury answered that issue "No," and the first issue "Yes," and, if there was any error in such responses, it was not an error of law, but an error of fact, and hence not reviewable on appeal. In *Turner v. Lumber Co.*, 119 N. C., at p. 399, 26 S. E. 25, this court said: "If the plaintiff was inexperienced in the use of machinery, and the knives were so arranged as to make them a hidden danger,—such a danger as not to be obvious to inspection,—then, if the defendant, by the use of ordinary care, could have foreseen the happening of the accident, it became its duty either to provide an adequate protection against the knives, or to give the plaintiff proper warning of the danger." Here it did neither. Among many similar cases that can be cited are *Myers v. Lumber Co.*, 129 N. C. 252, 39 S. E. 960, where shavings were allowed to accumulate, and the plaintiff slipped and fell against a saw running naked, without a guard; also *Dorsett v. Manufacturing Co.* (at this term) 42 S. E. 612, in which the plaintiff was caught in cog-wheels revolving near him. In both these cases, and many others similar, it was held that the question of negligence was for the jury. This is a far stronger case, for in neither of the above two cases was the plaintiff young and inexperienced, or put to work at a dangerous machine without instructions, and contrary to his father's contract, which was that he should not be exposed to such risks.

The other exceptions are without merit, and require no discussion.

DOUGLAS, J., concurs in dissenting opinion.

(131 N. C. 569)

ELMORE v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 18, 1902.)

COUPLING CARS—DEFECTIVE COUPLERS—CONTRIBUTORY NEGLIGENCE.

1. A self-coupler was defective, in that a link was missing. A brakeman opened the lip of the coupler, which restored it to its usefulness, and then, just as the cars were coming together, kicked the bumper of the approaching car, which had a lateral play, and was not in the center, and which he testified he had to kick to make the coupling. Held, that the injury to his foot, crushed between the couplers, was not caused by a defective coupler, but by his contributory negligence.

Clark and Douglas, JJ., dissenting.

On rehearing. Granted, and new trial allowed.

For former report, see 41 S. E. 786.

Allen & Dortch and Isaac F. Dortch, for plaintiff. Day & Bell, J. B. Batchelor, T. B. Womack, and Shepherd & Shepherd, for petitioner.

MONTGOMERY, J. The plaintiff's own testimony upon the question of the defendant's negligence is not consistent, it seems to us, with the allegations of the complaint; and it also seems to us that his honor, in the charge, had some difficulty in understanding what the contention of the plaintiff was as to the proximate cause of the plaintiff's hurt. In the complaint, as it was first drawn and filed, the plaintiff alleged that the defendant was in September, 1900, operating a train of cars on its line of railway between Wilmington and Hamlet with the couplers on the train of cars out of repair and defective "to such an extent that the cars in said train and other cars belonging to the defendant at Clarkton, which were to be made a part of said train, could not be coupled without going between said cars; that on that date there were four cars upon the side track at Clarkton, and as the train approached that place it was uncoupled, leaving the cab on the main track below the beginning of the side track, the balance of the cars being carried along the main track to a place above the other end of the side track." The remaining portion of the complaint was as follows: "(3) That plaintiff was ordered by the conductor in charge of said train, whose orders the plaintiff was bound to obey, to remain near the cars on the main track below said side track, for the purpose of coupling those cars to the cars upon the side track; and the said cars upon the side track were put in motion by defendant, and were negligently permitted to roll very rapidly by means of what is known as 'kicking' cars along said side track and on the main track, and negligently and violently to come in contact with the cars on the main track, where the plaintiff was. (4) That at the said time and place the defendant negligently permitted the coupler attached to the cars on said side track to remain out of repair, so that the lip was closed, which made it necessary for plaintiff to go between said cars in order to couple the same. (5) That on said day, at said town of Clarkton, while the plaintiff was endeavoring to perform the order of said conductor and while he was coupling said cars, he was greatly injured and damaged by reason of the negligence of defendant as herein set forth, and by other acts of negligence. His foot was crushed to such an extent that his big toe and a part of his foot had to be amputated. He suffered great physical and mental pain and anguish, and was compelled to incur great expense, was disabled from work, and has been permanently injured, to his great damage \$10,000." The complaint was afterwards amended, the amendment consisting of the allegation that the conductor well knew that the order to couple the cars could not be performed without going between them on account of the condition of the cars, and the further allegation that the plaintiff was in no fault on his part. It is to be seen from the complaint, then,

that the allegation as to defective couplers on the train before it was uncoupled at the siding was a general allegation, bearing no more particularly on the cab than on any of the freight cars which composed the train; while it appears from the fourth allegation of the complaint that the coupler attached to the car on the side track, which car was to be shoved back and coupled with the cab, was the particular car equipped with the defective coupler. And yet on the trial that particular car and coupler disappeared practically from the case, and the plaintiff's whole testimony was in respect to an alleged defect in the coupler on the cab.

It is stated in the case on appeal that all of the evidence was sent up, and, after a careful perusal of it, it seems evident from the plaintiff's testimony (and that without being confused by the cross-examination) that he was uncertain where to fix the negligence of the defendant; i. e., whether his hurt was caused from trying to remedy the defective coupler on the cab, or that on the freight car, or both. By the amendment of the complaint he alleged in a general way that the conductor knew that the coupling could not be made without going between the cars on account of the condition of the cars. He did not allege that the conductor knew that there was any defect in the coupler on the cab, or in that on the particular freight car which was to be attached to the cab. On his examination as a witness, however, he said that Capt. Byrd, the conductor, knew that the coupler on the cab was out of fix to the extent that the link or chain was gone—missing. The coupler was a standard automatic coupler, such a one as is required by law to be attached to cars; and the only defect in the one on the cab was the missing link; and, as we have seen, the plaintiff said that the conductor knew that link was missing when he ordered the plaintiff to go to the cab and make the coupling when the cars on the siding should be pushed back against it. The only effect of the missing link was that it rendered it necessary, in order to produce a coupling of the cars, that the lip of the coupler should be opened by the hand; and as the plaintiff testified that he was ordered to make the coupling, and that the conductor knew that the link was missing, let us assume that he was authorized under the order to go to the car and open the lip. He did that, and when it was done the coupler was in as good condition for coupling as if the link had not been missing in the first place. That is to be emphasized, for there is no evidence, not even in the plaintiff's own testimony, to the effect that the coupler had any other defect about it. We know he said that the bumper was turned towards him, and was not in the center, and that he had to kick it to get it into the center to make the coupling with the approaching freight car; but all that is mere opinion evidence. The fact still remained that there was no other de-

fect except the missing link. This court, in *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, decided that it was the duty of railroad companies in this state to equip their cars with self-couplers, and by act of congress all cars that are operated in interstate commerce are required to be so equipped; and it would seem to almost border on the absurd for this court to say that we can have no common knowledge of what a self-coupler is, or that we will receive as evidence that a self-coupler is defective simply because the bumper is not exactly in the center. We know it must be to some extent movable so as to adjust it to curves of the track, and no greater mobility was shown by the plaintiff than that. When the plaintiff, therefore, had opened the lip of the coupler on the cab in the manner described by himself, he had discharged the order which had been given him by the conductor. (The conductor testified that he gave him no such order, and that the coupler was in good condition.) But the plaintiff said that, after he had discharged his duty,—that is, after he had opened the lip of the coupler,—he looked up the side track, and saw the cars coming rapidly, and noticed that the coupler on the cab was not in the center, and, to carry out the order of the conductor to make the coupling, he kicked at the bumper on the cab to get it in the center, and his foot was instantly caught between the couplers on the two cars, and badly crushed. We are not disposed to modify in the least the decision made in *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, in which we decided that the railroad companies in this state should equip both their passenger and freight cars with self-couplers, and we are of the opinion that a neglectful failure to keep the couplers in proper condition and repair would be as culpable as if the cars had never been so equipped. But, as we have said, in the case before us the plaintiff was not hurt by the failure of the company to have a self-coupler on the car, or for a failure to keep it in repair. The plaintiff, when he opened the lip of the coupler, had restored it to its full usefulness, and in his kicking the bumper afterwards, when he saw the freight cars rapidly approaching him, and, indeed, so near to him as to be right upon him, for his foot was caught before he could get it down, he violated a rule of the company which he knew of, and which rule put the blame on himself. That he contributed to his own injury is too clear to admit of doubt from his own testimony. According to the plaintiff's evidence, the order was given by the conductor, not upon a certain emergency, without the opportunity of reflection, and obedience was a choice of two dangers.

The petition to rehear is allowed, and there must be a new trial. Petition allowed.

FURCHES, C. J. (concurring). I did not hear this case argued. The first I knew of it

was in conference, when I was told that the court was evenly divided, and the case was stated to me. As I understand from this statement, the point of difference was as to whether the case fell under the decisions of Greenlee and Troxler, as the road had provided itself with automatic couplers, when I said I thought it did, and gave my vote in favor of the plaintiff, and the opinion was in that way based on Greenlee and Troxler. And I am still of the opinion I then expressed, that, if the defendant had allowed its coupler to remain broken four or five months without repairing the breach, it was the same in effect as if it had not supplied itself with the automatic coupler. And in concurring in the opinion of the court it must not be understood that I do not sustain Greenlee and Troxler and the other opinions cited for the plaintiff sustaining the doctrine announced in those cases, for I do. But being applied to for a rehearing, I examined the case more thoroughly than I had done, in connection with the model of two cars with automatic couplers, and came to the conclusion that the plaintiff's injury was not caused by the defect in the coupler, but was one of those unfortunate accidents that always have happened, and always will happen, to those engaged in such dangerous work as railroad-ing. It would be hard for me to describe this coupler to one who has not seen and examined one. But it consists of what are called "knucks" on each end of the car, which open and shut, something like a man's hand; and, to effect the coupling, one or both of these must be open when the impact of the cars takes place, and the jar caused by this impact causes the hands or knucks to close. And the bolt spoken of is a small key or pin, which falls when the knucks are closed, and prevents them from opening until this pin or key is raised. The wire spoken of as being broken attaches to this pin at one end and a crank at the other end. This pin can only be raised by the hand when this chain is broken. But raising the pin with the chain and crank or with the hand does not open the knucks. This can only be done with the hand, and necessitates the party opening them to go between the cars, whether the pin is raised with the chain and crank or with the hand. In this case it appears from the evidence that the plaintiff had raised the pin with his hand, and was out of danger, and would not have been hurt, but for the fact that he discovered, on the approach of the car which was to cause the impact and which was to be coupled with the caboose, that the drawhead to which the automatic coupler was attached was not in the center of the car, and he kicked it to put it in the center, so as to strike the drawhead of the caboose, and in doing this his foot was caught, and he was injured. The plaintiff testified: "I took my fingers to pull up the draw pin to open the lip of the coupler, and when I had found that the bumper on the

drawhead was towards me, and I saw it was not in the center, I looked at the other cars, and saw that the bumper on them was not open, but was closed. If they had been open, I would have opened the lip and stood outside, and it would have made its own coupling. I saw how the situation was, and I had to push my foot down and push this bumper in the center." In order to allow for the curves in the road, it is necessary to allow the drawheads, or "bumpers," as they seem to be called by the plaintiff, to have a small lateral play. And when they are uncoupled on a curve they are sometimes left standing out of the center. This cannot be prevented. But it is utterly impossible for a man to raise this pin with his foot by kicking or otherwise. And, while I agree to the doctrine in the Greenlee Case and in the Troxler Case, as I understand them, I cannot agree that they apply to the facts in this case. I agree that the defendant was guilty of negligence in allowing this chain to remain out of repair for so long a time. But this does not entitle the plaintiff to recover, unless it caused the injury. Negligence alone does not give a right of action. The negligence complained of must be the cause of the injury. I never supposed that it would be contended that the Cases of Greenlee and Troxler would entitle an employé of a railroad company to recover damages for any injury he might recover from the company while in its employment, whether the defective coupler had anything to do with the injury or not. It seems to me that it might as well be held that, if the plaintiff had been lying on top of the car asleep, and the jar of the impact had caused him to fall off and break his leg, he might recover because the coupler was out of fix, as to hold that the plaintiff can recover for the injury in this case, when the defective coupler had nothing at all to do with the injury. I am compelled to treat this matter coolly, in the discharge of my duty, as I understand it, without any effort to create sensation or alarm, and without conflicting with the Cases of Greenlee and Troxler. In my opinion, the petition ought to be allowed.

CLARK, J. (dissenting). This is a petition to rehear the decision in this case. 130 N. C. 506, 41 S. E. 786. No fact is shown to have been overlooked, nor any direct authority, and upon examination of the briefs on the former trial it will be seen that the petition simply presents the same points for reargument. In Dupree v. Insurance Co., 93 N. C. 239, Smith, C. J., quoting Chief Justice Pearson in *Watson v. Dodd*, 72 N. C. 240, says: "No case ought to be reheard upon a petition to rehear, unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court." This has been often quoted with approval, among other instances by Furches, J., in *Capehart v. Burrus*, 124 N.

C. 50, 32 S. E. 378. The amended complaint alleges that "the defendant was operating a train of cars" at the time and place of the injury to the plaintiff, on which then, "and for a long time prior thereto, it negligently permitted the couplers to be out of repair and defective to such an extent that the cars in said train and other cars belonging to the defendant at Clarkton, which were to be made part of said train, could not be coupled without going between the cars." Is not this a clear allegation of negligence, and of a violation of the United States act of 1893 [U. S. Comp. St. 1901, p. 3174]? The complaint further alleges that, the train being uncoupled, and a part left below the beginning of the switch and a part above it (both on the main line), "the plaintiff was ordered by the conductor in charge of said train, whose orders the plaintiff was bound to obey, to remain near the cars on the main track below said side track, for the purpose of coupling those cars to the cars upon the side track, which order the said conductor well knew could not be performed without going between said cars on account of the condition of the cars, and the said cars were negligently permitted to roll very rapidly by means of what is known as 'kicking cars' along said side track and onto the main track, and negligently and violently came in contact with cars where plaintiff was"; that, by reason of the defendant having "negligently permitted the coupler attached to the cars on said side track to remain out of repair," the lip was closed, "which made it necessary for the plaintiff to go between said cars in order to couple the same," and that "while plaintiff was endeavoring to perform the order of said conductor, and while coupling said cars, and without fault on his part, he was greatly injured and damaged by reason of the negligence of the defendant as herein set forth," etc. Here the allegation is explicit of negligence in permitting couplers to be and remain out of repair both on the train on the main line and on cars on the side track, which were kicked back, and that they could not be coupled without going in between the cars; also negligence in violently kicking them back, and in the conductor ordering the plaintiff to make the connection, "which order the conductor well knew could not be performed without going between said cars," on account of the defective couplers. There was evidence tending to prove each and every allegation above stated, and the jury, which, under the constitution and laws, is guaranteed to every litigant, no matter how humble, as the sole tribunal which may determine issues of fact, has sustained the charges, and the jury were unanimous, as the law requires of the triers of fact. And the parties, in order to secure triers of fact to which neither side could have any legal objection, had been allowed such challenges as were proper, for there is no exception on that ground. Had there been, notwithstanding, any ground to believe that the verdict was against the

weight of the evidence, or to suspect that justice had not been done for any other reason, the trial judge, who heard the evidence, and knew all the incidents of the trial, had full authority to set the verdict aside. *Bird v. Bradburn* (at this term) 42 S. E. 936. His refusal to do so cannot be reviewed by us. We, who did not hear or see the witnesses, cannot possibly be more competent than the jury and the trial judge to determine from the imperfect transmittal of the evidence on paper, without tone or emphasis, as to the weight to be given to the respective parts thereof. There was evidence that "the coupler had been out of fix three months; that the conductor knew it; that the link was gone; that with that link gone the cars will not couple, to save your life, without using some means to open the thing; that, in the condition that coupler was in, it was not possible to couple without taking hold with hand or foot." All these sentences are quoted from the evidence in the record. And, further, it is stated in the evidence sent up: "The coupler was broken. It was an automatic coupler. The link that pulls up the draw pin was out, so you could not use this coupler without the use of the foot or something;" and, further, "you cannot couple if the draw pin won't work." Even the superintendent of the defendant says, "If the statement made by the young man is true, and the chains were gone, it would be necessary for him to go in and lift it up." It has been suggested that the absence of the link was not a very material fact, but the evidence by which a jury must reach its conclusions according to the weight they may give it contains this: "Question. Does that link have anything to do with the coupling? Ans. Yes, sir. You cannot couple if the draw pin won't work." Again: "Question. Why did you not have time to go and see to them while they were standing still? Ans. The cars were rolling when the captain instructed me to go couple them." The conductor says, "The cars started, and had cleared the switch, when I started down to the depot;" and the plaintiff's evidence is: "Question. Where were you when the cars commenced moving? Ans. I was standing there by Captain Byrd, and he said, 'Son, you run up and couple those cars, while I run up to the warehouse to get orders.'" To order the plaintiff to go in to make the coupling, especially when the cars were moving, was of itself negligence, even before automatic couplers were required (*Mason v. Railroad Co.* [1802] 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814); and it is doubly so now, when, as here, there is evidence in the record that the conductor knew that the coupler was out of order, and well knew that the coupling in that condition could not be made without going in between the cars.

Aside from the negligence of the conductor in giving such order, the permitting the couplers to remain out of order more than three months was itself a violation of the federal

statute (Act March 2, 1893, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and negligence. In a remarkably well considered case in the United States circuit court for Iowa, *Voelker v. Railroad Co.* (C. C.) 116 Fed. 867,—decided just after the opinion in this case was filed, in June last,—Shiras, J., holds that “a carrier, by permitting couplers, originally sufficient, to become worn out and inoperative, is within the prohibition of the act of congress of March 2, 1893, against using cars in interstate commerce not equipped with couplers coupling automatically.” Also he says that the company was liable where, the coupler being out of order, the employé “undertook to fix it so the coupling might be made, and while so engaged he was caught between the cars, and received injuries causing his death.” This is “on all fours” except that here the negligence of the defendant crippled their man, but did not kill him. In that case, as in this, the defendant urged that it was error to permit the jury to determine that the “condition of the coupler was the proximate cause of the injury.” Judge Shiras overruled the objection, and makes the following pertinent ruling, without which the statute would become a delusion, and cease to be any protection to the hundreds of thousands of laboring men whose lives and limbs were for so many long years exposed to needless peril for the lack of such statute. He says:

“The statutory requirement with respect to equipping cars with automatic couplers was enacted in order to protect railway employes, as far as possible, from the risks incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that, if it calls upon one of its employes to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that to make the coupling the employé must subject himself to all the risks and dangers that inhered in the old and dangerous link and pin method of coupling, it is subjecting such employé to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employé to risk to life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on the part of the master is certainly negligence, which will become actionable if injury results therefrom to the employé, and liability therefor cannot be avoided by the plea that, if the company was thus guilty of actionable negligence in this particular, it cannot be held responsible therefor because it was guilty of another act of negligence which aided in causing the accident. This accident happened

because Voelker, in the performance of his duty, was called upon to place his person in a position where he might be caught between the cars he was expected to couple together. He was required to place himself in this dangerous position because of the negligent failure of the company to have upon the car a coupler in proper and operative condition, and certainly this negligent failure of the company was the proximate cause of the accident.”

This is practically the same ruling which this was the pioneer court to make in *Greenlee v. Railway Co.* (May 26, 1898) 122 N. C. 977, 30 S. E. 115, and which has been reiterated in *Troxler v. Railway Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, and so many cases since, down to and including *Fleming v. Railway Co.* (at this term) 42 S. E. 905. Those cases practically settle also the issue of contributory negligence, for, as the injury would not have happened, and the plaintiff would not have had to go between the cars at all, if the couplers had been in proper condition, it is immaterial whether he went in negligently or not, for the negligence of the defendant in not having couplers, and in good working order, was the proximate cause. *Voelker v. Railroad Co.*, supra. In *Harden v. Railroad Co.*, 129 N. C. 355, 40 S. E. 184, the court affirmed the judge below, who had charged (quoting from *Greenlee's Case*) as follows: “If you find that the freight train was not fully provided with modern self-acting couplers, and that the plaintiff would not have been injured had the cars been so provided, you will find the first issue ‘Yes,’ and the second issue ‘No.’” This ruling has just been reiterated in *Fleming v. Railway Co.* (at this term) 42 S. E. 905.

There was some conflicting evidence, but that was the province of the jury. The plaintiff's testimony, above referred to, is that, if the coupler had been in good condition, he would not have had to go in between the cars, nor to kick the bumper; and he is corroborated by the superintendent of the defendant company, who says, if the coupler was in the condition the plaintiff testified, it was “necessary for him to go in and lift it up.” Whether his manner of “lifting it up” was negligent or not is immaterial in view of our uniform decisions from *Greenlee's Case* down to *Fleming v. Railway Co.* (at this term) 42 S. E. 905, that the proximate cause—the *causa causans*—is the negligence of the railroad company in not complying with the law, which requires that it shall have automatic coupling apparatus, which will not require an employé to go in between the cars at all. The plaintiff could not assume a risk which the law forbids the railroad company to impose upon him. Besides, assumption of risk does not apply to railway employes in this state since the act which is printed as chapter 56, Priv. Laws 1897. *Coley v. Railroad Co.*, 128 N. C. 534, 39 S. E. 43, and other cases sustaining it, which are collected and reaffirmed in *Mott*

v. Railway Co. (at this term) 42 S. E. 601. Humanity, justice, and the soundest principles of public policy alike require that Act Cong. March 2, 1893, and the principles laid down by Judge Shiras in the above-cited case of Voelker v. Railroad Co., and by the uniform rulings of this court from Greenlee's Case down to Fleming's Case, should be sternly upheld and rigidly enforced. In the report of the interstate commission for 1902 it is said that in 1893, when the act requiring automatic car couplers was enacted, there were 433 men killed and 11,277 wounded in coupling cars in this country, and that by reason of the gradual enforcement of that law the number of killed and wounded in car coupling for the year ending June 30, 1902, aggregated a little over 2,000,—a diminution of more than 9,500 in the number of men killed and wounded annually, though the number of railway employes has increased 200,000 in the same period of time, which at the same ratio would have caused 15,000 men to have been killed and wounded annually in coupling cars, if there had been no forced use of automatic couplers by the law. The commission says the decrease of accidents in that particular (car coupling) has been 68 per cent. fewer killed and 81 per cent. fewer injured than in 1893 (without adding in the further loss which would have occurred among the additional 200,000 employes), which decrease they attribute to this legislation, and its enforcement by the courts. They point out that in no other particular have injuries to passengers or employes been diminished, but that in fact there is a decided increase. If the law is effectively enforced, the annual loss still existing of 2,000 killed and wounded in manual coupling will entirely disappear. But if, notwithstanding the law requires automatic car couplers, they can be left off, or (which is the same thing) allowed to remain out of repair, and, when an employe is ordered in to make the coupling which has become non-automatic, these powerful corporations can contest before the jury whether the railroad company is not relieved from all responsibility because the employe might have done the act illegally required of him in a more prudent manner, and carry that contest up from court to court, then the provisions of a law which was enacted for the protection of this vast body of useful and industrious men is a nullity, construed away by the courts, and they are handed over to the tender mercy of a power which saw with indifference the number of killed and wounded in coupling cars mount up year after year till the figures reached the annual total of near 12,000. In that steady increase there was no halt until the force of a humane and irresistible public opinion compelled the use of automatic couplers, though their life and limb saving properties had been well known to railroad managers for a quarter of a century. The evidence is that this injury to

the plaintiff could not possibly have happened if this law had been complied with by the defendant.

This court, which was the pioneer to lay down, independent of legislative enactment, the requirement of justice that such appliances should be used, should not be the first to construe away the efficacy of what is now a federal statute applicable to the defendant and all other railroads throughout the Union engaged in interstate commerce.

DOUGLAS, J. (dissenting). Dissenting in toto from the opinion of the court, except in so far as it approves the Greenlee and Troxler Cases, both in its view of the law as applicable to this case and its assumption of fact, I shall briefly notice but one or two of its apparent errors. The opinion seems rather to forestall dissent by assenting "that it would seem almost to border on the absurd for this court to say that we can have no common knowledge of what a self-coupler is." In spite of this dictum, I venture to assert that neither this court nor the average citizen has any common knowledge of the mechanical constitution of an automatic or self-coupler. The only fact that would seem to be of common knowledge is that a coupler that will not couple itself is not a self-coupler, and that a coupler which has to be pulled and pushed into place is not automatic. A model was exhibited to this court, which was not used below, and was not proved to be similar to the coupler on the cars. This was a mere illustration of the general working of automatic couplers, and was not proof of any fact in controversy. There are, in fact, different kinds of self-couplers,—those most generally seen being the Janney and M. C. B. (Master Car Builders). I do not know the difference, but believe that the latter includes any coupler approved by the association. Many of these patent couplers are interchangeable, but still there is some difference. Again, the opinion characterizes certain testimony of the plaintiff as "mere opinion evidence," when in fact it appears to me a plain statement of existing facts,—that the bumper was not in the center, and had to be kicked into the center to make it couple. This fact does not seem to have been denied by any one. Again, the opinion says, "The fact still remained that there was no other defect except the missing link." This may or may not be true. If the coupler was negligently arranged, so as unnecessarily to allow so much lateral play as to destroy its character as a self-coupler, this would be an evident defect. Again, the opinion says that, "When he had opened the lip of the coupler, . . . he had discharged the order which had been given him by the conductor." I do not think so. His order was to couple the cars, and, if it was necessary to kick the coupler on the incoming car,—a method which is shown by the testimony to be frequently resorted to

by railroad men,—then he was still carrying out his orders. But all these are findings of fact, which, I respectfully submit, are not within the province of this court. Again, the opinion says, "That he contributed to his own injury is too clear to admit of doubt from his own testimony." This gratuitous assertion of fact should be left to the jury. This court is not authorized to set aside the verdict of a jury simply because a majority of its members would not concur therein were they jurors. In any event, if this court undertakes to perform the functions of a jury in finding the facts, it would seem that it should at least do so by a unanimous verdict.

(100 Va. 774)

**NITROPHOSPHATE SYNDICATE, Limited,
OF LONDON, ENGLAND, v.
JOHNSON.**

(Supreme Court of Appeals of Virginia. Dec. 11, 1902.)

**MORTGAGE—FORECLOSURE SALE—SETTING
ASIDE—VALUE OF PROPERTY—CON-
TRACT TO RESTRICT BIDDING.**

1. Where a foreclosure sale made by commissioners appointed by the court has been absolutely confirmed, it will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give like relief if the sale had been made by the parties in interest.

2. After full notice of a foreclosure sale, and an open sale, fairly conducted, with such competition as can be attracted by full and sufficient notice, the highest bid which is made is a fair criterion of the value of the property at the time.

3. A contract made for the purpose of lessening competition at a judicial sale on foreclosure is illegal, and will not be enforced.

Appeal from circuit court of city of Norfolk.

Petition by the Nitrophosphate Syndicate, Limited, of London, England, asking that a sale of foreclosure to Jessie C. Johnson be set aside. From a decree refusing the same, petitioner appeals. Affirmed.

Wm. E. Bibb and Leake & Carter, for appellant. Starke & Starke and W. W. Old & Son, for appellee.

HARRISON, J. This attachment proceeding in equity was instituted by the Industrial & General Trust, Limited, of London, England, a corporation created under the laws of Great Britain, against the Nitrophosphate Syndicate of London, England, another corporation, created under the laws of Great Britain, to foreclose a mortgage in favor of the plaintiff upon certain properties; among others, a tract of land in the county of Norfolk, Va.

After full advertisement of the property for eight consecutive weeks, the land in controversy, in Norfolk county, was sold at public auction on April 2, 1896, to the appellee, Mrs. Jessie C. Johnson, of Baltimore, Md., at the price of \$37,000; her husband, Green-

leaf Johnson, having made the bid for her. When this sale was reported to the court for confirmation, Messrs. Neely, Seldner, and Warrington, attorneys, appeared for the debtor company and Boyd M. Smith, the sole representative and general manager of that company in this country, who was, by appointment of the court, acting as receiver of the property pending a sale, and filed exceptions to the report of sale. After some days given the exceptants in which to obtain an upset bid, the court received from Messrs. Neely, Seldner, and Warrington, their attorneys, the following communication: "To Honorable Robert R. Prentiss, Judge of Circuit Court of Norfolk County—Dear Sir: In lieu of a personal appearance, we beg to inform the court that, so far as we are informed, an effort to obtain an upset bid in the Nitrophosphate Case has failed to secure such bid." Thereupon, on the 28th day of May, 1896, the exceptions were overruled, the sale to the appellee confirmed, and the same special commissioners directed to collect the purchase money, pay the same over to the parties entitled thereto, and to execute and deliver to the purchaser a deed of conveyance for the property. Mrs. Johnson paid the whole of her purchase money in cash, and a report was made in due time by the commissioners, supported by proper vouchers, showing that the fund had been disbursed, and all the requirements of the decree of May 28th carried out. This report was confirmed by decree of November 11, 1896, which ended the cause, and directed that it be stricken from the docket. Subsequently, at the same term of the court, on motion of Boyd M. Smith in his own right and as receiver, so much of the decree as removed the cause from the docket was set aside, and upon his further motion he was made a party plaintiff, and the cause retained on the docket at his cost, with leave given him to file a petition within 60 days.

The foundation of the present litigation is a petition filed by the appellant, the Nitrophosphate Syndicate, Limited, in which it asks that the sale to the appellee, Jessie C. Johnson, be set aside upon the ground that she had bought the property at an inadequate price, and procured a confirmation of the sale by fraud. To this petition appellee filed an answer, denying that the sale had been in any respect unfair, or that she had been guilty of fraud in obtaining a confirmation of the sale to herself. An answer to the same effect was filed by Greenleaf Johnson, the husband of appellee, who had been made a party.

The sale was made by the learned counsel, acting as commissioners, who represented the parties most vitally interested in the result, after an unusually extensive and expensive advertisement of the time, place, and terms of sale, and appears to have been in all respects conducted with perfect propriety and fairness to all concerned.

In *Berlin v. Melhorn*, 75 Va. 639, Judge Burks says that: "It may be safely laid down as a general rule, deducible from the authorities, that, after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give like relief if the sale had been made by the parties in interest, instead of by the court. But where the objection is to the confirmation, the rule is more liberal."

In the light of this well-established doctrine, we might, without further consideration, dismiss the subject of the alleged inadequacy of price, for it will hardly be contended that, if this sale had been effected between the parties hereto, a court of equity would, at the instance of the vendor, set the sale aside upon the ground that the price paid was inadequate. It may, however, be added that after full notice, an open sale fairly conducted in the face of such competition as can be attracted, the highest bid which is made is a fair and just criterion of the value of the property at that time; and so after-stated opinions, affidavits of under value, etc., are regarded with but little favor, and estimated as of little weight, in the presence of the fact established by the auction and its results. *Todd v. Manufacturing Co.*, 84 Va. 586-591, 5 S. E. 676.

In support of the charge that the appellee secured the confirmation of the sale by fraud, the appellants have called two witnesses, Boyd M. Smith and Jessie C. Johnson, the appellee. The substance of Smith's testimony is that on the 25th of May, while the court was holding the report of sale open for him to put in an upset bid, he started for Philadelphia to obtain from friends there the 10 per cent. advance required by the court; that he stopped en route in Baltimore, and had an interview with the appellee and her husband; that he told her of his purpose to put in an upset bid; that he had friends who would furnish the money, but that he was advised by his counsel that it would only cause additional expense and delay, and that the property might be run up by other bidders to a much higher price than it had been already sold for; that for these reasons he was willing to give her the benefit of the 10 per cent. bid; that she could have the property confirmed to her at the \$37,000 she had bid, upon the terms that she would then convey it to him in consideration of \$40,000, of which \$5,000 was to be paid in six months and the remaining \$35,000 secured by mortgage on the property at 5 or 10 years. He admits that the husband of appellee refused to reduce this alleged agreement to writing, but states that appellee, with approval of her husband, accepted his proposition, which caused him to withhold the upset bid that was to be secured through his friends, and allow the property to be confirmed to her. This witness admits on cross-examination

that he made this alleged agreement with Mrs. Johnson for his individual benefit, and not in the interest of the debtor company represented by him, and that he did not abandon this expectation of profit for himself alone until advised that he occupied a trust relation to the Nitrophosphate Syndicate, Limited, and could not claim the benefit of the contract for himself. For this reason the present proceeding was inaugurated in the name of the Nitrophosphate Syndicate, Limited, and subsequently united in by its creditor, the Industrial & General Trust, Limited, claiming that it was entitled to anything that might be realized to the extent necessary to satisfy a large balance due on its debt after applying the proceeds of sale made.

Mrs. Jessie C. Johnson, the appellee, was called by the appellants, and subjected, as an adverse witness, to a prolonged and searching cross-examination. The result of her evidence is a flat denial of the statements of the witness Smith with respect to the agreement he claims to have had with her. She admits the fact of the visit to her house, and that Smith submitted some proposition looking to a purchase of the property from her, but declares that she declined positively to accept or to consider his proposition; that she told him the property was in the hands of the court; that the title was in the court; that she did not desire to sell the property, and could not sell property to which she had no title; that she would not sell to him or any one else; that in this position her husband, who was present, concurred; and that Smith left that day, as he said, for Philadelphia, and that she had never heard from him or seen him from that day until the morning she testified in this case. This emphatic and flat denial of the witness to the alleged agreement, relied on as showing fraud, is consistently maintained and unshaken by a rigid and searching cross-examination covering 16 pages of printed matter and running into 128 questions.

In *Camp v. Bruce*, 96 Va. 521, 31 S. E. 901, 48 L. R. A. 146, 70 Am. St. Rep. 873, Judge Buchanan, speaking for this court, after pointing out that the law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor from any wish to protect his interests, but from reasons of public policy, says: "We have no statute declaring that contracts like the one under consideration are unlawful, yet under the principles of the common law any contract that is made for the purpose of, or whose necessary effect or tendency is, to lessen competition and restrain bidding at judicial sales, is held to be illegal, because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sale from every kind of improper influence. To allow one bidder to buy off another,—which is but a

species of bribery,—and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices.”

These wise and salutary views are as sound now as when they were first uttered, and the doctrine enunciated will be enforced in every case to which it is applicable. In the case at bar, however, the burden was upon the appellant to establish clearly and satisfactorily the fraud with which the appellee was charged. Instead, however, of establishing that the appellee had entered into an agreement with Boyd M. Smith with respect to the property by which she was to reap a profit, and he was prevented from putting in an upset bid, the decided preponderance of the evidence shows that Boyd M. Smith sought the appellee, and made to her an illegal proposition, which she promptly and emphatically repudiated and refused to accept. There is nothing to show that the appellee has done any act to cast the slightest suspicion upon the propriety of her conduct as a bidder and purchaser of the property in question.

We are therefore of opinion that the decree appealed from, dismissing the petition filed by appellant and striking the cause from the docket, is plainly right, and must be affirmed.

(64 S. C. 564)

MOORE v. NAPIER et al.*

(Supreme Court of South Carolina. Dec. 1, 1902.)

**MANDAMUS—PHYSICIANS—CERTIFICATE—
RESTOPPEL.**

1. Code 1902, § 1112, subd. 3, providing that the state board of medical examiners shall examine applicants who hold diplomas from medical schools or colleges, and given each successful applicant a certificate of fitness to practice medicine, on the payment of a fee, was amended February 15, 1901, so as to provide that the section shall not apply to regular graduates holding diplomas from colleges having a four-years course of instruction. *Held*, that a student of the South Carolina Medical College, who has a diploma of a three-years course, is not entitled to a certificate to practice without an examination.

2. A writ of mandamus will be refused by the supreme court when the granting of it would violate the intent of a statute of the legislature.

3. Where a person applies to have a certain act of the legislature enforced by a mandamus, he cannot ask that it also be declared unconstitutional.

Petition for mandamus in the original jurisdiction of this court by James C. Moore against J. L. Napier and others. Dismissed.

T. W. Bouchier and C. E. Sawyer, for petitioner. Knox Livingston, for respondents.

GARY, A. J. This is an application to the supreme court, in the exercise of its original jurisdiction, for a writ of mandamus. The question presented by the pleadings is wheth-

er the petitioner, who received a diploma from the South Carolina Medical College, but who studied the course for only three years, is entitled to a writ of mandamus requiring the state board of medical examiners to issue to him a license to practice medicine without standing an examination before said board as to his qualifications and knowledge of medicine. It appears that, when the petitioner matriculated as a student of the South Carolina Medical College, the course of study established for graduation was only three years; that before receiving his diploma the South Carolina Medical College established a four-years course of study, commencing with the collegiate year of 1901; and that the petitioner only took a three-years course. Subdivision 3, § 1112, of the Code of 1902, contains the following provision: “It shall be the duty of said board [the state board of medical examiners] when organized, to examine all applicants for examination, who hold diplomas from any medical college or schools, and who present certificates of their good moral character and of their sobriety from some reputable person or persons known to the board, and to pass upon their qualifications and fitness to practice medicine in this state, and to give to each successful applicant a certificate to that effect upon the payment of five dollars to the treasurer of said board.” On the 15th February, 1901 (23 St. at Large, p. 733), subdivision 7 of said section was amended so as to read as follows: “Nothing in this section shall apply to regular graduates, holding diplomas issued by any college of established reputation in this state which has a four years course of instruction and a standard of not less than seventy-five per cent. on examination, and make satisfactory evidence of their standing to the board of medical examiners, nor to commissioned medical officers of the United States army or navy, or United States marine hospital service, nor shall it include physicians or surgeons residing in other states, and called in consultation in special cases with physicians or surgeons residing in this state.” The South Carolina Medical College, no doubt, changed its course of study from three years to four years so as to enable graduates holding diplomas from that college to receive the benefit of the act of 1901 hereinbefore mentioned. When the South Carolina Medical College changed its course of study in the manner hereinbefore mentioned, it did not contemplate that it should have any application to the petitioner, who only studied the course three years, as it is to be presumed that the college would not have conferred upon him a diploma unless he had pursued the course of study for four years, which was required by the resolution making said change, if it thought the resolution applicable to the petitioner. The manifest intention of the amendatory act of 1901 was to exempt from the necessity of standing the examination before said

*Rehearing denied December 12, 1902.

board as to qualifications and fitness those graduates holding diplomas issued by a college of established reputation in this state, which has a four-years course of instruction, and a standard of not less than 75 per cent. on examination, when satisfactory evidence of the standing of the college is made to the board of medical examiners, and when the graduate has studied the course for four years.

The allowance of the writ of mandamus is discretionary with the court. *State v. McMillan*, 52 S. C. 73, 29 S. E. 540; 19 Am. & Eng. Enc. Law (2d Ed.) 751. This court, in the exercise of its discretion, will refuse the writ when the effect of granting it would be to violate the intention of an act of the legislature.

The respondents have set forth in their return that the act of 1901 is unconstitutional. The authorities in this state, however, show that they have not the right to raise such question. *State v. Hagood*, 30 S. C. 523, 9 S. E. 686, 3 L. R. A. 841; *Ex parte Florence School*, 43 S. C. 16, 20 S. E. 794.

It is the judgment of this court that the petition be dismissed.

JONES, J., concurs in result.

(64 S. C. 545)

LANCASTER SCHOOL DIST. v. ROBINSON-HUMPHREY CO.

(Supreme Court of South Carolina. Nov. 25, 1902.)

MUNICIPAL INDEBTEDNESS—LIMITATIONS—STATE DEBT.

1. Const. art. 10, § 5, limiting the indebtedness of a municipality or political division to 15 per cent. of its taxable valuation, does not require the state debt to be included therein.

Appeal from common pleas circuit court of Lancaster county; Aldrich, Judge.

Controversy without action in Lancaster school district against the Robinson-Humphrey Company. From circuit decree, defendant appeals. Affirmed.

Appellant, pro se. Ernest Moore, for appellee.

PER CURIAM. The sole question made in this case is whether or not, in estimating the aggregate debt mentioned in the last clause of section 5 of article 10 of the constitution of this state, the state debt is to be apportioned in order to determine whether the proposed issue of bonds to the amount of \$15,000 by the Lancaster school district will exceed the 15 per cent. limitation contained in said section. Upon a careful consideration of the terms of the section of the constitution above mentioned, this court is of opinion that, in the clause of the constitution here in question, reference was intended only to the debts of "the several political divisions or municipal corporations" of this state "covering or extending over the same territory, or parts there-

of," as the debts to be taken into consideration in determining whether a proposed issue of bonds would exceed the 15 per cent. limitation prescribed in said section, and that the state debt is not to be apportioned to any such political division or municipal corporation as a part of the debt to be estimated in ascertaining whether or not such limitation has been reached. Although it is not in express terms so decided in the case of *Todd v. City of Laurens*, 48 S. C. 404, 26 S. E. 682, yet the question here made, is, in effect, decided as above concluded by necessary implication from the language used by this court in that case.

It is therefore adjudged, that the decree of the circuit court herein be affirmed.

(116 Ga. 655)

FORD v. LAMB.

(Supreme Court of Georgia. Dec. 10, 1902.)

SLANDER—EVIDENCE—DAMAGES.

1. A petition which alleges that the defendant falsely and maliciously said to a person with whom plaintiff was negotiating a trade that plaintiff "is no good; he will not pay for anything he gets,"—and thereby caused the trade to be broken off, the petition not alleging any special damage to plaintiff, sets forth no cause of action, and a demurrer thereto should be sustained.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by J. C. Lamb against I. D. Ford. Judgment for plaintiff, and defendant brings error. Reversed.

Dean & Dean, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

SIMMONS, C. J. An action for \$3,000 for slander was brought by Lamb against Ford. The petition alleged: That plaintiff and Bass were negotiating a trade, and that defendant gratuitously said to Bass: "Don't sell Lamb anything. He is no good. He will not pay for anything he gets." That on account of these words Bass broke off the trade, "greatly to petitioner's worry and mortification." The petition further alleged that the words spoken were false and malicious, and injured petitioner in the sum of \$3,000. There was no allegation as to the character of the plaintiff's business, or that he had any business office or occupation at all. The defendant demurred to the petition on the grounds that it set forth no cause of action, and that there were no special damages set forth. The demurrer was overruled, and the defendant excepted.

Under Civ. Code, § 3837, damages will be inferred from slanderous words (1) imputing to another a crime punishable by law, (2) charging him with a contagious disorder, or with some debasing act which may exclude him from society, or (3) making charges in

¶ 1. See Libel and Slander, vol. 22, Cent. Dig. § 212.

reference to his trade, office, or profession calculated to injure him therein. Where the slander consists in disparaging words productive of special damage flowing naturally therefrom, "the special damage is essential to support the action." The plaintiff did not rely on the Code provision as to the three classes of slander in which damage will be inferred, but sought to put his case within the class last mentioned. The petition set out the disparaging words, but failed to allege any special damage flowing therefrom. True, plaintiff alleges that the words caused the negotiations between him and Bass to be broken off, but he does not allege any special damage resulting therefrom. In order to recover, plaintiff should have alleged special damage; as, for instance, that he would have realized a certain sum from the trade if it had not been broken off as a result of the slanderous words spoken by the defendant. No special damage was alleged, and the petition was, therefore, fatally defective. The judge erred in overruling the defendant's demurrer.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 748)

FEARS v. FEARS.

(Supreme Court of Georgia. Dec. 12, 1902.)

VERDICT—EVIDENCE—REVIEW.

1. The verdict rendered was not objectionable for indefiniteness; the evidence, while conflicting, was sufficient to warrant the jury in finding for the plaintiff; and it does not appear that the court, for any reason assigned, erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Butts county; E. J. Reagan, Judge.

Action by Elizabeth Fears against G. W. Fears. Judgment for plaintiff. Defendant brings error. Affirmed.

Ray & Ray, for plaintiff in error. O. L. Redman and Y. A. Wright, for defendant in error.

CANDLER, J. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 596)

CHAPMAN v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

CRIMINAL LAW—VACATING SENTENCE—JURISDICTION—EVIDENCE.

1. A motion to set aside a verdict and vacate the order or sentence made in a criminal case cannot be entertained by a judge of a city court in vacation, for want of jurisdiction.

2. The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

Error from city court of Americus; C. R. Crisp, Judge.

J. P. Chapman was convicted of a misdemeanor. From an order refusing to set aside

the judgment and vacate the sentence, he brings error. Affirmed.

J. R. Williams and Shipp & Sheppard, for plaintiff in error. F. A. Hooper, Sol. Gen., and J. A. Ansley, Jr., for defendant in error.

LITTLE, J. Chapman was indicted for a misdemeanor, and the case was transferred to and tried in the city court of Americus. The trial resulted in a conviction. The defendant moved for a new trial, and the motion was continued from time to time, and came up finally for a hearing before the judge at chambers, under continuances properly made. We are conclusively to presume that this motion was heard in vacation, for the reason that it does not appear by the bill of exceptions to have been heard in term time, and the order overruling the motion was dated at chambers, September 15, 1902. The motion will therefore be considered as having been determined in vacation. When the motion came on for a hearing, the plaintiff in error, in connection therewith, submitted, in writing, a motion to set aside the judgment which had been rendered in the case, and to vacate the order or sentence based on said verdict, for reasons stated in the written motion. After considering that motion, the presiding judge denied and overruled the same; and the plaintiff in error excepted, and, in his bill of exceptions, complains that the court erred in overruling that motion. We do not think the court committed any error in so ruling. In the case of *Haskens v. State*, 114 Ga. 837, 40 S. E. 997, it is declared that a judge of the superior court has no authority to entertain a motion made in vacation to set aside a judgment of that court. So, without regard to whether there was or was not any merit in the ground of the motion to set aside, had it been made at the proper time, it is sufficient to say that at the time it was presented the court had no jurisdiction to entertain it, and committed no error in overruling the same.

2. It is also complained that the trial judge erred in overruling the motion for a new trial. The grounds of this motion were that the verdict was contrary to the evidence, against the weight of the evidence, and contrary to law. An examination of the evidence upon which the conviction was founded results in the conclusion that the evidence was sufficient to warrant the verdict, and we know of no reason why the same is contrary to law.

The judgment overruling the motion for a new trial is therefore affirmed. All the justices concurring, except LUMPKIN, P. J., absent, and CANDLER, J., not presiding.

(116 Ga. 679)

SIMS v. SIMS et al.

(Supreme Court of Georgia. Dec. 10, 1902.)

CUSTODY OF CHILD.

1. The judgment of the ordinary, awarding the custody of the child in question to its fa-

ther, was amply supported by the evidence, and the overruling of the certiorari sued out by the mother was not erroneous.
(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Naomi Sims against W. J. Sims and others. From the judgment awarding custody of children to defendant Sims, Naomi Sims brings error. Affirmed.

Henry Walker, for plaintiff in error. M. B. Eubanks, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent.

(116 Ga. 741)

HIGGINBOTHAM v. COOPER.

(Supreme Court of Georgia. Dec. 12, 1902.)
SPECIFIC PERFORMANCE—IDENTITY OF SUBJECT-MATTER.

1. A court of equity will not undertake to compel the specific performance of a parol contract for the sale of land, unless the land which is the subject-matter of the alleged contract is clearly identified.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Suit by R. M. Higginbotham against J. P. Cooper, executor. Judgment for defendant, and plaintiff brings error. Affirmed.

C. A. Thornwell, for plaintiff in error. W. W. Brookes and Halsted Smith, for defendant in error.

COBB, J. Mrs. Higginbotham brought an equitable petition against the executor of Clark, praying for the specific performance of a parol contract for the sale of land. The judge directed the jury to return a verdict in favor of the defendant, and an assignment of error upon this ruling was the only one insisted upon in this court. The evidence introduced in behalf of the plaintiff was possibly sufficient to establish all that was necessary for the specific performance of the alleged parol contract, except that the identity of the land alleged to have been the subject of the sale was not shown with sufficient definiteness. The plaintiff being an incompetent witness, on account of the death of the other contracting party, it was sought to make out the case by proof of declarations of the defendant's testator. A daughter of the plaintiff testified that she had seen her mother pay Clark sums of money at different times, and that, in the conversations about the payments, Clark referred to property which he had sold the plaintiff. The witness said she knew what property Clark referred to, and that it was situated on Seventh avenue, "between our place and the Ragan place." There was, however, nothing in this witness' testimony to show that Clark referred to the property she thought he was talking about, and nothing to show that he said anything

by which the identity of the property could be determined. A son of the plaintiff testified that he had heard a conversation between his mother and Clark, in which he referred to the place as the "Orchard Place," but there was no evidence to show where the Orchard place was, or of what it consisted. Henry Walker, Esq., testified that Clark had told him that he had sold to plaintiff a piece of land, and that she had paid all except \$10 of the purchase money; that Clark said the property he had sold to her was on Seventh avenue; that he had bought it at a tax sale, and had a sheriff's deed to it. There was no evidence as to where Seventh avenue was. But let it be conceded that Seventh avenue was in Rome, Ga.; no particular lot was identified; and this would be true even though it was a lot on that street which Clark had bought at a tax sale. There was no evidence as to the length of the street, or as to how many houses and lots were on it; and it was possible that Clark might have been, at the time of the conversation with Walker, the owner of several lots on that street, which he had bought at tax sales. Certainly it was incumbent upon the plaintiff, resting under the burden of making out her case by evidence, to show that the lot described in her petition was the only lot on Seventh avenue which Clark had bought at tax sale, before she could rely on the evidence of Walker as in part identifying the property which was the subject-matter of the sale. A court of equity will never decree the specific performance of a contract for the sale of land, unless the land which is the subject-matter of the alleged sale is clearly identified in the contract. Especially is this rule to be applied where the effort is to enforce a parol contract for the sale of land. See, in this connection, *Printup v. Mitchell*, 17 Ga. 567 (16), 63 Am. Dec. 258; *Smith v. Jones*, 66 Ga. 338, 42 Am. Rep. 72; *North v. Mendel*, 73 Ga. 404, 54 Am. Rep. 879; *Douglass v. Bunn*, 110 Ga. 159, 35 S. E. 339; *Gatins v. Angler*, 104 Ga. 386, 30 S. E. 876; *Dwight v. Jones*, 115 Ga. 744, 42 S. E. 48.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 747)

CENTRAL OF GEORGIA RY. CO. v. LANCASTER.

(Supreme Court of Georgia. Dec. 12, 1902.)
APPEAL—HARMLESS ERROR—EVIDENCE.

1. The evidence objected to, even if not technically admissible, was harmless to the plaintiff in error, as the fact sought to be established thereby was not denied by it, and was abundantly proved by its own witnesses.

2. The evidence on the trial before the magistrate was sufficient to support the verdict found against the defendant in its capacity either of carrier or of warehouseman, and it was therefore not error for the judge of the superior court to overrule the certiorari.

(Syllabus by the Court.)

* 1. See *Appeal and Error*, vol. 2, Cent. Dig. §§ 4163, 4164.

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by J. F. Lancaster against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Hall & Cleveland and Cabaniss & Willingham, for plaintiff in error. Julian B. Williamson, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent.

(116 Ga. 599)

McPHAIL v. STATE

(Supreme Court of Georgia. Dec. 9, 1902.)

CRIMINAL LAW—EVIDENCE—NEW TRIAL—HEARING OF MOTION.

1. Where a motion for a new trial is made in term, and set for a hearing in vacation, and for any reason is not disposed of in vacation, it is in order for hearing and disposition during the term without notice.

2. The evidence warranted the verdict, and no reason appears why the judgment overruling the motion for a new trial should be reversed.

(Syllabus by the Court.)

Error from superior court, Irwin county; D. M. Roberts, Judge.

Tom McPhail was convicted of murder, and brings error. Affirmed.

McDonald & Quincey, for plaintiff in error. J. F. De Lacy, Sol. Gen., and Jno. O. Hart, Atty. Gen., for defendant in error.

CANDLER, J. At the March term, 1902, of the superior court of Irwin county, McPhail was tried and convicted on an indictment charging him with the offense of murder. At the same term the defendant made a motion for a new trial, and the presiding judge granted a rule nisi calling upon the solicitor general to show cause at such time and place as should be further ordered by the court, upon 10 days' notice to each party, why a new trial should not be granted. The motion was afterwards set for a hearing at Eastman on August 6, 1902, at chambers, and was duly heard at that time, the court reserving its decision until August 8th, at which time the motion was overruled. The defendant tendered to the court a bill of exceptions, in which error was assigned on the hearing of the motion on August 6th, without having given the 10-days notice "required by law and by the order." So far as the record shows, the tendering of the bill of exceptions complaining of the hearing of the motion without giving the notice provided for by the order was the first occasion upon which the attention of the trial judge was called to this point. Before the bill of exceptions was certified by the judge, the solicitor general presented the following motion: "Now comes J. F. De Lacy, solicitor general, and shows to the court that the above-stated motion came on to be heard

upon notice given, which was not served within ten days, and, relying upon the belief that ten days' notice was waived, the motion was decided by the court, and a new trial refused. It now appears that exception has been taken to the decision upon the ground that ten days' notice was not given movant before the hearing. Wherefore, to obviate any legal difficulty, and to give the movant the ten-days notice, said solicitor general prays that an order be granted requiring movant to show cause why the judgment on said motion for new trial refusing the same should not be set aside, and the said motion for new trial reinstated." Upon this motion the court passed the following order: "Upon reading and considering the foregoing motion of the solicitor general, it is ordered by the court that the counsel for movant in said motion for new trial show cause before me at Irwinville, Georgia, on the 10th day of September, 1902, why said motion for new trial should not be reinstated as prayed for." The motion and order were dated August 27, 1902. On September 10th—which was during the regular September term of Irwin superior court—an order was passed setting aside the order refusing a new trial and reinstating the motion. On the following day—September 11th—the motion was heard a second time, and the court again passed an order refusing a new trial. When the motion was called for a hearing on September 11th, counsel for the movant objected to proceeding with the hearing on the ground that he had not had the 10-days notice provided for by the original order, but this objection was overruled by the court.

1. It will be observed that there was no objection, on the part of counsel for the accused, to the setting aside by the court of the first order denying a new trial. This was a consent order, passed in term time, and we are left to determine whether or not the court erred in hearing the motion, over objection by counsel for the accused, during a regular term of the court, without giving the 10-days notice provided for in the original order. The sole objection made by counsel to the hearing of the motion on September 11th was that he had not had that notice, but the record does not disclose that he advanced any reason why the hearing of the motion should be further delayed. The first order, providing for 10 days' notice of the time and place of the hearing of the motion, evidently had in view the hearing of the motion in vacation. The act approved December 14, 1895 (Civ. Code, §§ 4323 et seq.), was intended to apply only to hearings in vacation. When, upon motion of the solicitor general, the court, with the consent of counsel for the accused, passed an order setting aside the first order denying a new trial, the motion stood upon the docket of the court just as did any other motion pending therein, and, in the absence of any legal showing for a continuance or postponement, could be

heard during the regular term of the court. The courts of this state have power to call and hear, during a regular term, any matter pending therein; and this without notice to anybody. The law supposes that counsel having business in a court are always present at its sessions, and it appears by the record in this case that when the motion was called on the day following the order reinstating it counsel for the accused was present, and that the only objection made to the hearing was that the 10-days notice had not been given which was provided for in the original order. This court has held in a number of cases that jurisdiction to proceed in term is not lost by an order to hear at chambers. From the record in this case it appears that the first hearing, on August 6th, was improvidently had; and when the court, in term time, without objection on either side, set aside the order passed in vacation, the motion stood upon the docket as any other motion thereon, and so remained until called up in its order. See *Helmly v. Davis*, 111 Ga. 860, 36 S. E. 927, and cases cited; Civ. Code, § 5485.

2. The foregoing disposes of the only question presented by the record in this case which requires discussion. The motion for a new trial contains only the general grounds that the verdict was contrary to law and the evidence. A careful review of the testimony shows that the conviction of the accused was amply warranted by the evidence, and no reason appears why the judgment of the court below should be disturbed.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 753)

KING v. WESTBROOKS.

(Supreme Court of Georgia. Dec. 12, 1902.)

ACTION ON NOTE—PLEADING—INTEREST.

1. While it is not necessary in a suit on a promissory note to set out in the petition figures the amount of interest due at the commencement of the suit, but an allegation that interest is due at a given rate from a given day will be sufficient to authorize a recovery of all interest due and payable on the debt, still, if the pleader sets forth a stated sum as due on a given day, no larger sum than that can be recovered as interest up to the date stated.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by W. H. Westbrooks against Carrie King. Judgment for plaintiff, and defendant brings error. Affirmed, with direction.

Cabaniss & Willingham, J. B. Williamson, and E. G. Cabaniss, Jr., for plaintiff in error. Persons & Persons, for defendant in error.

COBB, J. Westbrook brought suit against Mrs. Carrie King, alleging that she had "executed unto him a certain mortgage note" for \$415.96, maturing October 15, 1893, bearing

interest from maturity at 8 per cent. per annum; that the defendant was committing waste upon the mortgaged premises; and praying that she be enjoined. Plaintiff amended his petition, and prayed that the mortgage be foreclosed, and "that he be allowed to recover of [defendant] the sum of \$391.76, as principal, and upon which there is due up to August the 1st the sum of \$15.66 (total principal and interest due up to August 1, 1899, \$406.42), and all further interest from said date at the rate of eight per cent. per annum." There was also an amendment praying for a judgment for attorney's fees. The defendant filed several pleas, but at the trial relied only on one, setting up that the original debt due plaintiff was partly hers and partly her husband's, and that she had paid all that was due by her. The verdict was in favor of the plaintiff for \$367.10 principal, \$102.20 interest to February 13, 1902, the date of the verdict, and \$46.93 attorney's fees. The defendant excepts to a judgment overruling her motion for a new trial. The evidence was conflicting, but there was evidence authorizing a finding in favor of plaintiff on the issue made by the defendant's plea. We find no error which would require a new trial on this issue. It is contended, however, that, even if this is true, the verdict is too large. The plaintiff claimed only \$15.66 due as interest to August 1, 1899. The interest on \$367.10 from that date to February 13, 1902, is \$74.37, which, added to \$15.66, makes \$90.03. The verdict is therefore for \$12.17 interest in excess of what the plaintiff is entitled to recover if he is bound by the averment that only \$15.66 interest was due on August 1, 1899. Why should he be not so bound? It was not necessary for him to have set out the exact amount claimed as interest, but, having done so, he cannot recover any larger sum as interest up to the date referred to in the petition. Direction is given that the verdict and judgment as to interest and attorney's fees be so amended as to conform to the above ruling, and that the costs of this writ of error and all costs that have accrued in the court below since the verdict be taxed against the defendant in error.

Judgment affirmed, with directions. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 762)

BAIRDWIN FERTILIZER CO. v. CAR-MICHAEL.

(Supreme Court of Georgia. Dec. 12, 1902.)

NOTE—INDORSEMENT—LIMITATIONS—PLEADING—AMENDMENT.

1. A contract attached to a promissory note, and signed by the payee thereof, in which he undertakes to transfer the note, "and guaranty it as free from any defense that could be made under section 2785 of the Code of Georgia, and also guaranty payment in full on the day it is due," is, in this state, a contract of indorsement.

2. The note being a sealed instrument, the statutory bar applicable to the contract of indorsement is 20 years, though no seal follows the signature of the payee tuereto.

3. Where the petition seeking to recover on such a contract as that above quoted describes the defendant as a "guarantor," it is competent to amend by describing him as indorser, even if such an amendment is necessary in order to authorize a recovery on the contract.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Action by the Baldwin Fertilizer Company against Lucia C. Carmichael, administratrix. Judgment for defendant, and plaintiff brings error. Reversed.

G. A. Merritt and Jos. P. Brown, for plaintiff in error. Jas. B. Park, for defendant in error.

COBB, J. The plaintiff brought suit on March 7, 1901, against Carmichael, on a contract of which the following is a copy: "For value received, I transfer the within note to Baldwin Fertilizer Co., and guaranty it as free from any defense that could be made under section 2785 of the Code of Georgia, and also guaranty payment in full on the day it is due. This June 20, 1894. J. F. Carmichael, per Jas. Davison, Atty." This contract was attached to the note to which it referred, and Carmichael was the payee of this note, which was a sealed instrument, and was dated May 11, 1894. Pending the case in this court, Carmichael died, and his administratrix was made a party in his stead. The petition described Carmichael as a "guarantor," and the suit was brought against him as such. The defendant made a motion to dismiss the petition on the ground that the contract sued on was barred by the statute of limitations, and upon the further ground that the record in the case showed—which was conceded to be true—that the principals were nonresidents of Greene county, and had never been sued on the contract. Pending the consideration of this motion, the plaintiff offered an amendment to the petition, seeking to strike the word "guarantor" wherever it occurred in the petition, and to substitute the word "indorser," thereby changing the petition so as to allege that defendant was liable to plaintiff as indorser, instead of guarantor. The court refused to allow the plaintiff to amend, and dismissed the petition on the grounds stated in the motion to dismiss. To each of these rulings the plaintiff excepted.

Under the former decisions of this court, the contract sued on seems to be one of indorsement. It was made, according to the allegations of the petition, for the purpose of transferring the note to the plaintiff in satisfaction of a claim held by it against the defendant, and the mere use of the word "guaranty" will not make the contract one of guaranty. The case of Pattillo v. Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616,

seems to be controlling in principle on the question. See, also, Vanzant v. Arnold, 31 Ga. 210; Manufacturing Co. v. Jones, 90 Ga. 309, 17 S. E. 81. If the contract was one of indorsement, then, under the ruling made in Milledge v. Gardner, 29 Ga. 700, the suit was not barred. In that case it was ruled: "Under our statutes the indorsement of a sealed instrument, although the signature of the indorser has no seal nor scroll attached to it, is itself a contract under seal, and the statutory bar applicable to it is twenty years." It is true that in the case of Ridley v. Hightower, 112 Ga. 476, 37 S. E. 733, which followed a decision made in Latham v. Kolb, 76 Ga. 291, this court refused to extend the ruling of the Milledge Case to a contract of suretyship, but that decision is left unimpaired so far as regards a case to which it is directly applicable; and this is such a case, the defendant here, as well as in the Milledge Case, being a technical indorser. It is true that in the Ridley Case it was suggested that, when the Latham Case in 76 Ga. was decided, the court probably thought, although no reference was made to the Milledge Case, that the change made in the law by the act of 1856, now embodied in Civ. Code, § 3765, rendered that decision inapplicable to the case then in hand; but the real distinction which the court in 112 Ga., 37 S. E., drew between that case and the Milledge Case was that one involved a contract of suretyship and the other one of indorsement. That case, therefore, is only authority for the proposition that the two contracts referred to were essentially different with respect to the question then being dealt with. The Milledge Case was decided when the act of 1838 (Cobb's Dig. p. 274) was of force, and this act, as well as the act of 1856, prescribed simply when an instrument should be considered as being under seal, but with no reference whatever to the question whether an indorsement or other similar contract should be regarded as being under seal merely because the contract to which it referred was under seal. We do not think, therefore, that any change has been made in the law since the Milledge Case was decided that could affect the decision then made. This being so, that decision is controlling upon us here, and the suit was not barred.

We are also of opinion that the plaintiff should have been allowed to amend so as to charge the defendant as an indorser, instead of a guarantor, if, indeed, such an amendment was an indispensable prerequisite to a recovery. The cause of action set forth in the petition was the right to recover on the contract set out therein. The fact that the plaintiff may have erroneously construed the contract would not operate to dismiss the action. We question whether any such amendment was necessary, and whether the court should not have construed the contract independently of any construction which the plaintiff may have put upon it. See, in this

connection, *Williamson v. White*, 101 Ga. 279, 28 S. E. 846, 65 Am. St. Rep. 302; *Thompson v. High*, 13 Ga. 311; *Callaway v. Harrold*, 61 Ga. 111. But certainly, under our system of amendments, an amendment which did not change the contract in any respect, but merely corrected an erroneous construction of the same, should have been allowed. See, in this connection, *McCandless v. Acid Co.*, 115 Ga. 968, 42 S. E. 449, and cases cited.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 615)

HUNT et al. v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

RIOT—EVIDENCE—NEW TRIAL.

1. The evidence introduced by the state fully warranted a conviction of the accused for the offense of riot, and, so far as appears, the court did not err in refusing to grant them a new trial.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

A. J. Hunt and others were convicted of riot, and bring error. Affirmed.

Griffith & Weatherby and Craven & Hutcherson, for plaintiffs in error. W. T. Roberts, Sol. Gen., and Edwards & Ault, for the State.

SIMMONS, C. J. The plaintiffs in error were brought to trial for and convicted of the offense of riot, under an indictment charging that on a day specified they, "with force and arms, did, in a violent and tumultuous manner curse, abuse, and drive away from the home of W. M. Jones J. H. West and Henry Jones, contrary to the laws of" this state, etc. A motion for a new trial was made by the accused, but proved unproductive, and they seek at our hands a decision as to its merits. The case made out by the state was, in brief, substantially as follows: On the day named in the indictment W. M. Jones was in the possession of a house he had rented from West, who was the agent of another, claiming title to the farm upon which this house was located. Two of the plaintiffs in error appear to have been under the impression that they were the true owners of the premises, while another of them asserted a claim based on the doctrine of emblements. He had a son, who apparently was devoted to his cause. The four appeared on the scene prior to the breakfast hour of W. M. Jones. Two of them were armed with guns, but in a conciliatory spirit approached West and Henry Jones, who were present, and also armed, and "proposed to settle this matter without using guns." This proposition was accepted, and the guns were "stacked" with a view to talking the matter over. The conference terminated in a fight without weapons be-

tween West and one of the accused, and after an indecisive struggle the latter took his departure, and was followed by the other members of his party, while West went into the house. The accused almost immediately returned, however, each armed with a gun, and commenced firing, at the time uttering threats and curses, and ordering the inmates of the house to at once leave the premises. West and Henry Jones, against whom this mandate was specially directed, then retired in good order. W. M. Jones and his family were then driven away also. He had, the night previous, agreed to move off the place, and had asked one of the accused to secure him another house. He was compelled, against his will, to move that day. No testimony was offered in behalf of the accused, though each made a statement to the jury in which he gave his version of what occurred. Under the evidence relied on by the state, it cannot be seriously insisted that the verdict of guilty was unwarranted, so we will pass to a consideration of the special grounds of the motion for a new trial. The court declined to admit evidence offered for the purpose of showing the title under which two of the accused laid claim to the premises over the possession of which the disturbance to the peace of the state arose. Obviously, this evidence was wholly irrelevant, for, however good a title they may have had to the premises, this would not justify them in proceeding in a riotous and tumultuous manner to take possession of the same. Another complaint is that the court refused "to allow defendants to prove by W. M. Jones that he was getting his things out of his house when defendants got there that morning." If such was the case, the disturbance created by them was all the more inexcusable. Peaceable preparations for the moving of household effects are not to be regarded as a signal for, or as justifying, a riot. Again, it is insisted that the court erred in not permitting counsel for the accused to ask W. M. Jones the question, "You made arrangements with him [one of the accused] to carry your things?" We cannot undertake to say that this ruling operated to the prejudice of the accused, since what answer was expected of the witness is not made to appear. *News Co. v. Mencken*, 115 Ga. 1017, 42 S. E. 369. Nor are we prepared to hold that injury resulting from refusing to allow one of the accused to make a statement of "all that took place during the time the offense was alleged to have been committed, and by confining him to a statement of just what he did." What he desired, but was not allowed, to state to the jury, should have been fully set forth in the motion for a new trial, in order that we might be enabled to pass intelligently upon the question whether or not the trial judge abused his discretion in the premises.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 754)

GRIFFIN v. GRIFFIN.

(Supreme Court of Georgia. Dec. 12, 1902.)

FORCIBLE ENTRY—EVIDENCE.

1. A verdict for the plaintiff in a proceeding founded upon Civ. Code, § 4823 et seq., providing a civil remedy for forcible entry and detainer, is not warranted when the evidence shows that the entry was made into an occupied dwelling house during the temporary absence of the person entitled to the possession.

(Syllabus by the Court.)

Error from superior court, Laurens county; Jno. C. Hart, Judge.

Action by F. D. Griffin against George Griffin. Judgment for plaintiff, and defendant brings error. Reversed.

S. B. Baker and Akerman & Akerman, for plaintiff in error. H. P. Howard and T. L. Griner, for defendant in error.

OOBB, J. Fred D. Griffin instituted in the justice's court an action of forcible entry and detainer against George Griffin under the provisions of Civ. Code, § 4823 et seq. The case was tried before a jury, and a general verdict for the plaintiff was rendered. The defendant filed a petition praying for a writ of certiorari, and to the refusal of the judge to sanction the petition he excepted. The sole question made in the petition is whether the verdict in the justice's court was warranted by the evidence, which, as set out in the petition, was, in substance, as follows: The plaintiff was in possession of the house alleged to have been entered by the defendant, using the same as a dwelling house. He went away temporarily, and locked up the house, leaving his bed, bedding, and other articles of furniture in the house. The back door of the house was fastened with a padlock by attaching a chain to a staple in the door facing; the chain being attached to the door by a little wire. During the plaintiff's absence the defendant broke open the back door of the house with an axe, entered, and took possession, and, when plaintiff returned, refused to surrender possession, claiming that he entered rightfully, and telling plaintiff that he would have to go to court to recover possession. Under the averments of the petition the jury were warranted in finding the facts to be as above stated, though, according to the defendant's testimony, he used no other force in making the entry into the house than to twist the little wire which attached the chain to the door. The only facts which the jury were authorized to inquire into were the "possession and the force." The merits of the title were not involved. Civ. Code, § 4826. It would seem that in a proceeding of this character, where the affidavit alleges both a forcible entry and a forcible detainer, it is necessary to prove both a forcible entry and a forcible detainer. See, in this connection, *Lewis v. State*, 99 Ga. 692, 26 S. E. 496, 59

Am. St. Rep. 255. But, without reference to this point, we are of opinion that under the facts alleged in the petition for certiorari a verdict in favor of the plaintiff was not warranted, and that the judge of the superior court erred in refusing to sanction the petition. In *Lewis v. State*, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255, it was held that "breaking and entering an unoccupied house in the absence of the person who had previously been in possession and control thereof, and who still claimed the right to the possession, is not indictable." In a carefully considered opinion, wherein he refers to both English and American authorities, Mr. Justice Lumpkin reaches the conclusion that the rule stated in the headnote, and which is quoted above, was of force under the English law, notwithstanding a statement to the contrary in some of the authorities. The judgment was reversed in that case, because the evidence failed to show a forcible entry, when the indictment had alleged both a forcible entry and a forcible detainer; it being held that it was necessary to show both. In the opinion it is stated that Pen. Code, § 338, adopts the common-law definition of forcible entry. That section is as follows: "Forcible entry is the violently taking possession of lands and tenements with menaces, force and arms, and without authority of law." As the provisions of our statute dealing with the civil proceeding do not undertake to define forcible entry and forcible detainer, it is manifest that the common-law definitions are to be applied also to the action instituted to redress the mere private wrong. Forcible entry or detainer was at first, under the English law, only an offense against the public. But by several early English statutes a summary proceeding was provided before one or more justices of the peace, who had power to summon a jury and try the question; and, if the person against whom the complaint was made was found to have committed a forcible entry or a forcible detainer, then a fine was imposed upon him, and, in addition to this, possession was restored to the complaining party, without inquiring into the merits of the title. 4 Bl. Comm. 149; 3 Bl. Comm. 179; 13 Am. & Eng. Enc. Law (2d Ed.) 744; 2 Tayl. Landl. & T. (8th Ed.) § 786. It will thus be seen that under the English statutes the civil remedy and the criminal prosecution were governed by the same rules, for they were tried together in the same proceeding. Indeed, the proceeding was really a prosecution for the public offense, with the incidental right of the person entitled to the possession to have his possession restored. Our statutes have, however, separated the two proceedings, but the statute providing the civil remedy bears a striking analogy to the proceeding had under the English statutes, and the same rules as to the character of the force necessary should be applied to it as to the prosecution for the public wrong. See, in this connection, 9 Enc. Pl. & Prac. p. 85. In 2 Tayl.

¶ 1. See *Forcible Entry and Detainer*, vol. 22, Cent. Dig. §§ 10, 18.

Landl. & T. (8th Ed.) § 787, referring to the civil remedy, it is said: "To make an entry forcible, there must be such acts of violence used, or such threats, menaces, or gestures exhibited, as give reason to apprehend personal injury or danger in standing in defense of the possession." This is substantially the definition of our Penal Code, upon which the ruling in the Lewis Case was founded. The definitions of forcible entry and forcible detainer contained in the Penal Code have been treated by this court as being applicable to the civil proceeding. See *Harrell v. Holt*, 76 Ga. 25; *Stuckey v. Carleton*, 66 Ga. 215. We think, therefore, that, inasmuch as, under the averments of the petition for certiorari, the uncontradicted evidence showed that the plaintiff was temporarily absent from the house at the time the defendant entered, the verdict rendered was not warranted, and the petition for certiorari should have been sanctioned.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 621)

ANTOGNOLI et al. v. MILLER.

MILLER v. ANTOGNOLI et al.

(Supreme Court of Georgia. Dec. 9, 1902.)

PLEADING—ANSWER—SUFFICIENCY—NEW TRIAL—ACTION ON NOTE.

1. In testing the relevancy and sufficiency of matters of defense set forth in one of several paragraphs of a defendant's answer, the facts alleged in such paragraph are to be considered, not alone, but in the light of the allegations embraced in the other paragraphs of the answer relating to the same defense.

2. There was in the present case no abuse of discretion in ordering another trial, notwithstanding the verdict set aside was the second finding by a jury in favor of the prevailing party.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Clarence L. Miller against Antognoli & Co. Verdict for defendants. From an order granting a new trial, both parties bring error. Affirmed.

Denny & Harris, for plaintiff in error. Henry Walker, for defendants in error.

SIMMONS, C. J. A petition was filed by Clarence L. Miller, in which the firm of A. M. Antognoli & Co. was named as defendant, and in which a promissory note for \$188, and a duebill for \$45, both signed in the name of that firm and payable to the plaintiff, were declared upon. An answer was filed by the defendant partnership, in which it set up two defenses: (1) That payment of the note had been made to H. R. Miller, who was the authorized agent of the plaintiff to collect it; and (2) that the plaintiff was only the nominal holder of the note and duebill, H. R. Miller being the real owner thereof, and, as such, having received payment in full of the indebtedness thereby evidenced. In support

of this latter contention the defendant alleged that H. R. Miller had been the proprietor of certain bottling works which were destroyed by fire; that, in order to conceal from his creditors the fact of his ownership thereof, he had conducted business in the name of the plaintiff, and, on receipt of the proceeds arising from a policy of insurance covering the property destroyed by the fire, had loaned a portion of the money so received to defendant, taking from defendant the note and duebill payable to the plaintiff, with a view to giving fresh color to the tradition that he had been the owner of the bottling establishment. The allegations of fact relied on as supporting this line of defense were set forth in the answer in divers paragraphs, each separately numbered. To the answer a demurrer was interposed by the plaintiff, several grounds of which were sustained by the trial judge, and others of which were overruled by him. In those grounds of the demurrer which his honor declined to sustain, separate attacks were directed against designated paragraphs of the answer which were assailed as containing matter which was wholly irrelevant, and which constituted no defense to the action. The case proceeded to a trial on the merits, and resulted in a verdict in favor of the defendant. This was, it appears, the second verdict returned in the case; the first, which was also adverse to the plaintiff, having been set aside by the trial court. He made a motion for a new trial, which was granted, and the defendant sued out a writ of error to this court, in which complaint is made that the trial judge abused his discretion in ordering that the case undergo a still further investigation before a jury. By a cross-bill of exceptions the prevailing party below brings to this court for review the judgment overruling certain grounds of his demurrer to the defendant's answer.

1. The nature of these grounds has already been sufficiently indicated. Doubtless it is true that the allegations of fact set forth in some of the paragraphs of the answer would not, taken alone, constitute any reason why the plaintiff should not recover; but to consider by itself each of these paragraphs is not the proper test for determining the relevancy and sufficiency of the facts therein pleaded. Regarded as a whole, the answer unquestionably set up a meritorious defense, upon which each of the paragraphs which the court below declined to strike had a direct bearing. That each of them should contain a full and complete defense was unnecessary. Indeed, to present an answer wherein the matters of defense relied on are set forth in orderly and distinct paragraphs, is a practice not only permissible, but one to be encouraged, as conducive to good pleading.

2. A careful scrutiny of the evidence introduced on the last trial of the case has led us to the conclusion that none of the sanctity which ordinarily attaches to a second verdict in favor of the prevailing party can be claim-

ed for that now under consideration. In fact, we are by no means clear that the trial judge would have been warranted in giving to it his approval. The defendant partnership signally failed to establish its defense that H. R. Miller, and not the plaintiff, was the real owner of the note and duebill upon which suit was brought. Nor was there any satisfactory evidence going to show that H. R. Miller retained in his possession these papers, and, as the authorized agent of the plaintiff, accepted in his behalf payments thereon. It appears that the firm of A. M. Antognoli & Co. had numerous business dealings with H. R. Miller as an individual, became indebted to him in a considerable amount, and made payments to him of money on divers occasions. In no instance, however, was he directed to apply any payment to the satisfaction of the note and duebill held by the plaintiff. On the contrary, it would seem that there was no understanding between H. R. Miller and the defendant partnership that he was to be regarded as the agent of the plaintiff with respect to the collection of either of these demands. Certain is it that the authority of H. R. Miller to thus act as the agent of the plaintiff was not made to satisfactorily appear. This being so, and there being no proof either that H. R. Miller had the above-mentioned papers in his possession at the time any payment was made to him by A. M. Antognoli & Co., or that any of the money collected by him from that firm ever reached the hands of the plaintiff, a recovery by him would seem to have been demanded. *Howard v. Rice*, 54 Ga. 52.

Judgment affirmed both as to the main and as to the cross bill of exceptions. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

(116 Ga. 745)

ATWATER v. HANNAH et al.

(Supreme Court of Georgia. Dec. 12, 1902.)

WAREHOUSES — AGREEMENT TO INSURE — PLEADING — AMENDMENT — NEW CAUSE OF ACTION — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

1. "A mere statement in a warehouse receipt that, 'All cotton stored with us fully insured,' will not alone constitute a contract between the parties, requiring the warehouseman to insure the cotton of his customer, and rendering him liable for the value of the same when destroyed by fire."

2. The amendments to the petition were properly disallowed for the reason that each sought to set up a new and distinct cause of action.

3. The evidence authorized the verdict. The showing as to diligence in reference to the alleged newly discovered evidence not being at all satisfactory, and there being no affidavit as to the character and credibility of the alleged new witness, the discretion of the trial judge in refusing to grant a new trial will not be controlled.

(Syllabus by the Court.)

Error from superior court, Upson county; D. M. Roberts, Judge.

Action by J. W. Atwater against G. W. T. Hannah & Co. Judgment for defendants, and plaintiff brings error. Affirmed.

J. A. Cotten and Worrell & Rigsdill, for plaintiff in error. M. H. Sandwich and J. Y. Allen, for defendants in error.

COBB, J. Atwater sued Hannah & Co., alleging in his petition, in substance, that the defendants were warehousemen, and as such had received for plaintiff six bales of cotton, which they undertook, for a consideration, to safely keep and deliver upon demand, but which they had failed to do, thereby becoming liable to plaintiff in a stated sum. It was further alleged that defendants, in order to induce custom, had inserted in the warehouse receipts the following: "All cotton stored with us fully insured. Acts of Providence excepted." It was averred that this statement was in the receipts given to plaintiff; that it constituted an agreement to insure; that plaintiff relied on it as an agreement to insure, and did not insure his cotton; that the same was destroyed by fire; and that therefore the defendants became liable to him, as insurers, for the value of the cotton. It was also alleged that the loss of the cotton was due to the gross negligence of the defendants; the petition setting out fully what is claimed to constitute the negligence, and laying damages in a stated sum. The trial resulted in a verdict for the defendants, and the case is here upon a bill of exceptions assigning error upon the refusal to grant a new trial, and upon other rulings made pending the trial.

1. The defendants filed a written demurrer upon the ground that there was a misjoinder of causes of action, in that the petition contained two counts, one sounding in contract and the other in tort. There was also an oral motion to dismiss so much of the petition as related to the contract, on the ground that the same set forth no cause of action. The court sustained the oral motion, and struck all the averments of the petition seeking to charge the defendants with liability on account of the statement in the warehouse receipts above referred to. Under the decision in *Zorn v. Hannah*, 106 Ga. 61, 31 S. E. 797, there was no error in this ruling.

2. The plaintiff offered two amendments to his petition; the first alleging, in substance, that prior to the time he stored his cotton with defendants he had a conversation with one of them, which, with the statement in the warehouse receipt, left him under the impression that his cotton was to be insured by defendants; that he acted on this impression, and did not insure his cotton; that the statements of the defendant with whom he conversed and the statement in the receipts were false and fraudulent, and intended to deceive and did actually deceive him, to his injury. The second amendment alleged that the conversation above referred to and the statement

in the warehouse receipt constituted an express contract to insure on the part of the defendants, and, having failed to so insure, they were liable for the value of the cotton. The court refused to allow either of these amendments. There was no error in these rulings. Even if the amendments were otherwise unobjectionable, they were properly disallowed, for the reason that they sought to set up new and distinct causes of action. It is by no means clear that the facts alleged in either amendment constituted a cause of action, but, if they did, the amendments were properly disallowed for the reason just stated.

3. The case went to the jury upon that portion of the petition which alleged liability on the ground that the defendants had not exercised that care which the law required of warehousemen. On this issue the evidence was in conflict, but there was evidence supporting the verdict. That ground of the motion for a new trial seeking a new trial on account of newly discovered evidence did not contain any affidavit as to the character and credibility of the alleged new witness. See Civ. Code, § 5481. In addition to this, the showing as to diligence was not at all satisfactory. The discretion resting with trial judges in such cases was not by any means abused in the present case.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 617)

RAWLS et al. v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

CRIMINAL LAW—NEW TRIAL.

1. The jury being the judges of the credibility of witnesses, and the testimony upon which the state relied, if credible, being sufficient to authorize a conviction, and the trial judge being satisfied with the verdict, the supreme court will not interfere with the discretion exercised by him in overruling a motion for a new trial based solely upon the general grounds.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Mag Rawls and others were convicted of crime, and bring error. Affirmed.

Cantrell & Ramsaur, for plaintiffs in error. Sam P. Maddox, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent.

(116 Ga. 603)

TRICE v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

LARCENY FROM DWELLING HOUSE—EVIDENCE.

1. An accusation charging a larceny from the dwelling house of a named person is not sustained by proof that he was the owner in fee of a hotel, which he rented to and which was conducted by another, and that the theft

was committed in a room of this hotel which was occupied by a guest of the latter.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Joe Trice was convicted of larceny from a dwelling house, and brings error. Reversed.

Thos. W. Thurman, for plaintiff in error. O. H. P. Slaton, for the State.

SIMMONS, C. J. The plaintiff in error, Joe Trice, was in the court below convicted of the offense of larceny from the house. The accusation under which he was brought to trial charged that he "did, with force and arms, unlawfully enter the dwelling house of J. T. Gray, and, after so entering, did wrongfully and fraudulently take and carry away a certain pistol, in said house stored, of the value of ten dollars, the personal property of T. B. Borom, with intent then and there to steal said pistol." The sole question presented for our determination is whether or not this charge was sustained by the evidence upon which the state relied for a conviction. The person in whom the ownership of the property alleged to have been stolen was laid testified: "I lost a pistol worth twelve or fifteen dollars. It was taken from my room in the Gray House, in the city of Griffin." J. T. Gray, who was alleged to be the owner of the dwelling house wherein the larceny was committed, testified: "The house where the pistol was taken is a hotel known as the 'Gray House,' and is run by Mrs. Barham. I rent the house to her, and board with her. I pay her board, and have no control over the house. Mrs. Barham controls the house." The precise point to be determined, therefore, is, was Gray, rather than Mrs. Barham or T. B. Borom, properly alleged in the accusation to be the owner of the dwelling house to which these witnesses referred? "The meaning of 'ownership' varies with the offense. Burglary is not a disturbance to the fee of the place as realty, but to the habitable security. Therefore, in burglary, 'ownership' means any possession which is rightful as against the burglar." 2 Bish. New Cr. Proc. § 137. "In general, possession and occupancy by the alleged owner are all that are required. While he need not own the fee,—he need not even pay rent,—it is enough that it was his actual dwelling house at the time." Even a possession unlawful as against the person claiming title, but lawful as against the burglar, will suffice." Id. § 138. "And as a general rule the ownership, so far as burglary is concerned, is in a lessee or other tenant having title, and not in the owner of the fee." 1 Whart. Cr. Law (10th Ed.) § 798. Accordingly an accusation charging that one burglariously entered the dwelling house of a named person is to be understood, not as referring to him as the owner of the fee, but as alleging that he had possession of and control over the house, and occupied it as a

dwelling. Indeed, our Penal Code (section 149), which defines the offense of burglary, evidently contemplates that the person who occupies, rather than another who holds the legal title to, but is not in possession of, a dwelling house, shall be regarded as the owner of the same; for that section, in express terms, declares that "a hired room or apartment in a public tavern, inn, or boarding-house, shall be considered as the dwelling-house of the person occupying or hiring the same." Such has been the construction which this court has heretofore put upon the language of that section. *Houston v. State*, 38 Ga. 165; *Yarborough v. State*, 83 Ga. 396, 12 S. E. 650, and cases cited. Under our statute, "larceny from the house is the breaking or entering any house with the intent to steal, or after breaking or entering said house, stealing therefrom anything of value." Pen. Code, § 178. This definition of this offense makes it so close akin to that of burglary, we can see no reason for holding that a distinction is to be drawn between an accusation charging a larceny from the house and an indictment for burglary, in so far as an allegation as to the ownership of a particular dwelling house is concerned. Neither offense involves "a disturbance to the fee of the place as realty"; so it would seem somewhat absurd to hold that the ownership of a dwelling alleged to have been burglariously entered should be laid in the actual occupant, and not in the owner of the fee, if he was not in possession, whereas the latter should be alleged to be its owner in the event of a mere larceny therein committed. Certain it is that no such distinction has heretofore been recognized by this court. On the contrary, it was, in *Markham v. State*, 25 Ga. 52, held that "the possession and occupancy of a house by a person as a dwelling house is sufficient evidence of ownership thereof in that person to support an allegation in an indictment for larceny from the house that the prisoner entered the dwelling house of that person." There it appeared that one Thomason was conducting a boarding house, wherein one Parker and the accused "roomed together," and from the room they occupied a watch belonging to Parker was stolen. The trial judge declined to charge the jury "that, if they believed from the evidence that the watch was taken from the hired lodgings of a boarder in the house of Thomason, that the indictment should have so charged it, and that it was not sufficient to have charged that the watch was taken from the house of Thomason." This court appears to have recognized that this charge, had there been sufficient evidence upon which to predicate it, ought to have been given; for, in passing on an assignment of error touching the matter, Judge McDonald said (page 54): "There was no evidence that the room from which the watch was stolen was the hired lodgings of a boarder. A boarder lodged there, but there was no evidence that he had hired that particular room. There

being no evidence to support the request * * * to charge the jury, it was not error in the presiding judge to refuse it." As regards the present case, we are of the opinion that the state did not prove the charge as laid, the evidence disclosing that Gray had rented the hotel to Mrs. Barham, and exercised no control over it, and that the pistol which was stolen was taken from a room therein not occupied by him, but by another, who, while a witness on the stand, several times referred to it as his. In fact, it does not affirmatively appear that Gray occupied any room in the building. That he was not the resident owner of it, in the sense charged in the accusation, we hold without difficulty or hesitation.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 626)

NOBLE et al. v. BURNEY.

(Supreme Court of Georgia. Dec. 10, 1902.)

CLERK OF COURT—PLACING CAUSE ON ISSUE DOCKET—CANCELLATION OF ENTRY.

1. Where the superior court and a city court in the same county have concurrent jurisdiction of a warrant for the eviction of a tenant holding over, and the counter affidavit thereto, and the sheriff returns the papers to the clerk of the superior court, and that officer, who is also clerk of the city court, places the case upon the issue docket of the superior court, he has no right, on his own motion, or at the request of counsel for the plaintiff, to cancel the entry on the superior court docket, change the entries on the papers, and transfer the case to the docket of the city court, without an order of the judge of the superior court. This is true although the act creating the city court makes such a case returnable to that court unless the plaintiff otherwise directs.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by Mary W. Noble and others against A. S. Burney. Judgment for defendant, and plaintiffs bring error. Affirmed.

Denny & Harris, for plaintiffs in error. McHenry & Maddox, for defendant in error.

SIMMONS, C. J. The plaintiffs in error sued out a warrant against Burney to dispossess him of certain premises as a tenant holding over and beyond his term. Burney filed the affidavit required by law, and the sheriff returned the papers to the clerk of the superior court, who placed the case on the docket of the superior court. This return to the clerk was made about February 14, 1902. The next term of the superior court after the return of the warrant to the clerk did not commence until the July following. The next term of the city court of Floyd county was the March term, 1902. At the request of counsel for the plaintiffs, the clerk canceled the entry of the case on the dockets of the superior court, and erased the entries on the papers showing a return to the July term of the superior court, and changed them

so as to show a return to the March term of the city court. He also entered the case on the dockets of the city court. The same person was clerk of the superior court and clerk of the city court. When the case was called in the city court, the defendant moved to dismiss it on the ground that the court was without jurisdiction, as the case had been docketed in the superior court, which court alone had jurisdiction of the case. The above facts appearing, the court struck the case from its dockets. The plaintiffs excepted.

The Civil Code (section 4816) declares that, after the counter affidavit has been made in a case like this, the sheriff shall return the proceedings to the next term of the superior court. The act creating the city court of Floyd county declares that the officer shall in such a case return the proceedings to that court, unless the plaintiff otherwise directs. Acts 1882-83, p. 536. Thus it appears that there are two courts in the county of Floyd having jurisdiction of such cases as the present. The Code makes it the duty of the sheriff to return the proceedings to the superior court. The act creating the city court makes the proceedings returnable to that court unless the plaintiff directs otherwise. The Code is mandatory; the act creating the city court is not so strong in expression as to the court to which the proceedings should be returned. The sheriff chose to follow the Code, and returned the proceedings to the clerk of the superior court, and that clerk placed the case on the docket of the superior court, as he had the right to do. When it was thus placed on the docket, the case became one pending in the superior court. According to our views, it must remain in that court to be tried or transmitted to the city court by an order of the judge of the superior court. The fact that the clerk of the superior court was also clerk of the city court did not authorize him to cancel the case on the superior court docket, and transmit it to the city court. While he was one person holding both offices, they were separate and distinct, and he was in himself two separate and distinct officials. He could not act as clerk of the city court in a manner which would affect his actions as clerk of the superior court. Had the offices been held by two different men, neither could have canceled the case from the dockets of one court and transmitted it to the other. The clerk of a court of record has no authority to strike from the docket a case which is properly returned to that court, and entered on the docket. The judge of the court has control of the dockets, and he is the only person authorized to strike cases from the dockets, or to make entries thereon. This case having been properly returned by the sheriff to the superior court, and having been properly entered upon its dockets, it was improper for the clerk to strike it from the docket, and transfer it to another court. When the de-

fendant in the proceeding ascertained that the case had been returned to the superior court, he could properly assume that it would remain in that court until the judge had regularly made some disposition of it. The judge of the city court was, therefore, right in striking the case from the dockets of the city court. The effect of his judgment was to strike the case from his dockets, and to leave it pending in the court to which it had been first returned, that court having jurisdiction.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 736)

PASCHAL v. TURNER et al.

(Supreme Court of Georgia. Dec. 11, 1902.)

LOST PAPERS—ESTABLISHMENT—APPLICATION FOR HOMESTEAD.

1. The original schedule and plat accompanying a petition to set aside land as a homestead, and for an exemption of personalty, which have been approved by the ordinary, after they have been recorded by the clerk of the superior court as directed by law, are the muniments of title by which the applicant for and the beneficiaries under the homestead hold the property exempted, and as such are private papers, and when lost or destroyed can be established by the superior court.

(Syllabus by the Court.)

Error from superior court, Putnam county; Jno. C. Hart, Judge.

Application of P. J. Paschal, trustee for his wife and others, against J. S. Turner and others, to establish homestead. Judgment for defendants, and plaintiff brings error. Reversed.

W. T. Davidson, for plaintiff in error. Turner & Preston, for defendants in error.

LITTLE, J. Paschal, as trustee for his wife and minor children, filed an application in the superior court of Putnam county to establish a copy of a schedule and plat, being parts of a homestead proceeding instituted by Paschal before the ordinary of that county in 1875, for the purpose of having set aside a homestead and exemption of personalty for the benefit of his family, which original schedule and plat it was averred had been lost. To the petition were attached copies of the alleged lost papers. The bill of exceptions recites that on the call of the case in the superior court several persons moved the court to be made parties defendant, which motion the court sustained, and the petitioner excepted, and assigned error on the granting of said motion; but this point seems to have been abandoned by counsel for the plaintiff in error in his brief, as no reference is made to the same, and therefore it will not be considered. Thereafter one of the defendants moved to dismiss the petition on the ground that the court had no jurisdiction to establish the alleged lost papers, and that the papers sought to be established were the records of another court

of general and exclusive jurisdiction. This motion was sustained by the court, and the petition was dismissed. So the only question which arises for our consideration is whether copies of a schedule and plat, pertaining to a homestead proceeding, which had been lost or destroyed, may be legally established in lieu of the lost originals in the superior court. Civ. Code, § 4743, provides that "upon the loss of any original petition, answer, declaration, plea, bill of indictment, special presentment, or other office paper, a copy may be established in-
stantly on motion." Section 4745 of the same Code provides that "the owner of a paper (other than an office paper, and which cannot be sued on and collected in a justice's court) lost or destroyed, desiring to establish the same, shall present to the clerk of the superior court of the county where the maker of the paper resides, a petition in writing," etc. And by section 4747 it is provided that, after proper service and notice, the court shall grant a rule absolute establishing a copy of the lost or destroyed paper, unless good and sufficient cause be shown why such rule absolute should not be granted. It is contended, in seeking to uphold the judgment rendered, that the court of ordinary, as a homestead court, is a court of original and exclusive jurisdiction, and that the superior court, whether exercising the powers of a court of equity or those at common law, has no power to establish the records of another court; from which it is argued that as, under the law, the ordinary only has power to set aside homesteads and exemptions of personalty, all applications for the establishment of lost papers connected with a homestead or exemption which has been set aside should be made to the ordinary. We recognize the general rule to be that lost papers pertaining to a legal proceeding can only be established in the court which had jurisdiction of and entertained that proceeding; but this is not true in relation to a plat and schedule of a homestead which has been passed on and approved by the ordinary. In Civ. Code, § 2835, which provides for the approval of the schedule and plat by the ordinary, it is declared that after such approval the ordinary shall hand such schedule and plat to the clerk of the superior court of his county, who shall record the same in a book to be kept for that purpose in his office. In the case of *Brown v. Driggers*, 60 Ga. 114, this court ruled that it was contemplated by the law that the original schedule and plat marked "Approved" by the ordinary should be left with the occupants of the homestead as their title, or the evidence thereof, to their home, and the articles exempted therein. The section of the Code to which we have last referred provides that the record or the certified transcript of such schedule and plat shall be competent evidence in all the courts of this state, and in the case referred to it was ruled that such certified

copies were not admissible until the original which should be in the possession of the party claiming the homestead is accounted for. In the same case when it was in this court for a second time (62 Ga. 354) it was ruled, where proper proof was made of the loss of the original homestead papers, that then a certified copy from the clerk's office was properly admitted. To the same effect, see, also, *Larey v. Baker*, 85 Ga. 687, 11 S. E. 800; *Pritchett v. Davis*, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298. Our conclusion from the rulings in these cases is that, after the schedule and plat has been recorded as required, they, as muniments of title, become the property of the applicant and beneficiaries of the homestead, and in no sense are to be considered as office papers either of the superior court or the court of ordinary. Being muniments of title, the applicant and beneficiaries have the same interest in such papers as they would in a deed under which they claim title. This being true, copies of these, when the originals have been lost, can be established in the superior court under the provisions of law to which we have referred; and the judgment of the court below, ruling otherwise, must be reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 738)

CITY OF ROME v. STEWART.

(Supreme Court of Georgia. Dec. 12, 1902.)
DEFECTIVE STREETS—EVIDENCE—DAMAGES
TO TRAVELER—EXAMINATION OF WIT-
NESS—INSTRUCTIONS.

1. There was evidence which authorized the jury to return a verdict for the plaintiff, and the amount fixed as the damages which she sustained was not, under the evidence submitted, excessive.

2. While the trial judge erred in permitting leading questions to be asked the plaintiff on her direct examination, and admitted in evidence her answers thereto, such error is not, under the rulings heretofore made by this court, sufficient to cause a reversal of the judgment.

3. The trial judge did not err in his instructions to the jury of which complaint is made, nor in refusing to instruct the jury as requested.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by J. F. Stewart against the city of Rome. Judgment for plaintiff, and defendant brings error. Affirmed.

Halsted Smith, for plaintiff in error.
Fouché & Fouché and McHenry & Maddox, for defendant in error.

LITTLE, J. The defendant in error instituted an action against the city of Rome to recover damages for injuries which it was alleged she sustained in consequence of a fall, occasioned by an improperly constructed iron cylinder used, in the language of some of the witnesses, as a "water cut-off," which

was placed on the sidewalk of one of the streets of the city. She claimed that such cylinder was covered with an iron cap or top, and that this was loose and unsteady; that on the day named, while she was walking on said street, she stepped on the cap or covering of the cylinder; that it turned under her weight, and threw her violently to the ground, inflicting permanent injuries, which were fully described; that she was without fault, but was injured in consequence of the negligence of the city in constructing said appliance, and in permitting said fixture to remain on the sidewalk in its then defective condition, projecting as it did above the sidewalk, and being loosely capped, etc. There was a general denial of liability on the part of the city. The trial resulted in a verdict for the plaintiff for \$1,000, and the city submitted a motion for a new trial, which being overruled, it excepted. It appears from the evidence introduced that the city of Rome owned and controlled its system of waterworks; that the cylinder had been allowed to remain on the sidewalk projecting above the same for a number of years; and that different persons had fallen by coming in contact with the same. The evidence for the plaintiff was amply sufficient to authorize the jury to find that she was injured; that this injury was occasioned by her stepping on one of two cylinders so placed; and that they projected above the level of the sidewalk, according to the evidence of one of the witnesses, from an inch to two inches. It would seem that the city, being owner and proprietor of the waterworks system, and having full control thereof, would be charged with notice of the condition of these cut-offs; and, in addition to this, the time which they were shown to have existed on the street in that condition would of itself have been sufficient to charge the city with notice. For authority that one injured by a projection allowed to remain on the sidewalk has a cause of action against the city, see *City of Atlanta v. Milam*, 95 Ga. 135, 22 S. E. 43, wherein appears a state of facts very similar to those of the present case. The result of our examination of the brief of evidence induces the conclusion that, if the jury believed the evidence submitted by the plaintiff, she was, as a matter of law, entitled to recover, as all essential elements requisite to a recovery were by such evidence sufficiently established; and, in view of the character of the injuries received, as shown by some of the witnesses, we cannot say that the amount fixed as damages was excessive. The court did not, therefore, err in overruling the motion for a new trial on the first four grounds of the motion.

2. It is complained that the court, over objection, allowed plaintiff's counsel to ask leading questions of her while she was on her direct examination during the trial of the case, and permitted answers to the same to go to the jury, and that these questions were,

in effect, direct suggestions to the plaintiff what to testify. A reference to the questions referred to, and plaintiff's answers thereto, shows that this criticism is a just one, and the objection raised by the defendant should have been sustained. The trial judge should not have permitted answers to the questions to be made. Our Civil Code (section 5283) states as the rule that leading questions are only allowed in cross-examination. An exception is stated in the same section to be that when, from the conduct of the witness, or other reason, justice requires, the court may allow the party calling the witness to ask leading questions. This rule is a wise and salutary one, and ought to be observed, and a violation of it may, in many cases, defeat the ends of justice. We are, however, under precedents which have been established by this court, compelled to rule that a new trial does not necessarily follow because of this error; for such it clearly was. In the case of *Parker v. Railway Co.*, 83 Ga. 539, 10 S. E. 233, Chief Justice Bleckley, in delivering the opinion of the court in that case, said, in response to a ground of a motion for a new trial which alleged error because the court allowed defendant's counsel to ask a witness leading questions, that: "It would be a very extreme case, indeed, in which the mere form of the questions to a witness would justify a reviewing court in setting aside the verdict and judgment." There, as here, the answers of the witness to such questions were relevant and admissible. The objection, when fairly stated, however, there, as here, was that this evidence was obtained through the medium of leading questions. To the same effect, see, also, *Doster v. State*, 93 Ga. 43, 18 S. E. 997. So far as I am concerned, if the question was an original one, I should be disposed to rule that the error alleged in this ground of the motion was sufficient to authorize a reversal of the judgment. In view, however, of the rulings of this court in relation thereto, the judgment cannot be reversed in this case on that ground.

3. Complaints are further made that the trial judge erred in his instructions to the jury in named particulars, and in refusing to charge the jury as requested by defendant's counsel. An inspection of the language of the charge complained of and of that which the judge refused to give brings us to the conclusion that no material error was committed in either of these two particulars. Possibly, the charge in relation to the liability of the city for injuries caused by any defective condition of the waterworks properties, if it was ascertained that the waterworks system was owned and controlled by the city, was stated too broadly, but not sufficiently so to work a reversal of the judgment. The request to charge, which was made as a result of a portion of the argument of one of the counsel for the plaintiff, in our opinion, need not, for a proper trial of the

case, have been given. That portion of the argument to which reference was made, in so far as it tended to assert the existence of any facts, should not have been made, although it is not apparent that any harm was worked to the city in the trial by reason of the statements which it contained. The remarks were not, in our judgment, of sufficient gravity or importance to call for any direct charge in relation to the assertions of fact which the record discloses were contained in the argument made.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 728)

LOYD et al. v. WEBSTER et al.

(Supreme Court of Georgia. Dec. 11, 1902.)

FAST WRIT OF ERROR—TRANSFER TO DOCKET.

1. The judgment of a judge of the superior court in vacation, appointing trustees, cannot be reviewed by this court upon a fast writ of error, notwithstanding there was also in the petition a prayer for injunction; it appearing that no action was taken by the court upon the application for injunction.

2. Under the ruling of this court in the case of *Smith v. Willis*, 32 S. E. 92, 105 Ga. 840, and upon application of counsel for the plaintiff in error, it is ordered that this case be transferred to the docket of the next term.

(Syllabus by the Court.)

Error from superior court, Monroe county; *E. J. Reagan*, Judge.

Action between *H. H. Loyd* and others and *Robert Webster* and others. From the judgment, *Loyd* and others bring error. Case transferred to the next term.

Cabaniss & Willingham and *Persons & Persons*, for plaintiffs in error. *R. L. Berner* and *J. B. Williamson*, for defendants in error.

CANDLER, J. Case transferred to the docket of the next term. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 757)

PRITCHETT v. MOORE.

(Supreme Court of Georgia. Dec. 12, 1902.)

DIRECTING VERDICT.

1. Where the evidence does not demand a particular finding by the jury, it is error to direct a verdict.

(Syllabus by the Court.)

Error from city court of Dublin; *J. S. Adams*, Judge.

Action by *William Pritchett* against *G. W. Moore*. Judgment for defendant, and plaintiff brings error. Reversed.

Jas. B. Sanders, for plaintiff in error. *P. L. Wade* and *Jas. B. Hicks*, for defendant in error.

CANDLER, J. On the ground of the non-residence of the defendant, *Pritchett* sued out an attachment against *Moore* in a justice's

court for \$100 principal, besides interest. In due time the plaintiff filed his declaration in attachment, in which he set out the account which was the basis of his suit. The defendant filed a plea of set-off, in which he averred that the plaintiff was indebted to him in the sum of \$230.99 on a contract, a copy of which was attached to his answer, leaving a balance due the defendant by the plaintiff of \$130.99. On the trial of the case it was agreed between counsel that a credit of \$82.40, which had been allowed the plaintiff by the defendant in his statement of the account between them, should be stricken, making the balance claimed by *Moore* only \$193.39. The contract upon which the defendant relied, together with other evidence, was introduced; and at the conclusion of the evidence the court, on motion of the defendant, directed a verdict in his favor for \$236.11 principal, and \$48.85 interest to the date of the judgment, and judgment was entered accordingly. The plaintiff excepted.

Leaving out of consideration the fact that it is practically impossible to determine from the record how the trial judge arrived at the amount for which he directed a verdict, and the further fact that the verdict directed was for a greater amount, even, than the defendant, in his plea, prayed to recover against the plaintiff, the case was one which, on its merits, should have been submitted to the jury. The evidence offered by the defendant did not demand a finding that he had complied with his part of the contract on which he sought to recover. By the terms of that contract, he was to bore for the plaintiff an artesian well, which should furnish, either by natural flow or by the aid of a deep-well pump, 25 gallons of water per minute. The evidence showed that this supply of water was not obtained by natural flow, and that no deep-well pump was ever used to ascertain if it could be obtained by that means. Expert testimony was introduced to show that if a deep-well pump had been used the supply of water required by the contract could have been obtained; but such testimony is, at best, but a matter of opinion, and the jury should have been left to determine its probative value. In the light of what has been said, it is manifest that a new trial must result.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 805)

JUSTICE v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

PARENT AND CHILD—DENIAL OF SUSTENANCE.

1. Evidence that a father refused to permit medicine to be administered to one of his minor children while sick does not support a conviction of the father for depriving such child of necessary sustenance, within the meaning of the statute which declares such deprivation to be an offense against the laws of this state.

(Syllabus by the Court.)

Error from city court of Dublin; J. S. Adams, Judge.

Sion Justice was convicted of a misdemeanor, and brings error. Reversed.

H. P. Howard and Jas. A. Thomas, for plaintiff in error. F. G. Corber, Sol., for the State.

LITTLE, J. Sion Justice was put on trial in the city court of Dublin under an accusation charging him with a misdemeanor. The specific allegation is that the accused did "unlawfully deprive of necessary sustenance one William Jordan Justice, a child five and a half years old; the said William Jordan Justice being ill, and the said Sion Justice failing and refusing to provide said child with necessary sustenance, the said Sion Justice being the father of said child." The trial resulted in a verdict of guilty, and the defendant made a motion for a new trial, which being overruled, he excepted. Each ground set out in the motion presents sufficient cause for the grant of a new trial.

Pen. Code, § 708, declares that "whoever shall torture, torment, deprive of necessary sustenance, mutilate, cruelly, unreasonably and maliciously beat or ill-treat any child," etc., shall be guilty of a misdemeanor. The theory under which the accused was prosecuted in this case was that he was guilty of depriving his minor child of necessary sustenance, because, on account of a religious belief, he refused to procure medicine to be administered to any of his children when they were sick. It was not shown or attempted to be shown that the accused deprived his minor child of food. One of the witnesses for the state testified that the defendant provided for his family in a decent and respectable manner, in the way of something to eat and drink, and was kind to his wife and children. He said, "The only thing I have to complain of is, he don't give any medicine." Another said that defendant "furnished his family all the necessaries of life as well as any ordinary farmer in his circumstances of life (all but medicine), and that is all I complain of." Still another said that defendant "always furnished his family with all the ordinary provisions that farmers have, and he was kind and considerate to his family and children, seemed to be a Christian, seemed to keep the commandments, and seemed to do unto others as he would have them do unto him." In our opinion, there is a very great difference between depriving a child of sustenance, and refusing to permit medicine to be administered to him. Sustenance is "that which supports life; food; victuals; provisions"; while medicine is defined to be "any substance administered in the treatment of diseases; a remedial agent; a remedy; physic." Our statute, in the use of the word "sustenance," means that necessary food and drink which is sufficient to support life and maintain health.

And evidence that, while a father fully provides for the wants of his children as to food, he refuses to permit them to take medicine, will not support a conviction under this statute; and we know of no provision in our penal laws enacted to meet a case of this character. It appears from the evidence that, under a belief characterized as a religious belief, the father conscientiously prohibits the use of any kind of medicine by any member of his family. From the standpoint which a majority of us occupy, this is a grave and grievous error of judgment, and oftentimes would deprive those who are nearest and dearest to us of the means of alleviating pain and suffering. But while this is true, it cannot be corrected, as the law now stands, through the medium of a criminal prosecution. Each ground of the motion embodies good cause for setting aside the verdict, and the trial judge erred in overruling the motion for a new trial.

Judgment reversed. All the justices concurring except LUMPKIN, P. J., absent.

(116 Ga. 607)

GROVES v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

CRIMINAL LAW—DEFECTIVE INDICTMENT.

1. This court having held that the indictment under which the accused was tried and convicted was fatally defective (*Groves v. State*, 42 S. E. 755, 116 Ga. 516), the conviction was a nullity.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

W. C. Groves was convicted of crime, and brings error. Reversed.

Robt. L. Colding and John R. Cooper, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

PER OURIAM. Judgment reversed.

LUMPKIN, P. J., absent.

(116 Ga. 596)

REGOPOULAS v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

CRIMINAL LAW—SETTING ASIDE JUDGMENT.

1. In obedience to rulings heretofore made, it is held that a motion to set aside a judgment, like a motion to arrest it, must be predicated on some defect apparent on the face of the record. The two differ only in respect of the time at which each must be made.

2. It follows from the foregoing that a motion to set aside a judgment in a criminal case, upon the ground that the accused had, upon demand for a list of the witnesses upon whose testimony the charge against him was founded, been furnished with an incorrect list, was properly overruled.

(Syllabus by the Court.)

Error from superior court, Chatham county; Pope Barrow, Judge.

A. C. Regopoulos was convicted of crime, and brings error. Affirmed.

G. T. & J. F. Cann, for plaintiff in error.
W. W. Osborne, Sol. Gen., for defendant in error.

COBB, J. When this case was here before, it was held that the failure of the solicitor general to furnish the accused with a correct list of the witnesses upon whose testimony the accusation against him was founded was not a good ground to arrest the judgment, for the reason that the failure to comply with the demand was not a defect appearing upon the face of the record. See *Regopoulos v. State*, 115 Ga. 232, 41 S. E. 619. It is now sought to set aside the judgment on a motion filed for that purpose. It has been repeatedly held by this court that a motion to set aside a judgment must be based upon some defect which appears on the face of the record. *Dugan v. McGlann*, 60 Ga. 353; *Pulliam v. Dillard*, 71 Ga. 598; *Artope v. Barker*, 74 Ga. 462; *Guano Co. v. Steed*, 92 Ga. 440, 17 S. E. 967; *Mize v. Improvement Co.*, 109 Ga. 359, 34 S. E. 583. See, also, in this connection, *Jones v. Killebrew*, 55 Ga. 153. There can be no doubt that at common law a motion to set aside a judgment could be predicated upon any irregularity in the judgment, whether appearing upon the face of the record or not. See the remarks of Judge McCay in *Fannin v. Durdin*, 54 Ga. 479 et seq. Judge McCay contended in the case just cited that the provisions of our Code were merely declaratory of the common law, but there was no ruling to this effect; what was said on the subject being simply obiter. See *Alken v. Peck*, 72 Ga. 435. In *Longman v. Bradford*, 108 Ga. 572, 33 S. E. 916, a judgment was set aside, upon motion, for a defect not appearing upon the face of the record. Whether any point was made as to the remedy pursued in that case does not appear from the reported decision; but, if the decision be treated as an authoritative ruling on the subject, it must yield to the ruling made in the earlier decisions which are cited above. These decisions, however, do not go to the extent of holding that there is no way known to the law of this state to set aside a judgment which is void for an irregularity not appearing on the face of the record. The rulings simply are that this cannot be done by motion. In *Dugan v. McGlann*, supra, Mr. Chief Justice Warner says: "The judgment of a court of competent jurisdiction may be set aside for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by a decree in chancery, or in a court of law, under our practice, by appropriate pleadings, and by making the necessary parties to the proceeding for that purpose, but cannot be set aside upon either of those grounds upon motion, as was done in this case." In *Turner v. Jordan*, 67 Ga. 604, a judgment was set aside by a proceeding at law for a defect which did not appear upon the face of the record. That was a proceeding founded upon appropriate

pleadings, with the grounds distinctly alleged, and all parties at interest brought before the court. Mr. Chief Justice Jackson said that a case thus brought was not within the rule laid down in *Dugan v. McGlann*. Upon a critical examination of the facts of the case of *Turner v. Jordan*, it is very hard to perceive any distinction between that case and an ordinary motion to set aside a judgment. But be this as it may, if the distinction pointed out by the learned chief justice exists, that case is not in conflict with the earlier rulings; and, if it does not exist, the case is clearly in conflict with the earlier rulings, and must yield to the same.

It seems to be now settled, so far as the rulings of this court are concerned, that the only difference between a motion in arrest of judgment and a motion to set aside a judgment is as to the time within which each must be made. The former must be made during the term at which the judgment was rendered, and the latter may be made at any time within three years from the rendition of the judgment. The defect in the judgment sought to be set aside in the present case not being one which appeared upon the face of the record, the motion was properly overruled.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent, and CANDLER, J., not presiding.

LITTLE, J. (concurring specially). I agree to the judgment rendered in this case only because I am bound to do so by the early adjudications pointed out by Mr. Justice COBB in his opinion.

(116 Ga. 743)

SOUTHERN RY. CO. v. REEVES.

(Supreme Court of Georgia. Dec. 12, 1902.)
CARRIERS—DUTY TO PASSENGERS—STATION FACILITIES—EXTRAORDINARY DILIGENCE.

1. Ordinarily it is no part of the duty of the employes of a railway company in charge of a passenger train to assist passengers to alight therefrom, but this duty on their part may arise when the circumstances are such as to suggest to them the necessity of assistance. Whether, in a given case, the circumstances were such as to suggest the necessity of assisting a passenger to alight, is a question to be determined by the jury.

2. While a carrier of passengers may not be held to so high a degree of care in the matter of keeping and maintaining station facilities as in the act of transportation, it is the duty of such a carrier to see that all reasonable precautions are adopted to insure both the safety and comfort of persons who are on the premises as passengers. The carrier must exercise at least ordinary care and caution with respect to such matters.

3. Carriers of passengers are bound to exercise extraordinary diligence for the preservation of the lives and persons of their passengers, but the rule of extraordinary diligence applies only to the receiving, keeping, carrying, and discharging of passengers.

4. While a railroad company may be bound to exercise only ordinary care and diligence in

¶ 3. See *Carriers*, vol. 9, Cent. Dig. § 1087.

the construction and maintenance of station facilities, it is bound to exercise towards a passenger extraordinary diligence while he is in the act of alighting from the train.

5. The charges complained of were, when read in the light of the entire charge, not erroneous for any of the reasons assigned. The charge, when taken as a whole, seems to be in accord with the principles above stated.

6. The evidence, though conflicting, was sufficient to authorize the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by E. R. Reeves against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Shumate & Maddox and Fielder & Mundy, for plaintiff in error. J. C. Clark, Westmoreland Bros., and Bunn & Trawick, for defendant in error.

COBB, J. The principles stated in the headnotes seem to be clearly deducible from the following decisions of this court: Railroad Co. v. Perry, 58 Ga. 461 (3); Railroad Co. v. Thompson, 76 Ga. 770 (2); Daniels v. Railroad Co., 96 Ga. 788, 22 S. E. 956; Railroad Co. v. Bates, 103 Ga. 333 (2), 347, 30 S. E. 41; Wilkes v. Railroad Co., 109 Ga. 794, 35 S. E. 165. The evidence, though conflicting, was sufficient to authorize a finding that the plaintiff was injured while attempting to alight from one of the trains of the defendant; that this injury resulted from the fact that the step of the car was a long distance from the ground, which was soft; and that the stool used for the purpose of enabling her to alight was set upon ground which was soft, and when the plaintiff stepped upon the stool it overturned and threw her, causing injuries which were painful and serious. The motion for a new trial complains that the verdict was contrary to the evidence, and also that the court erred in giving certain instructions to the jury. When the charge is taken as a whole, the extracts upon which error is assigned were not erroneous for any of the reasons set forth in the motion for a new trial, and the evidence authorized the verdict.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 674)

CARPENTER v. BRADSHAW.

(Supreme Court of Georgia. Dec. 10, 1902.)

DEEDS—MORTGAGES—FRAUD—EVIDENCE—SUFFICIENCY.

1. The trial judge erred in granting a nonsuit. There was evidence for the plaintiff from which the jury could have legally determined that the contract entered into by the intestate and the defendant was not expressed in the writing which the latter received and held, the meaning of which he (being unable to read or write) could not have ascertained for himself.

(Syllabus by the Court.)

Error from superior court, Floyd county, W. M. Henry, Judge.

Suit by C. E. Carpenter, as administrator of one Drummond, against H. J. Bradshaw. Judgment for defendant, and plaintiff brings error. Reversed.

Lipscomb & Willingham and C. E. Carpenter, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

LITTLE, J. Carpenter, as administrator of Drummond, deceased, complained of Bradshaw, and in an equitable petition filed in the superior court of Floyd county, as a basis for certain prayers which it contained, he alleged substantially the following as facts: In 1899 Drummond borrowed from Bradshaw \$265 to pay off certain debts which he (Drummond) then owed, and to secure the loan he delivered to Bradshaw his warranty deed conveying certain 80½ acres of land in the county of Floyd, of the value of \$800. At the time this conveyance was executed, Bradshaw delivered to Drummond a written obligation to reconvey the land on payment of \$286.92 on October 1, 1900. On or before said last-named day, Drummond tendered to Bradshaw that sum of money for the purpose of canceling the loan. This payment was not actually made, because Bradshaw deferred it and put off Drummond from time to time, until finally Drummond died. Afterwards, in December, petitioner again tendered to Bradshaw the sum of money named, together with interest, for the purpose of paying off the loan, and at the same time offered a deed to Bradshaw for execution, so as to reconvey the land to petitioner. Bradshaw refused to accept the money and cancel the loan, and alleged that the deed given him by Drummond was not to secure a loan, but was an absolute sale. At the time of the loan, Drummond was about 87 years old, feeble in both body and mind, and unable to leave his house; and he repeatedly sent messages to Bradshaw to come and get his money, but he did not do it. Bradshaw appropriated the rents of the land for 1900 and 1901, and refused to account for the same. He also, after the death of Drummond, carried away, without any authority of law, certain personal property, of the value of \$250, which he refuses to return. Petitioner asks that the court, by its decree, direct Bradshaw to deliver up the deed made to him by Drummond, for the purpose of cancellation, on the payment of the sum named in the bond for title, with interest thereon up to the time of his tender; that judgment be rendered in his favor for the value of the rents appropriated by Bradshaw; that he may have a judgment against the latter for the value of the personal property wrongfully appropriated by the defendant. He also prays that attorney's fees be allowed him. In his petition he makes a continuing tender of the amount due on the loan. By amendment it was alleged

that the rental value of the land was \$150 a year; and a prayer was added that Bradshaw be required to apply to his debt the rents of the land, and, if any amount remained due, that Bradshaw should have judgment, with a special lien against the land, and that the same should be sold thereunder, and any balance which remained after paying Bradshaw should be paid to the petitioner. In his answer the defendant generally denied the allegations, and put the plaintiff on proof of the same. A plain warranty deed from Drummond to Bradshaw, dated October 25, 1899, for a consideration of \$265, conveying title to 80½ acres (being the land in controversy) to Bradshaw, was introduced in evidence, and also an instrument in writing executed by Bradshaw, as follows: "Know all men by these presents that I, H. J. Bradshaw, have this day bought 80 and ½ acres land from G. L. Drummond and W. S. Drummond, being one-half of lot No. 230 in the 22nd district and 3rd section of Floyd county, Ga., and more fully described in land deed from G. L. Drummond to H. J. Bradshaw. Be it understood that H. J. Bradshaw is the true owner of said described land, and from this day, Oct. 25th, 1899, are in full possession of said described land; that it is further understood that I, H. J. Bradshaw, have agreed to sell G. L. Drummond said described land; the trade to take effect October 1st, 1900. If on that day G. L. Drummond shall pay to H. J. Bradshaw the sum of \$286.95, cash in hand, H. J. Bradshaw agrees to sell said described land to G. L. Drummond. But it is here understood that if G. L. Drummond fail to pay the amount named, \$286.95, then this offer by H. J. Bradshaw to sell G. L. Drummond is void. It is also understood that this is not a bond for title, and there is no notes taken, and is only a propose trade to G. L. Drummond, and to no other party; it is not transferable; and it is further understood that H. J. Bradshaw will not make deed or sell said described land to any other person at the price named, and if H. J. Bradshaw have the least idea that the deed are to be made to Drummond, and from him to some other person, H. J. Bradshaw reserve the right to himself to be the sole judge on this matter; and if the said Bradshaw believe there is any trick or arrangements to get the deed for another party, outside the G. L. Drummond, H. J. Bradshaw reserve the right to himself not to make the deed. This Oct. 25, 1899. [Signed] H. J. Bradshaw." It was shown on the part of the plaintiff that his intestate had been in feeble health for a number of years prior to his death; that in October, 1899, intestate sent his son G. F. Drummond to see Bradshaw, for the purpose of borrowing \$265 to pay off an indebtedness; that Bradshaw agreed to loan the sum to intestate, but preferred to take a deed instead of a mortgage, to prevent the wife of intestate from taking a year's support or dower in case of intestate's death; that Bradshaw afterwards came to the

house of intestate, had the papers made, and paid off the indebtedness of intestate to the amount of \$265. At the same time, according to the evidence of the witness G. F. Drummond, Bradshaw stated to his father that he would reconvey the land on the payment of the \$265, with interest. The intestate could neither write his own name nor read. Afterwards, in the fall of 1900, the intestate sent this witness to see Bradshaw concerning the payment of the loan, and witness told Bradshaw that his father desired him to come to the house and get the money, and that his father had it there for him. Bradshaw then stated that he would not reconvey the land to intestate unless a certain execution which he then held against the intestate was paid off, and unless intestate would permit him to retain a particular part of the land, on which were located certain barns and a blacksmith shop. The witness further stated that he went to see Bradshaw two or three times after this, and endeavored to get him to go to the house of his father and settle the loan, but he would not go; that defendant took charge of the land in 1900 and rented it out, and has been in possession ever since; that some time in 1901 the defendant came to his father's former home and carried off two horses, a wagon, a set of blacksmith's tools, a cultivator, and a lot of other personal property which belonged to his father; that the land which was conveyed as security was worth \$700 or \$800. At the time Bradshaw came and carried off the personal property, he held a mortgage which the witness, son of intestate, had given after the death of his father. This witness also testified that his father never tendered any money to Bradshaw, and that the latter took the personal property with his (witness') consent, and applied it to the payment of an execution held against the witness, his father, and his brother. Another witness testified that he was present at the execution of the deed to Bradshaw, and that the latter said he would reconvey the land to intestate when he paid back the money which he advanced. A number of witnesses testified that the value of the land was from \$700 to \$800, and that intestate was in very feeble health for some years prior to his death. The value of the land for rent in 1900 and 1901 was also shown. At the conclusion of the evidence for the plaintiff, a motion to nonsuit the case was made by defendant's counsel on the ground that time was of the essence of the agreement to reconvey, and that plaintiff had no right to sue for the land, and that it appeared from the plaintiff's evidence that Bradshaw held an execution against the intestate and his two sons, and the personal property was appropriated to the amount due thereon. The trial judge granted the order of nonsuit, and plaintiff excepted.

We reverse the judgment of the court below, and think the order of nonsuit was error. The proceeding instituted was an equi-

table one, and alleged fraud on the part of defendant. The evidence was conclusive that the intestate was an old, feeble man, unable to read or write. The fact is not contested that, being indebted, the intestate desired to borrow some money in order to pay his debts, and that he did borrow the necessary sum from the defendant, and secured the payment of the same by a conveyance of title. It is not necessary for us now to enter into any discussion as to the legal effect of the instrument which Bradshaw gave to Drummond at the time the latter conveyed title to the land, which on its face bears but little evidence that the terms it expressed were either fair or just. If the transaction between the parties was a mere contract of borrowing and lending money, the incidents which attach to such a contract are fixed by law. As a general rule, time is not of the essence of a contract of this kind. Whether it was the intention of the parties that it should be so in this case is a question which is practically denied on the part of the plaintiff, and asserted by the defendant. That it appears in the written agreement here is not absolutely controlling, for the reason that there is evidence to the effect that at the time he made the deed both the intestate and the defendant understood the transaction differently. It is true that written instruments ordinarily supersede verbal agreements touching the same subject-matter; but it must be remarked that it was shown that intestate could neither read nor write, and the witnesses testified to a state of facts which, if true, would authorize the jury to believe that he did not knowingly enter into the agreement set out in the instrument in reference to a reconveyance of the land. Therefore the material question in this case was, did the parties actually enter into it? Did the intestate at the time he made the conveyance agree to and understand the instrument of writing as now claimed and interpreted by the defendant? If he did not, he could not be held to such agreement. Did he accept this instrument under the belief that, as a matter of right, he or his personal representative would be entitled to a reconveyance of the land on the payment of the debt? If he did, then his rights are not measured by this instrument, but, to have a reconveyance, it is only necessary that the amount due on the debt be paid by his representative. Neither he nor his representative would be estopped from setting up a different contract than that indicated in the writing, because of the inability of the intestate to ascertain for himself what the writing contained, if it be true that the defendant committed a fraud on him, and the intestate believed the writing to be a mere instrument obliging the defendant to reconvey. In any event this case should have gone to a jury. There was evidence which would have authorized the jury to determine that the written instrument did not

set out the true agreement of the parties, and the court erred in granting a nonsuit. Again, while it was not shown that Drummond, in his lifetime, actually tendered the defendant the amount of money due him, yet there was evidence which might be held to be sufficient to waive and excuse an actual tender; that is, that the defendant declined, when he was asked to go and receive the money, to reconvey the land, even upon payment of the debt, unless certain conditions not incorporated in the contract were complied with. We do not, of course, pretend to say how all these matters are; but, from the general aspect and bearing of the evidence for the plaintiff, the jury might have justly ascertained the existence of certain equities in favor of the plaintiff which would affect the binding force of the written instrument, and to the jury this and any other competent evidence should have gone, and, under proper instructions, they should have been left to determine all of the facts of the transaction.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 617)

HATCHER v. STATE.

(Supreme Court of Georgia. Dec. 10, 1902.)

HOMICIDE—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS—NEW TRIAL.

1. The circumstances of the homicide, as testified to by some of the witnesses, authorized the trial judge to instruct the jury as to the law of voluntary manslaughter, in addition to that of murder and justifiable homicide. The verdict for voluntary manslaughter was supported by the evidence.

2. In the absence of a request so to do, the trial judge committed no error in failing to instruct the jury on the law as to the impeachment of witnesses; nor did he commit any error in overruling the motion for a new trial on the ground of newly discovered evidence.

(Syllabus by the Court.)

Error from superior court, Dooly county: Z. A. Littlejohn, Judge.

Will Hatcher was convicted of voluntary manslaughter, and brings error. Affirmed.

Jno. F. Powell & Son, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LITTLE, J. Hatcher, the plaintiff in error, was indicted for murder, and it was charged that with malice he unlawfully killed one Will Harrold by shooting him with a gun. The trial resulted in a verdict finding the accused guilty of voluntary manslaughter. He submitted a motion for a new trial, which being overruled, he excepted. The grounds of the motion allege that the verdict is contrary to the evidence; that the trial judge erred in charging the law of voluntary manslaughter, because the same was unauthorized by the evidence; and that the judge also erred in failing to charge the law in relation

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1900.

to the impeachment of witnesses; and there was a ground of newly discovered evidence. The first two of these grounds may be considered together, for, if the evidence did authorize the verdict for voluntary manslaughter, a charge on the law relating to that offense was proper. We have given the brief of evidence a careful examination, and find that there is very little difference in the evidence of the witnesses introduced by the state and those who testified in behalf of the defendant. It appears from the testimony of some of the witnesses that the deceased, with other persons, was engaged in gaming in the open air near to a house where quite a number of persons had congregated at an entertainment; that a misunderstanding arose between the deceased and a third person in relation to a sale of whisky; that the proprietor of the house sent the accused to where the persons were so engaged, with the request to stop the fuss; that the deceased was quarrelsome, and defied the accused to stop it, and went to the house where the entertainment was, and got his gun. It also appears that the accused followed the deceased, and also got a gun; that they came near together after leaving the house, when the deceased cocked his gun, and, pointing it at the accused, proposed, as both had guns, that they "die and go to hell together." The accused requested the deceased to take his gun "off of him." Not having done so, he requested him again to take his gun out of his face. This request not being complied with, he asked him a third time to do so, which not being done, he then shot and killed him. Some of the witnesses testified also that just before deceased was shot he made a step towards the accused. All of them agree that the parties were within a few steps of each other; that the deceased held his gun, which was cocked, pointing directly towards the accused; and that no reason existed why he could not have shot him. One of the witnesses for the state gives substantially the following account of the shooting and what happened immediately before. Referring to the time when the deceased and the accused had left the house, he says: "They were both going in the direction of the crowd. * * * I know that Will Hatcher spoke to Will Harrold, and told him to go on and shoot him, because I heard him. He didn't call Will Harrold's name, but when he spoke Will Harrold turned around. Will Harrold had his gun, * * * not exactly under his arm. * * * He took it close up under his arm, * * * [and] threw his gun on him just a little after that. He looked around before he turned, and * * * he seed Will Hatcher with the gun, and at that time he whirled his body around. He turned around bringing his gun up, was bringing it around when he was turning, and when he got turned around he had his gun in his face. * * * Will Harrold cocked

his gun as he whirled around. * * * Hatcher asked Will Harrold three times to take his gun out of his face. He didn't ask him one time right after the other. He asked him about two or three minutes apart. When he asked him the third time, there was no motion made by Will Harrold, not a bit. Will Harrold kept his gun in Will Hatcher's face. When Will Hatcher asked him for the third time to take the gun out of his face Will Hatcher didn't have his gun on him. * * * He never did bring the barrel in position to shoot him until he got ready to shoot him. He would carry his gun up * * * and bring it down. Brought it down three times. As he brought it down the third time, he dropped it in his hand, * * * and shot him. There was no motion made by Will Harrold at that time." One of the witnesses for the defense testified to the manner in which deceased was shot as follows: "Harrold had every opportunity to shoot him. All he had to do was to pull the trigger."

1. The theory of the state was that the accused was guilty of murder, because he did not shoot the deceased under the fears of a reasonable man to prevent the deceased from committing a felony on his person. The theory of the defense was that the accused in shooting the deceased acted in self-defense. These two theories were fairly given in charge to the jury in connection with the law relating to voluntary manslaughter. The jury did not take the view that the accused shot in self-defense, and the circumstances of the shooting, in our opinion, did not require such a finding. From the evidence of witnesses for the state it would appear that the accused shot the deceased more because he would not cease pointing his gun at him than because he feared that it was the purpose of the deceased to fire on him. Had the accused instantly fired when deceased pointed his gun at him, that circumstance would have indicated that the shooting was done to protect himself; but, if the evidence of these witnesses be true, he first told the deceased deliberately to take his gun off of him. The deceased failing to comply, he told him a second time, in the same manner, to take his gun off of him, and repeated it a third time, and, not being obeyed, shot. Neither the witnesses for the state nor those for the accused saw any reason why the deceased could not have shot the accused had he desired to do so; and, while they differ as to the actions of the deceased at the time he was shot, the jury could very properly have found that the accused did not shoot to prevent the commission of a felony on his person, and therefore that the homicide was not justifiable. On the other hand, the jury did not adopt the theory of the state that the accused, in shooting the deceased, acted from malice. And there were circumstances which justified them in arriving at this conclusion;

for the deceased armed himself with a loaded gun, placed it in a position ready for firing, and pointed it directly at the accused within range. This was an assault upon him, and, although the deceased made no active effort to shoot, yet, if accused shot because of this assault, the jury were authorized to grade the homicide as voluntary manslaughter. It is said, however, that the shooting was not the result of passion. The jury may properly so have found. The evidence is that, while directing the deceased to withdraw his gun, the accused repeatedly raised and lowered his own gun in a particular manner. In any event, it was such an assault on the accused as justified the excitement of passion, and, if the accused shot because of this assault upon him, and not to prevent a felony, the offense was voluntary manslaughter. This theory of the homicide is easily supported by the evidence. The jury found it to be true, and the trial judge committed no error in giving the law relating to this offense in charge to the jury.

2. As to the proposition that the trial judge committed error in failing to instruct the jury on the law as to the impeachment of witnesses, when there was no request made for such instruction, it is sufficient to say that this court has more than once ruled that such a failure, in the absence of a request, is not error. See *Smith v. Page*, 72 Ga. 539; *Stevens v. Railroad Co.*, 80 Ga. 19, 5 S. E. 253; *Cole v. Byrd*, 83 Ga. 207, 9 S. E. 613; *Lewis v. State*, 91 Ga. 168, 16 S. E. 986; *Joiner v. State*, 105 Ga. 646, 31 S. E. 556.

It must also be ruled that the court committed no error in overruling the motion for a new trial because of the newly discovered evidence set out in the record. This consisted of an affidavit of a person who apparently was not sworn on the trial, to the effect that prior to the homicide he heard the deceased make threats against the accused, which the witness communicated to the accused. Proof of threats of the kind indicated in the affidavit, had they been in the evidence before the jury, would, in all probability, not have had any effect on their finding, because that finding was apparently based on the actions of the parties at the time of the homicide. But, aside from this, the rule in relation to the grant of a new trial on the ground of newly discovered evidence, as laid down in Civ. Code, § 5481, is that, if the newly discovered evidence is that of witnesses, affidavits as to their residence, associates, means of knowledge, character, and credibility must be adduced. No affidavits in relation to either of these subjects are found in the record. So, even if the evidence alleged to be newly discovered was sufficient to authorize the grant of a new trial, an observance of the rule just stated would prevent that result being reached in the present case.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 758)

FINNEY v. MORRIS.

(Supreme Court of Georgia. Dec. 12, 1902.)

SALE OF LAND—DEFICIENCY OF QUANTITY—APPORTIONMENT OF PRICE.

1. Where land is sold by the tract, and described in the conveyance as so many acres, "more or less," a deficiency in the number of acres actually conveyed to the purchaser will not authorize an apportionment in the price agreed to be paid, if the purchaser admits that there was no intentional fraud upon the part of the vendor.

(Syllabus by the Court.)

Error from superior court, Jones county; Jno. C. Hart, Judge.

Action by C. S. Morris against H. J. Finney. Judgment for plaintiff, and defendant brings error. Affirmed.

Johnson & Johnson and R. L. Berner, for plaintiff in error. J. C. Barron, for defendant in error.

FISH, J. Morris sued Finney for \$90 and interest thereon, the balance appearing to be due upon a promissory note given by the defendant to the plaintiff. The defendant pleaded that the note was given in part payment for certain lands which he purchased from the plaintiff; that he bought of the plaintiff two tracts of land for farming purposes, for which they were only suitable; that, according to the plaintiff's representations, there were 90 acres in one of the tracts and 75 acres in the other; that in arriving at the price to be paid the lands were valued at \$5 per acre; that the defendant subsequently had the tracts surveyed, when he ascertained that there were only 72 acres in the larger tract and 59½ acres in the smaller one. He alleged that the deficiency of 33½ acres was "so gross as to justify the suspicion of willful deception on the part of plaintiff, or a mistake amounting to fraud," and he was, therefore, not liable on the note sued upon. He also sought to recoup against the plaintiff the difference between the amount which had been paid on the purchase price and the value of the land actually conveyed to him, estimated at \$5 per acre. In his plea the defendant set forth the deeds made to him by the plaintiff, in each of which the tract therein conveyed was described as containing the number of acres which the plaintiff had represented it to contain, followed by the qualifying words, "more or less." On the trial the defendant, who in his plea had admitted the execution and delivery of the note sued on, took the burden. He fully established the facts alleged in his plea as to the deficiency in each tract in the number of acres actually conveyed to him, but he testified that he did "not charge Morris with any intentional fraud, but that he was mistaken in the number of acres," and his counsel disclaimed any purpose to charge the plaintiff with intentional fraud. Upon the close of the evi-

dence for the defendant the plaintiff made a motion for the direction of a verdict by the court on the ground "that from the evidence and pleadings a verdict for the plaintiff was demanded," which motion the court sustained, and directed a verdict accordingly, which being rendered, the defendant excepted, and brought the case here for review.

In our opinion, the court did not err in directing a verdict in favor of the plaintiff. We know of no distinction between actual and intentional fraud. When the defendant disclaimed any purpose to charge the plaintiff with any actual fraud in the sale of the land, he admitted himself out of court; for, as we understand the decisions of this court, it is only in cases of actual fraud that a purchaser of land sold by the tract, and described in the deed as so many acres, "more or less," can have the price which he agreed to pay for the land apportioned because of a deficiency in the number of acres actually conveyed to him. In *Beall v. Berkhalter*, 26 Ga. 564, it was held that, unless the enumeration of the quantity of land sold is of the essence of the contract, and not matter of description merely, the covenant of warranty will not be broken by a deficiency in the quantity of land conveyed. This decision was rendered prior to the adoption of our first Code, and, in view of the provisions of Civ. Code, § 3542, which are but a repetition of provisions contained in each of our prior Codes, the writer of this opinion would, but for the decision rendered in *Walton v. Ramsey*, 50 Ga. 618, think that the rule laid down in *Beall v. Berkhalter* had been changed when the first Code was adopted, so that there might be an apportionment of the price for legal, as well as actual, fraud. The section of the Civil Code referred to reads as follows: "In a sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price. If the sale is by the tract or entire body, a deficiency in the quantity sold cannot be apportioned. If the quantity is specified as 'more or less,' this qualification will cover any deficiency not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud; in this event the deficiency is apportionable; the purchaser may demand a rescission of the sale or an apportionment of the price according to relative value." Under the decision in *Walton v. Ramsey*, however, there is no room for holding that the Code modified the previously existing rule. In that case it was held: "When a tract of land is sold in a body, as containing so many acres, 'more or less,' and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold cannot be apportioned." Chief Justice Warner, who delivered the opinion of the court, after stating the ruling made in *Beall v. Berkhalter*, said: "It is contended by the plain-

tiffs in error that the Code introduced a new element of fraud, which was not recognized by the court in *Beall v. Berkhalter*, to wit, legal fraud. We do not think so. The principle recognized by that case and the Code is that, when a tract or settlement of land is sold in a body, as containing so many acres, 'more or less,' and both parties have an equal opportunity to judge for themselves, and both act in good faith, a deficiency in the quantity sold cannot be apportioned. The deficiency in quantity might be so great as to justify the suspicion of actual fraud and willful deception; but that is not this case, and, in our judgment, it comes within the decision made in *Beall v. Berkhalter*, and must be controlled by it. The principle recognized by that case and the Code is that, if there is actual fraud and deception on the part of the vendor of the land, or the deficiency in the quantity of land is so gross as to be evidence of it, then the deficiency may be apportioned, but not otherwise." That decision was followed in *Stephens v. Hudson*, 54 Ga. 513. Applying the principle laid down in those cases to the present case, if Finney, the purchaser, and Morris, the vendor, had equal opportunities to judge of the number of acres contained in the tract sold, and both acted in good faith, the deficiency in the number of acres actually conveyed cannot be apportioned. It does not appear from the evidence that their opportunities for estimating the number of acres were unequal. All the boundaries of each tract were given, and Finney testified that he had known the land for 40 years. It is true that he also testified that he did not know any of the lines, "did not know as much as Morris, and did not risk his [Finney's] judgment." This does not show that he did not have equal opportunities with the vendor to judge of the number of acres sold. The disclaimer of the defendant of any purpose to charge the plaintiff with intentional fraud in the sale of the land amounted to an admission that there was no such fraud, and that, therefore, the plaintiff acted in good faith. So, the case falls squarely within the principle ruled in *Walton v. Ramsey*. The plaintiff in error relies upon the decision rendered in *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355. As we understand the question involved in that case and the decision rendered thereon, it is not in conflict with the prior decisions of this court, which we have cited above. There the plaintiff in the court below charged the defendant with willful deception and intentional fraud, and did not like the defendant in the present case, rely upon mere legal fraud. That case, as we understand it, holds that there can be no investigation of the question whether there was or was not fraud in the sale of the land, until the preliminary question whether the deficiency in the land as conveyed is so gross as, in and of itself alone, to justify the suspicion of willful deception, or mistake amounting to fraud, has

been determined in the affirmative; that, when this preliminary question has been so decided, then, and then only, the question of actual fraud may be considered and determined by the jury; and that in determining the preliminary question no other evidence is to be considered than that which establishes the fact and the amount of the deficiency; and, consequently, upon this question, evidence of good or bad faith on the part of the vendor is immaterial and irrelevant. It could not have been the intention of the court to overrule the decision in *Walton v. Ramsey*, for this could not have been done without expressly reviewing that case, and in the elaborate and able opinion of the court, delivered by Chief Justice Bleckley, that case is not even alluded to, nor is there any mention whatever of any other case previously decided by this court. *Estes v. Odom* lays down the rule which is to be followed in cases of this character in making the investigation, and does not change the principle applicable in cases where it is found necessary to determine the ultimate question of fraud or no fraud in the sale, viz., that the ultimate inquiry is to be confined to the existence or nonexistence of actual fraud. If, however, *Estes v. Odom* is in conflict with the former cases, they must govern.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 614)

UNDERWOOD v. STATE.

(Supreme Court of Georgia. Dec. 9, 1902.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The charge complained of was not, for any reason assigned in the motion for a new trial, erroneous; the evidence warranted the verdict; and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Americus; O. R. Crisp, Judge.

C. E. Underwood was convicted of crime, and brings error. Affirmed.

J. H. Lumpkin, for plaintiff in error. F. A. Hooper, Sol. Gen., and J. A. Ansley, Jr., Sol. City Court, for the State.

CANDLER, J. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 728)

KEEN v. McAFEE et al.

(Supreme Court of Georgia. Dec. 11, 1902.)

EXECUTORS' SALE—PURCHASE-MONEY NOTES—SUIT BEFORE MATURITY—CAVEAT EMP-TOR—FAILURE OF TITLE.

1. Where one purchases land at an executors' sale, and gives four promissory notes, due in successive years, in payment, and two of the notes mature and are not paid, the executors may bring suit upon the matured notes, but cannot, in the same action, obtain judgment on the notes which, at the time suit is filed, are

not due, without alleging some special equitable reason which would authorize a court of equity to render a decree or judgment for the amount of said unmatured notes. *Littleton v. Spell*, 2 S. E. 935, 77 Ga. 227, distinguished.

2. The doctrine of caveat emptor applies to sales of executors and administrators. Where, at an executors' sale, land is sold, and the purchaser gives his promissory notes in payment of the purchase price, and is sued thereon by the executors, there is no error in sustaining a demurrer to a plea filed by the purchaser, which alleges that the executors represented to him that they had a right to sell, but that in fact neither the executors nor the testator had title to the land, and there was, therefore, a failure of consideration, and that the executors had no order of any court authorizing the sale, which was therefore void; it appearing from the plea that the defendant went into possession under the sale, and still retains possession, claiming to have subsequently purchased the true title.

(Syllabus by the Court.)

Error from superior court, Laurens county; Jno. C. Hart, Judge.

Action by J. T. McAfee and another, as executors, against W. J. Keen. Judgment for plaintiffs, and defendant brings error. Reversed.

T. L. Griner and Jas. K. Hines, for plaintiff in error. J. L. Kent and E. L. Stephens, for defendants in error.

SIMMONS, C. J. The executors of McAfee brought their action against Keen, alleging that they, as executors, had sold him a certain tract of land, for the purchase price of which he had given them four promissory notes for \$200 each, payable in successive years; that two of these notes had become due, and that the other two were not due. They prayed for a judgment for the amount of the two matured notes, and a special lien on the land; and also prayed that the sheriff sell the land, and, if it brought more than enough to pay off the two notes sued on, that he be directed to hold the surplus, and, on the maturity of the notes not due at the time of the filing of the suit, to apply it to the payment of these notes. At the time of the trial of the case all of the notes had become due. The defendant's plea having been stricken, the judge directed a verdict against the defendant on all four of the notes, with a special lien on the land. Judgment was entered up accordingly, giving the plaintiffs a general judgment and also a special lien upon the land, and directing that the land be sold, and that, if there was any surplus after paying off all the notes, it should be turned over to the defendant.

1. The defendant excepted to the direction of the verdict and to the judgment thereon on the ground that the judge had no power or authority to direct a verdict upon the two notes not sued on, or to enter judgment thereon. We think these exceptions well taken. Generally, a person holding a written contract of another has no right to sue

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1577.

upon it until there is a breach of the contract, or to have any judgment on such contract without a suit thereon. The present suit was upon two notes, which were past due, and the petition alleged that there were two notes not then due, petitioners praying for a judgment for the amount of the two notes due, with a special lien on the land, and that, if there was a surplus remaining after paying the notes then due, it should be held by the sheriff until the maturity of the other notes, and then applied to them. The judge for some reason—probably because all of the notes had matured before the date of the trial—directed a verdict for the full amount of all of the notes, and entered up judgment accordingly, giving a special lien for the full amount, and directing the sheriff to sell the land, and to turn over to the defendant any surplus that might remain after paying off all of the notes. We think this was clearly erroneous. There was no suit upon the unmatured notes, and no judgment prayed for on them. The court was, therefore, without jurisdiction to give judgment on them. The defendants in error seek to uphold the judgment, under the decision in *Littleton v. Spell*, 77 Ga. 227, 2 S. E. 935. The facts of that case were quite different from those shown by the present record. In that case the petition set out that the defendant had purchased certain land, and had given therefor two notes. One of these was paid at maturity. The other was payable in four equal annual installments, and partial payments had been made on the installments due in 1883 and 1884, but nothing paid on the next installment, which was also due. The fourth installment was not due. It was alleged that the defendant was insolvent, and was unable to pay for the land, and that he held plaintiff's obligation to make him titles. The plaintiff prayed for a judgment for the amounts due; that the land be sold, and the proceeds be applied to the payment of the installments due; and that the surplus, if any, should be retained by the sheriff to satisfy the installment thereafter to become due. Under these facts this court held that in equity the plaintiff was entitled to the relief sought, analogizing the case to the foreclosure of a mortgage where the debt was due in installments. In the present case the insolvency of the defendant was not alleged. So far as appears from the record, he is abundantly solvent, and able to meet any judgment that could be obtained against him on these notes. Nor does it appear whether the plaintiffs had made him a deed to the land, or given him a bond for titles. No equitable reasons were given which would authorize a court of equity to grant the prayers of the petition. The petition makes simply a common-law suit upon two promissory notes, with a prayer for a special lien on the land, and that the surplus be held up to satisfy the other notes upon their maturity. Conceding that *Littleton v. Spell*, su-

pra, was correctly decided, it is not controlling or applicable in the present case. Two of the notes were not sued on, and the judge erred in directing a verdict and entering a judgment thereon.

2. The defendant also complained that the judge erred in striking his pleas. These pleas were, in substance, that the plaintiffs represented to him that they had a right to sell the land, whereas in truth and in fact neither they nor their testator had any title to the land, and there was, therefore, no consideration for the notes; that the title was in the state of Georgia, and so remained until it was granted to defendant; and, further, that the plaintiffs had no right to take the notes, because there was never any order granted them by any court authorizing the sale, and the contract was, therefore, illegal and void. In all judicial sales in this state the doctrine of caveat emptor applies. The purchaser at such a sale must, at his peril, ascertain that the officer making the sale has competent authority to make it, and that he is apparently proceeding to sell under the prescribed forms. If, therefore, an executor having the authority to sell puts up and exposes for sale a certain tract of land, the purchaser is, in the absence of fraud, bound to pay his bid, although the testator had no title. At such a sale the executor sells the interest of the testator's estate, whatever it may be, without any warranty or guaranty. In *Colbert v. Moore*, 64 Ga. 502, it was held that "a purchaser of property at administrator's sale cannot repudiate his bid because of a defective title, or no title at all in the intestate, when there is no fraud or misrepresentation by the administrator." See, also, *Jones v. Warnock*, 67 Ga. 484. The plea does not disclose that there was any fraud on the part of the executors at the time of the sale. It is true it alleges that they represented to defendant that they had a right to sell, but not that these representations were fraudulent, or known to the executors to be false, or that the executors represented that their testator had title. Nor is it alleged that the defendant acted upon these misrepresentations, or believed them to be true. The plea, therefore, failed to set up any such fraud or misrepresentations as would constitute a defense to the action on the notes. The plea also alleged that the executors had no order granted them by any court authorizing them to sell the land. This plea was also insufficient. It was the duty of the purchaser to ascertain, before bidding at the sale, whether the executors had competent authority to sell. A purchaser at judicial sale is bound to look to the judgment, the levy, and the deed. *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 436. Moreover, this being a sale by executors, the plea was insufficient, in that it did not negative the power which may have been given in the will authorizing the executors to sell at private or public sale without an order of court.

The plea should have alleged that the sale by the executors was unauthorized by either an order of court or the provisions of the will of the testator. In addition to all of this, the purchaser should not be allowed to remain in possession, and at the same time set up the invalidity of the sale by which he acquired that possession. It seems to us that, before the defendant can make this defense, if he can make it at all, he should surrender the land to the executors. This certainly is the rule as to ordinary private sales. The pleas of the defendant contained nothing constituting a defense to the action, and they were properly stricken by the court. The judgment is reversed on the ground that the court erred in directing a verdict as to the two notes not sued on and in entering judgment thereon.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 719)

CENTRAL OF GEORGIA RY. CO. v. DORSEY.

(Supreme Court of Georgia. Dec. 11, 1902.)

RAILWAYS—NEGLIGENCE—CARRYING PASSENGER PAST STATION—DAMAGES—FRIGHT—PROXIMATE CAUSE—EVIDENCE—CONTINUING TORT—JURISDICTION.

1. Damages traceable in some measure to a tortious act, but resulting chiefly from other and contingent circumstances, and not the legal or natural consequence of the act, are too remote to be the basis of recovery against the wrong-doer.

2. It follows that, where a female passenger on a railroad train was carried beyond her station, and the train stopped near the next station, and the passenger walked at night, and without escort, through the town, to the house of a friend in that town, she would not be allowed to show that she was frightened by hearing loud voices of negro men, who were walking behind her, unless it is also made to appear that the locality was one in which such occasion for fright was likely to occur, and that the railroad company had notice of this.

3. Where a continuous tort by a railroad company is commenced in one county and completed in another, the principal damage being done in the latter county, the courts of that county have jurisdiction of the cause of action.

(Syllabus by the Court.)

Error from superior court, Henry county; W. A. Brown, Judge pro hac.

Action by N. E. Dorsey against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Berner and Hall & Cleveland, for plaintiff in error. W. T. Dickens, G. W. Bryan, and L. R. Ray, for defendant in error.

SIMMONS, C. J. It appears from the record that Mrs. Dorsey purchased a ticket of the Central of Georgia Railway Company at East Point, Ga., one of its stations, for transportation to Lovejoy, Ga., another of its sta-

tions,—a distance of about 16 miles. The conductor at East Point stood at the front end of the ladies' coach, and Mrs. Dorsey boarded the coach at the rear end. During the passage of the train between the two points, the conductor failed to discover Mrs. Dorsey, and she failed to call his attention to her presence on the train, or that her destination was Lovejoy. The train was not stopped at Lovejoy for her to get off. After she discovered that she had passed her destination, she requested another passenger to find the conductor. The fellow passenger did so. The conductor then stopped the train. Before the stop was made, the train had run a short distance beyond the station at Hampton, the station on the road which was next beyond Lovejoy. The conductor assisted Mrs. Dorsey off, and she undertook to walk to the house of a friend, who resided in the town of Hampton. In her testimony she said that she walked back to the station, and there was no light there. She then went on along the road leading to her friend's house. On her way to the station she heard loud voices of people, whom she supposed to be negroes, and after she left the station these negroes followed her, talking loudly. She became very much frightened and alarmed on account of the voices of the negroes and their following her. At a cross-street she turned toward the house of her friend, and the negroes took another street. This testimony as to her fright because of the voices of the negroes and their following her was objected to by defendant's counsel, and the objections overruled by the court. The jury returned a verdict for the plaintiff. The defendant moved for a new trial, and the admission of the evidence just referred to was made one of the grounds of the motion. The court overruled the motion, and the motion excepted.

1, 2. This is the third time this case has been before this court (106 Ga. 826, 32 S. E. 873; 113 Ga. 564, 38 S. E. 958), but the last trial seems to have been the first at which objection was made to the evidence as to the plaintiff's hearing the negroes following her, and as to her consequent fright, and the damages resulting to her therefrom. The principal objection made to this evidence was that it did not show such damages as could be recovered, because the damages sought to be proved were too remote and consequential in character. We think this objection well founded. Our Civil Code declares (sections 3912, 3913): "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrong-doer." "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or material consequence, are too remote and contingent." The damages claimed by

¶ 2. See Carriers, vol. 9, Cent. Dig. § 1062.

the plaintiff as arising from her being frightened by the negroes' voices were imaginary and contingent, and were not the legal or natural result of the tortious act of the defendant. It was not shown or intimated in the evidence that the defendant or its agent knew, or had any reason to believe, that there were any negroes at the station or in the vicinity, or that disorder was prevalent or common in the neighborhood, or that it was the custom of negroes to congregate there, and talk in a bolsterous manner. The defendant was not bound for anything which happened to Mrs. Dorsey, after she had left the train, which was not the natural and probable result of its putting her off at that place. It was no more bound to pay for her nervousness and fright occasioned by the voices of negroes than if she had claimed to have seen a ghost and been thereby frightened. Upon this question, see *Hopk. Pers. Inj.* § 14 et seq., where all of the decisions of this court upon the subject are collected. Under these decisions we are clear that the evidence was, in this case, inadmissible, and that the court erred in overruling the objections thereto. Defendant in error relied mainly upon decisions made in other states in regard to the question of proximate cause; but, whatever may be the rule in those states, this court is bound by the sections of the Code above quoted, and by the decisions made thereunder. Of course, we do not intend to hold that plaintiff is not entitled to recover for fatigue resulting from her walk to her friend's house and damages resulting therefrom. We do hold simply that she cannot recover for damages resulting from the fright she so graphically described, arising from hearing the negroes' voices, when it does not appear that the locality was one in which such occasion for fright was likely to occur, or that the defendant had any notice of this. What has been just said disposes of the question made by the motion for new trial in regard to the admission of evidence and to the refusal to give in charge a request substantially embodying the law laid down in the first headnote.

3. It appears that the station at which the plaintiff expected to leave the train, and for which she had purchased a ticket, was in Clayton county, while the station near which she was put off was in Henry county, in which latter county the suit was brought. The defendant requested the court to charge the jury as follows: "A party must sue for a tort in the county where the tort is committed, and, under the facts of the case, the plaintiff cannot recover for any damages for any tort that occurred in Clayton county. If Hampton is in Henry county, the plaintiff cannot recover for being carried beyond Lovejoy, or for not putting her off at Lovejoy." In our opinion, there was no error in refusing to give this charge. While, under the plaintiff's theory, it was a tort not to stop the train at Lovejoy, and this tort was committed in Clayton county, the carrying her on be-

yond Hampton made it all a continuous tort. We think plaintiff might have brought suit in either county. *Railway Co. v. O'Bryan*, 112 Ga. 127, 37 S. E. 161.

4. The question as to the remarks made by plaintiff's counsel, and claimed by the defendant to have been improper, is not likely to arise again, and no opinion is expressed thereon.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 624)

MABRY v. CITY ELECTRIC RY. CO.

(Supreme Court of Georgia. Dec. 10, 1902.)

EXPULSION OF PASSENGER—DAMAGES.

1. A railroad company is liable in damages for an injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by Mrs. Joe Mabry against the City Electric Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Seaborn & Barry Wright, for plaintiff in error. Denny & Harris, for defendant in error.

CANDLER, J. Mrs. Mabry brought suit for damages against the City Electric Railway Company, a street railroad corporation, of the city of Rome. Her petition alleged that on a named day she boarded a car of the defendant at a point "some 200 yards from the switch where all cars on the line of the defendant company meet, * * * and from which points the cars run to the several destinations of the line." It was her intention to go to her home in North Rome. As she boarded the car, she asked the conductor if she could ride to the switch, and be transferred to an outgoing car, and go to her home, and the conductor replied that she could. She then paid her fare, and when the car reached the switch she "got off of the incoming car from North Rome and boarded the outgoing car to North Rome." Transfers of passengers were made orally by the conductors of the company, and not by written transfer tickets, and she supposed that she had been transferred, as promised by the conductor of the car that she first boarded. After riding a short distance on the outgoing car, the conductor asked for her fare. She told him that she had paid her fare, and explained the agreement made by the conductor of the car which she had first boarded; but in spite of her protests the conductor ejected her in the presence of other passengers, and she was compelled to walk to her home, a distance of more than a mile. She sued for

¶ 1. See *Carriers*, vol. 2, Cent. Dig. § 1423.

\$500 on account of wounded feelings and "great physical distress." The defendant demurred to the petition, the material portions of which are substantially set forth in the foregoing statement, the grounds of demurrer being: (1) That no cause of action was set out, in that no physical injury was alleged to have been sustained by the plaintiff; and (2) that no damages for pain and suffering "or other pathological damages" can be recovered unless there is some physical injury. The court sustained this demurrer, and dismissed the petition, and the plaintiff excepted.

It will be observed that the defendant does not call in question by its demurrer the sufficiency of the allegations of wrong done to the plaintiff by its servants, but asserts that no cause of action is set out, in that no physical injury is alleged to have been sustained by her. So far as appears from the pleadings, the plaintiff was rightfully on the car from which she alleges that she was ejected, and under the alleged agreement made with her by the conductor of the first car she was entitled to ride to her home on the second car. After informing the conductor of the second car of the facts of that agreement, which, if true, entitled her to ride to her destination in pursuance of her original design, it is alleged that he, over her protests, and in the presence of other passengers, ejected her from the car, compelling her to walk to her home, a distance of more than a mile. Her suit is for wounded feelings and physical distress on account of this wrongful treatment. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical." *Head v. Railway Co.*, 79 Ga. 360, 7 S. E. 218, 11 Am. St. Rep. 434. The defendant company owed the duty to the plaintiff to carry her safely and properly to her destination, and under this obligation she was entitled to be treated respectfully. If it intrusted this duty to servants, the law holds it responsible for the manner in which these servants executed their trust. The precise question made by the demurrer in the case at bar was before this court in the case of *Cole v. Railroad Co.*, 102 Ga. 474, 31 S. E. 107. In the present case, as in the case cited, the question presented is, does the law afford any redress for wounded feelings unaccompanied by injury to the person or purse? Both cases are clearly distinguishable from the case of *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183. In the *Chapman* Case there was no tort independently of the violation of the contract, and in such cases the best decisions of the courts of last resort are to the effect that the damages recoverable are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is willful, wanton, or malicious. That case proceeds upon the idea of a negligent omission to perform a contractual obligation,

and the judgment might well have been placed upon the character of the suffering alleged and the remoteness of the damages arising therefrom. The case at bar, however, is based upon the wrongful commission of an overt act, which in itself involved the feelings, sensibilities, and, in a measure, the reputation, of the plaintiff; an act tending to degrade her in the estimation of other persons present at the time. The injury alleged is, not the failure to carry the plaintiff to her destination, but her expulsion from the car over her protestations of her right to remain thereon. We do not think, therefore, that the *Chapman* Case is applicable to the case at bar. While the law protects the person of the citizen from physical injury, it also protects his feelings from laceration, and will apply money to such wounds as a salve for their healing.

The court erred in sustaining the demurrer to the petition, and the judgment is therefore reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 732)

ANDERSON et al. v. LEVERETTE.

(Supreme Court of Georgia. Dec. 11, 1902.)

BILL OF SALE—EXECUTION—ATTESTATION—RECORDING—CONDITIONAL SALES—MARE—TITLE TO FOAL.

1. A conditional bill of sale may be executed before and attested by a clerk of a superior court in the county wherein he holds his office, and may thereupon be properly recorded in any other county wherein the vendee resides at the time of its execution. When so recorded, such bill of sale is admissible in evidence under the same rules as govern the admission of registered mortgages.

2. A bill of sale for a designated mare, which was then in foal, but not so described, provided that title to the mare should remain in the vendor till the payment of the purchase price. The instrument was properly executed and recorded. The vendee sold the mare's colt, when a few days old, to one who had no actual notice of the title of the vendor of the mare. *Held* that, until the purchase money of the mare was fully paid, the purchaser of the colt did not acquire title thereto, as against the vendor of the mare.

(Syllabus by the Court.)

Error from superior court, Jasper county; H. M. Holden, Judge.

Action by Anderson & Conley against Em. Leverette. Judgment for defendant, and plaintiffs bring error. Reversed.

W. S. Florence, for plaintiffs in error. J. D. Kilpatrick, for defendant in error.

FISH, J. On January 21, 1898, Anderson & Conley executed to Lee Cornwell a bill of sale for a certain mare, therein described as "one black mare, nine years old, known as the 'Mayfield Owens Mare'"; it being stipulated in the bill of sale that the title to the mare was retained in Anderson & Conley until the purchase price, \$65, should be fully paid. The instrument was executed in the presence of and attested by the clerk of the

superior court of Newton county, and on January 25, 1898, was recorded in Jasper county, where Cornwell resided, and where he had possession of the mare, by the clerk of the superior court of the latter county. The mare was heavy with foal at the time of the execution and record of the bill of sale, though not so described therein. Within a few days after she dropped the colt, Cornwell sold the colt to Mrs. Em. Leverette, who at the time had no actual notice that Anderson & Conley had title to the mare. On November 15, 1899, Cornwell returned the mare to Anderson & Conley, and they entered a credit on the bill of sale of \$35. The balance of the purchase money not having been paid, Anderson & Conley brought an action of trover against Mrs. Leverette for the colt. Upon the trial the plaintiffs elected to take a money verdict, and the value of the colt was shown to be \$70 or \$75. The plaintiffs offered to put in evidence the conditional bill of sale, but, upon objection by the defendant, it was excluded, because "the same had not been proven by the subscribing witness, and because it was not properly attested so as to admit it to record, in that the clerk of the superior court of Newton county had no authority to attest a conditional sale contract for record in Jasper county." The court thereupon directed a verdict for the defendant. Plaintiffs sued out a bill of exceptions, assigning error upon the ruling of the court in sustaining the objection to the admissibility in evidence of the bill of sale, and upon the direction of the verdict.

1. Written contracts of the sale of personal property, stipulating that the title thereto is to remain in the vendor until the purchase price thereof shall have been paid, "shall be executed and attested in the same manner as mortgages on personality." Civ. Code, § 2776. "A mortgage on personal property must be executed in the presence of, and attested by, or proved before, a notary public or justice of any court in this state, or a clerk of the superior court * * * and recorded." Id. § 2724. "A mortgage on personality must be recorded in the county where the mortgagor resided at the time of its execution, if a resident of this state; or where the property is located in some county other than that of the mortgagor's residence, then, it shall be recorded in the county where the property is located at the time of the execution of the mortgage, in addition to being recorded in the county of the mortgagor's residence." Id. § 2726. The bill of sale in the present case, having been executed in the presence of and attested by the clerk of the superior court of Newton county, we are very clear that, under the provisions of the Code above cited, it was properly recorded by the clerk of the superior court of Jasper county, where the vendee resided at the time of the execution of the bill of sale. Counsel for the defendant in error contends that under the ruling made in *Bosworth v. Davis*, 26 Ga.

406, a clerk of the superior court of one county cannot attest a mortgage so as to authorize its record in another county, and, as the law relating to the registry of bills of sale is the same as that for the recording of mortgages, the bill of sale in the present case was not properly recorded. In the case just cited the question was whether the attestation of a mortgage of land by a clerk of the superior court of a county other than the county in which the land lay, and in which the mortgage should be recorded, was sufficient to admit it to record, without further proof. The court held that it was not. The ruling was based upon the act of February 14, 1850 (Cobb, Dig. p. 180), which declared: "It shall and may be lawful for the clerks of the superior courts to administer to any witness or witnesses to a deed, conveyance, or other paper intrusted for record, the usual oath or affidavit heretofore administered by a judicial officer or notary public, in making probate of the same to admit said papers to record." This act, however, was changed by the provisions of our first Code, which went into effect in January, 1863 (see section 2668), which declared that in order to authorize the record of a deed to realty or personality, if executed in this state, "it must be attested by a judge of a court of record of this state, or a justice of the peace, or notary public, or clerk of the superior court in the county in which the three last mentioned officers, respectively, hold their appointments," etc. Our present Civil Code has a similar provision (Civ. Code, § 3620). This language evidently means that a clerk of a superior court can attest a deed in the county wherein he holds his office, and not elsewhere, and certainly does not mean that he can only witness a deed when it is to be recorded in that county. The provisions of Civ. Code, § 2774, relating to the execution and attestation of mortgages, are even broader, as we have seen; for it is there declared that the attestation may be by "a clerk of the superior court,"—meaning, of course, any clerk of a superior court in this state. "A registered deed shall be admitted in evidence in any court in this state without further proof, unless the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that the said deed is a forgery, to the best of his knowledge and belief," etc. Civ. Code, § 3628. "Mortgages, when duly executed and recorded, shall be admitted in evidence under the same rules as registered deeds." Id. § 2728. "Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages." Id. § 2777. It follows that the bill of sale in the present case, having been properly executed and recorded, was admissible in evidence, without other proof, in the absence of an attack upon it for forgery, and it was erroneous for the court to exclude the same.

2. The bill of sale, having been properly recorded, was constructive notice to Mrs. Leverette that title to the mare was in Anderson & Conley until the purchase price for it should be fully paid. "The increase of all animals follow the condition of the mother and belong to the owner of the mother at the time of birth." Civ. Code, § 3075. This was the rule of both the common and the civil law. 2 Bl. Comm. 390. The title to the colt was therefore in Anderson & Conley. Did Mrs. Leverette, under the facts of the case, have notice of this title? We think she did. It is true that she had no actual knowledge that Anderson & Conley owned the colt, but, as already said, she had constructive notice that they owned the mare; and as the colt was only a few days old when she purchased it from Cornwell, and, of course, not weaned, it was connected with its mother for nurture, and the then existing relation between the mare and colt was sufficient, at least, to put Mrs. Leverette upon inquiry, which, if followed up, would have disclosed that Anderson & Conley owned the colt. It has been frequently held in jurisdictions where, as at common law, the title to mortgaged property is in the mortgagee, that the increase of a female animal which is under a mortgage is covered by the mortgage, as against innocent third parties, during the period requisite for suitable nurture of such increase by the mother. 1 Cobbey, Chat. Mortg. §§ 366, 368. It follows from the foregoing that, if the court had not excluded the conditional bill of sale from the evidence, the plaintiffs would have made out a case which would have entitled them to a verdict.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 722)

HANSON v. STEPHENS et al.

(Supreme Court of Georgia. Dec. 11, 1902.)

INSOLVENCY — RECEIVERSHIP — BANKRUPTCY — TRUSTEE — RECEIVER'S AND ATTORNEY'S FEES — PAYMENT — INJUNCTION — BILL OF EXCEPTIONS.

1. Exceptions to a judgment on a motion to dissolve an injunction can come to the supreme court only by an ordinary bill of exceptions, and not by a fast bill.

2. While a fund raised by a sale of the property of an insolvent debtor, through the medium of a receiver under the orders of a state court, may, on the application of a trustee, appointed after an adjudication of such debtor as a bankrupt, for a transfer of such fund in the state court to him, be charged with the cost and expenses of converting the property of the debtor into cash, yet after the property of a debtor has been seized under the order of a state court and placed in the hands of a temporary receiver, and after the adjudication of such person as a bankrupt, and before the conversion of his property into cash has been made by the receiver, the trustee, on application to the state court, is entitled to the possession of the property for the purpose of being sold and administered in the court of bankruptcy; and it is error on the part of the judge of the state court to order the transfer

of such property to the trustee on condition that the fees for the attorneys and receiver shall be first paid. Where no fund is in the hands of the receiver, out of which such payments may be made, the persons claiming to be paid out of the property must be remitted to the bankruptcy court for the adjudication and establishment of their respective claims.

(Syllabus by the Court.)

Error from superior court, Pike county; E. J. Reagan, Judge.

Petition by O. B. Henderson, individually and as next friend of L. F. Henderson and another, minors, against J. J. Rogers and others, for the appointment of a receiver to take charge of the estate of J. J. Rogers, in which C. A. Stephens was appointed receiver. J. W. Hanson, as trustee in bankruptcy of said J. J. Rogers, applied for an order requiring the receiver to turn over to applicant all the property and assets in his possession belonging to the bankrupt. The application was conditionally granted, and applicant brings error. Reversed.

W. W. Lambdin, for plaintiff in error.
Dodd, Newman & Dodd, for defendants in error.

LITTLE, J. On the 27th of November, 1901, O. B. Henderson, in his own right, and as next friend of L. F. and J. M. Henderson, minors, filed in the superior court of Pike county an equitable petition against J. J. and W. T. Rogers, Mrs. S. R. Henderson, and Mrs. Lillie Farnum, in which, after making certain allegations, they prayed for equitable relief, the grant of an injunction, and the appointment of a receiver to take charge of the estate of the principal defendant, J. J. Rogers; and on the 5th of March, 1902, the judge of the superior court granted an order restraining Rogers from disposing of his property, from creating any liens thereon, and appointed Stephens as temporary receiver, to take charge of and hold the property and assets of J. J. Rogers until the further order of the court; and a rule nisi was also issued, calling on Rogers, on a day named, to show cause why the injunction should not be granted and a receiver appointed, as prayed for. Pending this condition of the case, on March 20, 1902, a petition in involuntary bankruptcy was filed against Rogers at the instance of his creditors; and on April 5th thereafter he was duly adjudicated a bankrupt, in accordance with the terms of the bankrupt act. On April 23, 1902, J. W. Hanson was duly and legally appointed trustee for the estate of said bankrupt, and duly qualified as such. On May 19, 1902, the trustee was authorized by an order passed by the judge of the United States district court for the Southern district of Georgia, to apply to the superior court of Pike county for an order requiring and directing the temporary receiver to turn over and surrender to him all of the property, effects, and assets which he had in his custody and control, belonging to the bankrupt. At the time

of the passage of the order authorizing the trustee to make said application, the judge of the United States court, by an order duly passed, restrained the plaintiffs in the petition pending in the state court from further proceeding against the property and assets of the bankrupt in the state court. Neither the receiver nor any creditor resisted the application of the trustee to be put in possession of the property and assets of the bankrupt; but, when said petition came on to be heard in the superior court, the attorneys for the plaintiffs in the state court and the temporary receiver made application to be allowed fees and expenses out of the assets of the bankrupt, and introduced evidence tending to show the value of the services rendered both by the receiver and the attorneys. The result of this hearing was that the judge of the superior court passed the following order: "Upon hearing the within application, the court declines to pass upon the question of dissolving the temporary injunction and receivership in this case, on the ground that an order has heretofore been granted by the court suspending the proceedings in this case on account of the adjudication in bankruptcy of the defendant J. J. Rogers. It is further ordered and adjudged that upon the payment of the expenses, amounting to \$32, incurred by the receiver, and upon payment of \$500 to the receiver, Edward A. Stephens, as his compensation, and upon the further payment of the further sum of \$500 to Dodd, Newman & Dodd, attorneys, as their compensation,—said amounts having been adjudged by this court to be due said Dodd, Newman & Dodd for services in filing the original petition and the petition for the appointment of a receiver in said case,—the receiver is directed to turn over and deliver to the trustee in bankruptcy, J. W. Hanson, the assets, choses in action, and effects of J. J. Rogers, bankrupt, now in his hands as such receiver." The trustee excepted to this order, and alleged that the court erred: First in declining to pass upon the question of dissolving the temporary injunction, for the reason that the case, as made by the pleadings, did not justify the grant of an injunction and the appointment of a receiver, and that the suspending of the proceedings on account of the bankruptcy proceedings was no bar to the action sought by the trustee; second, in awarding a fee of \$500 to the temporary receiver for his services, and a like amount to the attorneys for services rendered in the state court; and, third, in making the payment of said fee of \$500 to said receiver, and \$500 to said attorneys for the receiver, conditions precedent to the delivery of the assets of the bankrupt to the trustee.

1. Upon the call of the case in this court, a motion was made by attorneys for the defendant in error to dismiss the bill of exceptions, for the reason that, "the grounds of exceptions in said bill being exceptions to the order of the court below refusing to

dissolve injunction and receivership, the same should have been certified within twenty days as a fast bill of exceptions." There is no merit in this motion to dismiss. Civ. Code, § 5540. "A fast writ of error will not lie to a refusal to dissolve an injunction." *Smith v. Willis*, 105 Ga. 840, 32 S. E. 92, and citations.

2. It appears from the evidence of Stephens, the temporary receiver, that while he had in his hands a large amount of property belonging to the estate of Rogers, which he had received by virtue of his appointment in the state court, his total cash receipts had been \$251.63, and his disbursements \$208.24, and that there remained in his hands the sum of \$43.39. The petition to the judge of the superior court, asking for an allowance of fees for the attorneys in the state court and for the temporary receiver, contained a prayer that an order be passed fixing the fees of said attorneys and receiver, and that the same be paid out of the assets of the estate before they were delivered to the trustee; and it was under these prayers, and the evidence as to the value of the services of each, that the judge made and passed the order complained of. It will be noted that this order, in effect, directs the transfer of the assets of the bankrupt to the trustee only on payment of the sums named in the order. We are of opinion that the court erred in the passage of the order to which exceptions are taken. It was admitted that the only fund in the hands of the receiver was \$43.39, and the only way in which the additional sum ordered to be paid could be raised was by the sale of sufficient assets in the hands of the temporary receiver. But at the time the order was passed, title to these assets had vested in the trustee in bankruptcy. By section 70a of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3451], it is declared that the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he should have one or more, upon their appointment and qualification, shall, in turn, be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to the property exempt. Construing the order of his honor Judge Reagan by the plain meaning of its terms, the court refused to authorize the transfer unless the sums named should be first paid. No fund was in the hands of the receiver out of which these allowances could be paid, and there was no other manner of raising them except by a sale of the property of the bankrupt in the hands of the receiver, on the theory that they were entitled to be paid because they were proper charges of the officers of the court in bringing in this fund. In the case of *Wilson v. Parr*, 115 Ga. 629, 42 S. E. 5, it was ruled by this court that it was not erroneous for a superior court, which had appointed a receiver to take charge of and ad-

minister the assets of a firm which had subsequently been adjudicated a bankrupt, to grant an application that the receiver deliver those assets to the trustee in bankruptcy; and it was there further ruled that the state courts might and should first charge the assets so to be delivered with the payment of the costs and expenses incurred in bringing the same into court, before requiring delivery to be made to the trustee. But under the facts of the case there presented, it appeared that the assets of the bankrupt had, by proper orders of the superior court, been reduced to cash, and the fund brought into the superior court for distribution, and the property which was asked to be turned over was money. Following the well-established rule, founded upon principles of justice and right, the proposition was recognized that this money in the hands of a receiver, which had arisen from the disposition of the property in his hands by orders of the court, should be first charged with the expenses of converting the assets into cash; that these charges amounted to proper expenses for such services; and that the fund should be diminished by an allowance of these proper charges, in the way of costs. But so far as we know, it has never been ruled that property of a duly adjudicated bankrupt, in the hands of a temporary receiver in a state court, shall or can be made subject to sale by the state court for the purpose of liquidating claims of the receiver for fees, especially after the trustee in bankruptcy has applied for possession of the same; and there are many reasons why this can not properly be done. At the very date of the passage of the order in this case, by operation of the bankrupt law the title to the property had been taken out of the bankrupt, and put in the trustee for the benefit of the bankrupt's creditors. The bankruptcy court had assumed full jurisdiction, and the trustee was entitled to have the estate of the bankrupt, wherever that might be found. There is a marked difference in charging a fund already raised by a sale of the property of a debtor with the expenses of its conversion into cash, and subjecting the property to sale for the purpose of raising funds for the purpose of paying costs and expenses after he has been adjudicated a bankrupt. It is our opinion that the judge erred in passing the order to which exception has been taken; and, while he could very properly have devoted to legitimate expenses and costs the cash in the hands of the temporary receiver, he had no power or authority to make the order for the delivery of the assets contingent upon the payment of the fees of the receiver and attorneys, or cause the property of the bankrupt in the hands of the temporary receiver to be sold for the purpose of raising such funds. Any person, under such circumstances, urging a claim to be paid from the bankrupt's estate, whether he is a creditor of the bankrupt, or because

he has rendered services in caring for the estate or preserving the property for the benefit of creditors, should be referred to the proper court of bankruptcy, where the merits of such claims and their priorities can be passed on and established. It was, in our opinion, immaterial that the judge refused to pass on the question of dissolving the temporary injunction and receivership. The effect of adjudicating the debtor to be a bankrupt transferred the control and management of his estate to the bankruptcy court, and placed the right of adjudicating the claims of creditors in another forum. But he erred in granting an order making the transfer of the property of the bankrupt to the trustee in bankruptcy conditional upon the payment of costs and expenses. He should have granted the prayer of the trustee as to the transfer, and remitted the temporary receiver and the attorneys to the bankruptcy court for an adjudication and settlement of their respective claims.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 748)

WOODWARD v. McDONALD.

(Supreme Court of Georgia. Dec. 12, 1902.)

RULE ON CONSTABLE—FAILURE TO SELL UNDER EXECUTION.

1. Where a rule is issued against a levying officer, calling upon him to show cause why he has not brought to sale property levied on by him under an execution issuing from a court of this state, it is incumbent upon him to make it affirmatively to appear that he parted with possession of the property levied on in obedience to the mandate of a court of competent jurisdiction, which he was bound to respect, or that the process placed in his hands could not legally have been enforced by him.

(Syllabus by the Court.)

Error from superior court, Henry county; E. J. Reagan, Judge.

Rule by C. D. McDonald against N. W. Woodward, constable. Rule made absolute, and defendant brings error. Affirmed.

J. F. Wall, for plaintiff in error. John S. Gleaton, for defendant in error.

FISH, J. At the instance of C. D. McDonald, a rule was issued against N. W. Woodward, as constable of the 498th district, G. M., of Henry county, calling upon him to show cause why the money had not been made on two executions in favor of McDonald, which had been placed in his hands for enforcement. An answer was filed by Woodward, in which he set up the following matters of defense: Both of these executions were duly levied on four bales of cotton as the property of the defendant in *fi. fa.*, and the cotton was advertised for sale on the first Friday in November, 1901, which was the earliest day upon which it could legally have been sold. Some time prior to that date the attorney of the defendant in *fi. fa.* served

upon the constable written notice to the effect that there was pending in the United States district court for the Northern district of Georgia a proceeding in bankruptcy which had been instituted against his client, and that therefore that court had exclusive jurisdiction over his estate. The attorney who served this notice also stated to the constable "that, if he sold said cotton, that he would apply to Hon. Clifford W. Walker, referee in bankruptcy, and ask him to call upon [the constable] to show cause why he should not be committed to jail for contempt of said bankrupt court." Thereafter, but before the day of sale, "he was served with the following notice, viz.: 'In the District Court of the United States for the Northern District of Georgia. In the Matter of Thomas L. Sutton, Bankrupt, in Bankruptcy. It being shown to the court that N. W. Woodward, L. O. of Henry county, Georgia, is in possession of a certain lot of baled cotton belonging to the estate of the bankrupt stated, upon which he has levied: It is therefore ordered that said cotton be delivered to J. Blalock, Esq., the duly appointed trustee of said bankrupt, forthwith. It is further ordered that a copy of this order be served upon said N. W. Woodward, L. C., as aforesaid. Given under my official hand at Monroe, Ga., Oct. 29th, 1901. [Signed] Cliff W. Walker, Referee in Bankruptcy.'" Before the cotton was levied on, one Thrasher, "in obedience and answer to a summons of garnishment sued out and made returnable to the justice's court of said 498th district, had delivered to" the justice of that court the warehouse receipts for the four bales of cotton which had been subsequently levied on; and the constable, in compliance with the terms of the above-quoted order, which had been served on him, "and by the advice and directions of said" justice, delivered these cotton receipts to Blalock, as trustee in bankruptcy of the defendant in *fi. fa.* There was no other property belonging to the defendant in *fi. fa.* upon which the executions placed in the hands of the constable could have been levied, and "for the above and foregoing reasons he has failed to make the money due" thereon.

A hearing of the case was had in the superior court, and the judge passed an order making the rule against the constable absolute, on the ground that he had "failed to show any lawful cause why he had not made the money on said *fi. fas.*" To this judgment, exception was taken. We are of the opinion that it should be affirmed. There having been no traverse filed to the answer of the constable, the recitals of fact therein contained should, of course, have been accepted as true. *Haynes v. Perry*, 76 Ga. 33. But it is to be noted that the respondent does not, in his answer, undertake to affirmatively allege that any proceeding in bankruptcy against the defendant in *fi. fa.* was, in point of fact, pending at the time the attorney of the latter gave written notice to that effect, or when serv-

ice was made of the order purporting to have been passed by Walker as referee in bankruptcy. Nor is there any allegation that any such proceeding had been referred to Walker as such referee; that the defendant in *fi. fa.* had been adjudicated a bankrupt, or that Blalock was, as recited in the order, his duly appointed trustee in bankruptcy. On the contrary, it is simply alleged in the answer filed by the constable that he received the above-mentioned written notice, which was accompanied by a verbal threat on the part of the attorney who served it, and was also served with a paper, a copy of which is set forth, upon which he, with the advice and at the direction of a justice of the peace, assumed to act, without himself having any knowledge concerning the truth of the recitals of fact embraced in either the written notice or in that paper. Certain it is that the justice was without jurisdiction to give to the constable any directions in the premises, and that the latter can claim no immunity because of the fact that he was advised by the justice, as a mere counselor, to obey the mandate contained in this unauthenticated order of a person assuming to act in the capacity of a referee in bankruptcy. See, in this connection, *Treadwell v. Beauchamp*, 82 Ga. 736, 9 S. E. 1040. So the real question presented for our determination is, was the constable warranted in taking for granted that the defendant in *fi. fa.* had been declared a bankrupt, that his estate was in the hands of Blalock as his duly appointed trustee, that Walker was the referee to whom the proceeding in bankruptcy had been referred, and that he, as such referee, had jurisdiction to pass an *ex parte* order such as that purporting to have been signed by him, and thus require the constable to surrender to Blalock, as trustee of the bankrupt, possession of the cotton which had been levied on?

Clearly, the trial judge could not be expected to take judicial cognizance of the pendency of proceedings in bankruptcy instituted against the defendant in *fi. fa.*, or of the action taken by the federal court in regard thereto. Nor can the order set forth in the answer of the constable properly be treated as affording the requisite evidence of the facts therein recited. But even upon the assumption that Walker was, as matter of fact, the referee to whom such a proceeding had been referred, and that he passed the order which was served upon the constable, it still remains true that his answer fails to show a state of facts authorizing the rule issued against him to be discharged. Such an order has none of the sanctity which attaches to a judgment rendered by a court of general jurisdiction. Indeed, it must be analogized to the judgment of an inferior judicatory, which does not on its face show the requisite jurisdictional facts upon which it was based. Under section 38 of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3436], a referee has jurisdiction to "exercise of the powers of the

judge for the taking possession * * * of the property of the bankrupt [only] in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act." Whether the judge himself has jurisdiction, by way of summary process, to compel an officer of a state court to surrender possession of property belonging to the estate of a bankrupt, is a matter of grave doubt, and one concerning which there is a wide diversity of judicial opinion. See, on the one hand, *In re Brown* (D. C.) 91 Fed. 358; *In re Francis-Valentine Co.* (D. C.) 93 Fed. 953; *Id.*, 94 Fed. 793; *In re Fellerath* (D. C.) 95 Fed. 121; contra, *In re Abraham*, 93 Fed. 767, 35 C. C. A. 592; *In re Franks* (D. C.) 95 Fed. 635; *Trust Co. v. Benbow* (D. C.) 96 Fed. 514. Be this as it may, a mere referee in bankruptcy has no power whatever in the premises, save, "in the event of the issuance by the clerk of a certificate" such as is provided for by the bankrupt act. The answer of the constable failed altogether to allege that Walker, as referee, based his action upon the issuance of a certificate of this character. The order signed in his name, as referee, makes no recital as to the authority under which he assumed to issue this most extraordinarily summary process,—an *ex parte* order of a most extraordinarily mandatory character. How, then, could the judge of the court below reach the conclusion that the constable obeyed, as it was his duty to do, process duly and regularly issued by a court of competent jurisdiction? The mere fact that a levying officer who has failed to realize money under a levy made by him "acted honestly and in good faith, and intended no disobedience of the precept of the court" to which he was amenable, can constitute no legal excuse for his failure to perform his official duty. *Gladson v. Cobb*, 73 Ga. 235. This court, in *Sharman v. Howell*, 40 Ga. 257, 2 Am. Rep. 576, held that: "Where property is levied on by a sheriff under an execution from a state court, and the defendant is adjudged a bankrupt, and no proceedings are taken in the bankruptcy court to compel the property levied on to be brought into that tribunal for distribution, the adjudication of bankruptcy and the issuing of the ordinary writ of protection is no excuse to the sheriff for not proceeding to sell the property and raise the money." And this decision was subsequently followed in *Wheeler v. Redding*, 55 Ga. 87, and in *Urquhart v. Leverett*, 69 Ga. 92. In view of these rulings, it was incumbent upon the constable to show that he parted with the possession of the cotton levied on in obedience to legal process which he was bound to respect, or at least show that, upon proper demand made by a duly appointed trustee of a bankrupt who was entitled to enforce a surrender of the cotton, possession thereof was voluntarily yielded to him. As the constable did neither, we are constrained to hold that the trial

court did not err in making the rule against him absolute.

It is to be observed that while the bankrupt act of 1867, with regard to which the cases last above cited were decided, provided merely that meane process against the property of a bankrupt should be dissolved, if sought to be enforced within four months next preceding the commencement of bankruptcy proceedings, Acts 1898, § 671 [U. S. Comp. St. 1901, p. 3450], declares that "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt." If the effect of this provision in the later act is to render void a levy made under final process issued upon a judgment obtained in a state court within four months prior to the commencement of bankruptcy proceedings, it would seem illogical to hold it to be the duty of the levying officer to bring to sale the property levied on, since the process he was called upon to execute would itself no longer be operative. Accordingly, if the officer voluntarily surrendered possession of the property to the trustee in bankruptcy, he could hardly be said to be in contempt of the state court, or liable to the plaintiff in *fi. fa.* for not enforcing its thus nullified process. We are not, however, for the reasons above stated, now called upon to make any definite ruling in regard to the effect of the provision in the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3418] to which we have just directed attention.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 649)

CITY OF ROME v. SUDDETH.

(Supreme Court of Georgia. Dec. 10, 1902.)

CITIES—STREETS—OBSTRUCTIONS—FRIGHTENING HORSE—NEGLIGENCE—PLEADING—PETITION—FAILURE TO STATE CAUSE OF ACTION.

1. A petition in a suit for damages against a municipal corporation on account of personal injuries which alleges that the municipal authorities allowed to be placed at a certain point in the city "two large stones," and that the plaintiff's horse became frightened at these stones and ran away, causing the injuries on account of which suit is brought, but which fails to allege the length of time that the stones were permitted to remain in the place described, that the stones were objects naturally tending to frighten an ordinarily roadworthy horse, and that his horse was such an animal, and which does not allege that the city violated any duty in failing to cause the removal of the stones, or make any allegation of fact from which such a violation of duty can be inferred, does not state facts sufficient to authorize a recovery against the city, and should be dismissed on demurrer.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by A. F. Suddeth against the city

of Rome. A demurrer to the petition was overruled, and defendant brings error. Reversed.

Halsted Smith, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

CANDLER, J. Suddeth sued the city of Rome for damages. His petition alleged that a few days prior to July 28, 1901, two large stones were placed at a certain point in the city, at the intersection of two streets, and on the side of one of them; that on the day named, while driving with his wife and children by this point, his horse became frightened at the stones and ran away, throwing him to the ground and causing the injuries sued for; and "that said runaway, causing said injuries, was caused by the negligence of said city in allowing and permitting the placing of said stones in said place, and in allowing and permitting said stones to remain in said place, where it was likely and probable that they would frighten horses being driven along said avenue." Other than the language quoted, there was no attempt to charge the city with negligence. The petition was silent as to the length of time that the stones had been allowed to remain in the place referred to. The stones were not described, nor does it appear from the petition that they were objects which of themselves would have a natural tendency to frighten horses, or that they were placed on the street in such a manner as to give rise to that tendency. No intimation is contained in the petition as to whether the plaintiff's horse was or was not gentle and roadworthy, or whether or not the plaintiff was driving him in an ordinarily careful manner. To this petition the defendant demurred generally, and on the ground that no facts were stated therein showing any negligence on the part of the defendant upon which a recovery could be had. The demurrer was overruled, and the city excepted.

Construing the declaration, as we must, most strongly against the plaintiff, the reasonable inference from the language used is that the placing of the stones in question at the point mentioned was an act of some one other than a servant or agent of the city. While the declaration alleges that the city allowed the stones to be so placed, and further charges that the city was negligent in permitting them to remain as they were, it does not necessarily follow that the city had actual notice that the stones had been put upon the side of the street, as charged in the petition. Municipal corporations are not liable for defects in their streets, when there has been no negligence in constructing or repairing them, "when it has no notice thereof, unless such defect has existed for a sufficient length of time for notice to be inferred." Pol. Code, § 749. It follows that where an object or objects which would not ordinarily cause a reasonably roadworthy horse to take fright are placed, by some one other than a servant or agent of the municipal corporation, on the

side of a street, as a result of which one is injured by the running away of a horse frightened at such object, unless the city authorities had actual knowledge, or a sufficient time had elapsed to charge them with notice, of the fact that these objects were on the streets, the corporation should not be held liable; and a declaration which, reasonably construed, alleges that the objectionable objects were placed upon the street by some one other than a servant of the city, and which does not allege that the city authorities knew or were chargeable with knowledge that this state of facts existed before the injuries complained of were received, is defective. See, on this subject, *Enright v. City of Atlanta*, 78 Ga. 289.

The declaration was also defective in failing to set out either the character of the stones complained of, or the manner in which (if it was the manner of placing the stones that constituted the negligence alleged) the stones were left upon the street. The authorities are agreed that a city's liability to a private action for injuries caused by the obstruction of a street is for culpable neglect of duty, and such neglect can only be predicated on the fact that the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated. *Simon v. City of Atlanta*, 67 Ga. 618, 44 Am. Rep. 739; 1 Shear. & R. Neg. (5th Ed.) § 867. "Whenever a municipal corporation is not uniformly liable for torts of the character which the plaintiff attempts to set forth, he should set out in his declaration, petition, or complaint the special facts on which the liability in the particular case is claimed." "In actions against a municipal corporation for damages arising from a failure to perform a duty alleged to be owed by the corporation to the plaintiff, the facts from which the conclusion may be drawn that the defendant's duty to the plaintiff is as charged should be set out. It is not sufficient merely to state the duty as a legal conclusion, and a mere averment that the act done was unlawful, without averring how and in what its illegality consisted, is not sufficient." 14 Enc. Pl. & Prac. 238; *Conway v. City of Beaumont*, 61 Tex. 10. "In an action against a municipal corporation to recover damages for a physical injury, negligence on the part of the defendant is the test of liability. No matter how free from negligence the plaintiff may have been, he would not be entitled to recover, unless his injuries were caused by or were attributable to negligence on the part of the defendant. There is no presumption against the city in such a case, and therefore the plaintiff must allege such a state of facts as will show negligence on its part. The mere allegation by a plaintiff that an act otherwise unobjectionable is negligent will not suffice. He must show of what the negligence consisted. It is a well-known fact that it often becomes necessary in cities that building material for the use of property owners shall be unloaded, and for a time remain,

on the side of the streets. Municipal corporations are charged with the care and control of their streets, and are bound to see that such streets are kept in a condition of safety for the passage of persons and property; and if this duty be neglected, to the injury of a citizen, the corporation is liable. This obligation frequently entails the necessity of obstructing the street for its entire width, and at times leaving it obstructed for days or even weeks. It would not do to say that in every such case, in the event of an injury caused by the running away of a horse frightened at the sight of building material, paving blocks, or curbing, the city would be liable in damages. In order to establish such a liability, some special and well-defined reason must be set forth." In the case of *City of Cincinnati v. Fleischer* (Ohio) 58 N. E. 568, it was held that the duty of keeping the streets in good order is not violated by permitting a carriage block to occupy the usual position of such blocks near the curb. In this case the plaintiff described the block as a large one. In *Dubois v. City of Kingston*, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804, it was held that a municipal corporation does not, by assenting to the placing of a stepping stone on the edge of a sidewalk, become liable for accidents caused thereby. The supreme court of the United States has held that the fact that a steam roller was left standing for two days on the side of a street did not justify the submission to the jury of the question of negligence, and that the District of Columbia was not liable in damages to a person who was injured by reason of his horse becoming frightened at the roller. *District of Columbia v. Moulton*, 21 Sup. Ct. 840, 45 L. Ed. 1237. The mere fact that injuries result from a horse being frightened by some object upon the public streets does not give a right of action against the city. *Ritger v. City of Milwaukee* (Wis.) 74 N. W. 815. It is not reasonable to suppose that an ordinarily gentle horse would be frightened by two stones on the side of a street, and a declaration which fails to allege, in an action on account of injuries received from such a cause, that allowing the stones to be placed and to remain there was an act which would tend to cause an ordinarily roadworthy horse to become frightened, is fatally defective. In the case of *Brewing Co. v. Parnin* (Ind. App.) 41 N. E. 471, the appellate court of Indiana, in discussing a case similar in its facts to the one now under consideration, said: "The principal and primary purpose of the ordinary highways is to afford the people of the state a means of intercommunication and of passing from place to place. They are especially designed for passage and travel. But this is not the sole and exclusive purpose for which they may be used. They may be lawfully used for many other purposes, provided such uses do not materially interfere with the primary purpose. The right of the public to the use of the highways is subject to reasonable

and necessary limitations. The improvement of the highways themselves, the improvement of abutting lots by digging cellars and the erection of buildings, their use for the carriage and delivery of grain, fuel, and other goods, the loading and unloading of the same thereon, are legitimate uses of the highways, although such uses may result in a temporary obstruction to the travel." Citing *Beach, Pub. Corp. § 1230*; *Dill. Mun. Corp. § 730*. The defendant in the present case had the right to use its streets for the purpose of placing thereon curbstones, material for sidewalks, and for many other purposes which might be mentioned. Abutting property owners had, within limitations, the same right. The plaintiff's right to travel thereon was a superior right, but it is the duty of a traveler upon a highway to take into consideration the rights, not only of his fellow travelers, but of others, to use the highway for purposes other than those of travel, and to conform to those usages and customs which have grown up with the civilization and commerce of the city or country through which the road is constructed. "The person using a highway for purposes other than travel is in duty bound to conform to the rights of the traveling public. A violation of these duties may constitute negligence and lead to legal liability. There is no rule of law that forbids a person from traveling on a highway with a skittish or ill-broken horse, but, if he do so, he may be liable for the injuries resulting therefrom. Nor is there any fixed rule as to what objects a person may bring upon, or what acts he may do upon, a highway. But there are objects and acts which have a tendency to frighten horses. * * * If a person bring such an object upon or do such an action on a highway, he will violate a duty he owes to the traveling public, and be guilty of negligence. It does not follow that because he is negligent he is liable. The person injured may also be in fault. If the latter be traveling with a skittish or untrustworthy horse, there are instances in which he will be deemed to have assumed the risk or contributed to his own injury; for, although the object or act done may have had a tendency or was likely to frighten any kind of a horse, and although both a gentle horse and a skittish horse might have passed the object or act without becoming frightened, still there is much more probability that a skittish horse would become frightened than a gentle and well-trained one. It is for these reasons that, in order to make the complaint good, it should aver, either specially or in equivalent general terms, that the object or act done had a tendency to or was likely to frighten a horse of ordinary gentleness. In other words, the complaint must aver negligence on the part of the defendant, and negative contributory negligence on the part of the plaintiff. * * * If the obstruction or act be one that a person have no right to do or make at all, then there may be a liability even though the horse

be not one of ordinary gentleness." *Brewing Co. v. Parnin*, supra.

There is nothing in the declaration in the present case that goes to show that the plaintiff is entitled to recover. The charge of negligence made against the municipal authorities is too vague and general to constitute a basis of recovery against the city. For these reasons, we hold that the court below erred in overruling the demurrer. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

(116 Ga. 663)

HUGHES et al. v. TREADAWAY et al.
TREADAWAY et al. v. HUGHES et al.

(Supreme Court of Georgia. Dec. 10, 1902.)

LIMITATIONS—NEW PROMISE—POWER OF EXECUTOR—RES JUDICATA.

1. In order to take a debt out of the operation of the statute of limitations, it must be shown to have been kept alive by a new promise in writing, which plainly and unmistakably refers thereto. As a general rule, an executor is without power to bind the estate he represents by an original undertaking on his part; nor is a note given by him in his representative capacity to be regarded as a promise to pay a particular debt, when such note does not identify any outstanding claim against the estate.

2. A decree whereby an executor was granted leave to mortgage property belonging to the estate of his testator is not binding upon a creditor who was not made a party to the proceeding wherein such decree was rendered.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Suit by B. I. Hughes, cashier of the First National Bank of Rome, and others, against E. P. Treadaway and others. From the judgment, both parties bring error. Judgment on both main and cross-bill of exceptions reversed.

Fouché & Fouché and George A. H. Harris, for plaintiffs in error. J. Branham, John H. Reece, McHenry & Maddox, W. J. Neel, Halsted Smith, and I. W. Lipscomb, for defendants in error.

LITTLE, J. The facts brought to light upon the trial of this case in the court below were, in brief, as follows: Prior to November 10, 1890, G. W. F. Lamkin and Samuel Funkhouser were partners in the real estate business, and operated under the firm name of Lamkin & Funkhouser. In the early part of that year, J. H. Reynolds, G. W. F. Lamkin, R. G. Clark, Samuel Funkhouser, and B. I. Hughes signed a written memorandum, of which the following is a copy: "Rome, Ga., May 7th, 1890. We, the undersigned, have jointly bought six hundred shares of Printup City Land & Improvement Co. stock for fifteen thousand five hundred dollars, to be divided as follows: Lamkin & Funkhouser, 200 shares; R. G. Clark, 133 [shares]; B. I. Hughes,

133 [shares]; J. H. Reynolds, 134 [shares]. We have given our joint note for \$15,000.00, and the stock is held as collateral for payment of same." (To whom this note for \$15,000 was made payable does not appear.) On October 18, 1890, Reynolds, Lamkin & Funkhouser, and Hughes executed a promissory note for \$5,000, payable to R. G. Clark, and indorsed by him in blank. Another note for \$5,000 was on the same day signed by Clark, Lamkin & Funkhouser, and Hughes, and was indorsed by Reynolds, to whom it was made payable. A third note, also for \$5,000, and payable to Hughes, and indorsed by him, was on that date executed by Reynolds, Clark, and Lamkin & Funkhouser as joint principals. (These three notes were intended, it seems, to take the place of the \$15,000 note, which appears to have been previously destroyed; but who eventually became the holder of any one of them is not disclosed by the record.) On November 10, 1890, Lamkin died testate. His will contained, among other provisions, the following: (1) "I direct all my just debts paid as soon after my death as convenient." (2) "It is my will and desire that my four minor sons shall each have a good education, and to that end I authorize my executors, * * * as far as in their judgment best, to keep my estate together for that purpose and the maintenance of said minors. But, if it should be necessary for their education and their maintenance in like manner as I have maintained them, I authorize my executors to sell such of my real estate as they think best." Funkhouser, who was one of the executors nominated in the will, qualified, and on December 1, 1890, it was duly probated in common form. "On March 2, 1891, R. G. Clark having paid his share of the original note of \$15,000, J. H. Reynolds, Samuel Funkhouser, and B. I. Hughes made to the First National Bank of Rome a demand note for \$11,666.66, bearing interest from date." On the back of this note was the following unsigned memorandum: "\$5,000.00 of this is to be paid by Lamkin & Funkhouser, \$6,666.66 by Jno. H. Reynolds and B. I. Hughes." Below this memorandum were entered a number of credits, showing that Funkhouser had paid \$2,500, and Reynolds and Hughes each \$3,300, on the note. There also appeared on the back of the note the following entry: "The balance on this note is due by estate of G. W. F. Lamkin, for value received, \$2,500.00. Samuel Funkhouser, Exr. of G. W. F. Lamkin, Dec." The interest on the \$2,500 remaining due upon this note was regularly paid by Funkhouser, as executor, until January 1, 1894. Subsequently, at the request of Reynolds, who was the president of the bank, and with a view to keeping in life its claim against the estate of Lamkin, four notes, dated December 31, 1893, payable to "B. I. Hughes, Cashier," and aggregating in amount \$3,554.50, were executed by Funkhouser, in his rep-

representative capacity, and delivered to the bank. In none of these notes was there, however, any reference made to the original note for \$15,000, or the three notes for \$5,000 each, above mentioned as having been signed by the firm of Lamkin & Funkhouser. On the 25th of December, 1894, Funkhouser filed, in the superior court of Floyd county, an equitable petition, in which he named as parties defendant the legatees under the will of Lamkin, and in which he alleged, among other things: (1) That the estate in his hands consisted entirely of real property, the income from which was barely sufficient to pay taxes and repairs; (2) that, owing to a depression in the market price of such property, it could not be sold, except at a great sacrifice; (3) that it required \$900 per annum to maintain and educate the minor children of the testator; and (4) that he had already advanced out of his own private means a large sum of money in order to meet the expenses incident to carrying into effect the wishes of the testator as to the maintenance and education of these minor children. In this petition Funkhouser prayed that he be granted leave "to raise such sums from time to time by mortgaging the realty as [might] be needed to educate, support, and maintain the minor children, and pay taxes and make repairs on the property of the estate, and to reimburse him for money advanced to said children." A hearing was had upon this petition, and an answer filed in behalf of the defendants, and a decree was entered whereby the prayer of the petitioner was granted. Acting under this decree, Funkhouser, as executor, negotiated three loans,—one in March, 1895, another in July of the same year, and the third in March, 1896,—in each instance executing a mortgage on specific property belonging to the estate he represented. He died on the 8th of August, 1901, without having paid off any of these mortgages, and E. P. Treadaway was appointed administrator de bonis non of the estate of Lamkin. At the date of the death of Lamkin he was solvent, but at the date of the death of Funkhouser the estate was insolvent, he having failed to discharge the debts of his testator in accordance with the terms of the will. On December 2, 1901, B. I. Hughes, "as cashier of the First National Bank of Rome," filed an equitable petition in behalf of himself and such other persons as might wish to join with him as parties plaintiff, in which he named as defendants Treadaway, as administrator de bonis non of the estate of Lamkin, and the holders of the mortgages above referred to. In this petition the plaintiff set forth the following allegations of fact as a basis for the granting of the relief sought: On May 7, 1889, Lamkin, "jointly with R. G. Clark, S. Funkhouser, J. H. Reynolds, and B. I. Hughes, bought six hundred shares of stock in the Printup City Land and Improvement Company, and in part payment

for said stock gave their joint promissory note for \$15,000, payable to —, and at the time said G. W. F. Lamkin died said debt was unpaid, and the same is still unpaid. The executor, Saml. Funkhouser, had from time to time renewed said debt, and there is now due to petitioner on said debt the principal sum of \$3,554.50," besides interest and attorney's fees. No creditor of the estate of Lamkin was made a party to the proceeding whereby Funkhouser, as executor, obtained the decree of court granting him leave to mortgage property belonging to the estate in order to raise money for the purposes recited in such decree, "and petitioner never knew or heard of said proceeding until since the death of said executor and the appointment of E. P. Treadaway administrator de bonis non." The said executor "neglected to pay the debts of the testator, and applied the assets coming into his hands to the maintenance and education of the children of testator, and at the death of said executor the estate was insolvent, and, including the property mortgaged, there is not sufficient property to pay the just debts existing against the testator at his death." The mortgages executed by Funkhouser, as executor, in pursuance of the decree of court above mentioned, were in fraud of the rights of petitioner and other creditors of the testator, and, if these mortgages are paid off "in advance of petitioner's debt, petitioner will lose his entire debt, or the greater part thereof, for the reason that said estate is now insolvent." Acting under an order granted by the court of ordinary, Treadaway, the administrator de bonis non, has "advertised all the property of the testator for sale, for cash, * * * including the land described in the mortgages aforesaid"; and while the holders of the mortgages cannot, as against petitioner, assert any valid lien on the property therein described, yet they constitute a "cloud upon the title to the property, * * * and, if said sale is made by the administrator, the title will be further complicated and beclouded, and the property will be sacrificed," to the injury of petitioner and other creditors of the estate. The plaintiff prayed in his petition: (1) That Treadaway, as administrator, "be enjoined from selling the property attempted to be mortgaged, as alleged"; (2) that the holders of the mortgages "be each enjoined from proceeding to foreclose their said mortgages, or to collect the notes held by them, and that said mortgages be decreed to be surrendered and canceled"; (3) that each of them be required "to refund to the administrator de bonis non all the money paid to them on the notes and mortgages held and claimed by them, as aforesaid"; and (4) that petitioner "have judgment for his debt," and such other and further relief as to the court might seem equitable and just. In response to this petition, Treadaway, the administrator de bonis non, filed an answer in the na-

ture of a cross-petition to marshal assets, wherein he alleged that he was unfamiliar with the actings and doings of Funkhouser, the executor, and was, therefore, unprepared either to admit or deny the main allegations relied on by petitioner. Treadaway did, however, fully set forth the condition of the estate when he took charge of it, and gave the names of a number of persons holding claims against it who were not made parties to the petition. He asked that they be made parties to the case, and that the court should determine the rights of all persons concerned, and give him proper direction in the premises. Separate answers were filed by two of the holders of the mortgages executed by Funkhouser, as executor, in which they took issue with petitioner as to the validity and priority of the mortgages held by them. They also joined with Treadaway, as administrator, and the holder of the other mortgage attacked by the plaintiff, Hughes, in an answer setting up that his claim against the estate of Lamkin was barred by the statute of limitations. Among other persons whom Treadaway in his answer prayed should be made parties to the case was W. T. Jones, who held a claim against the estate for a monument sold by him to Lamkin during his lifetime, and who made an appearance before the court, and set up his claim. By consent of all parties, the presiding judge passed upon all issues of law and fact without the intervention of a jury, and entered a final decree in the case. Among other things, he adjudged: (1) That the claim of Hughes, the cashier of the First National Bank of Rome, was "a valid, liquidated demand against the estate of G. W. F. Lamkin"; (2) that the claim of Jones was "a valid, subsisting debt against" said estate; and (3) that each of the holders of the three mortgages executed by Funkhouser, as executor, had a valid and subsisting lien on the property pledged to secure his mortgage debt, which was superior to the claim of all other creditors. To this finding in favor of the holders of these mortgages both Hughes and Jones excepted, and joined in suing out a writ of error to this court. Thereupon the administrator *de bonis non*, the holders of the mortgages just referred to, and other parties below sued out a cross-bill of exceptions, in which complaint is made that the judge erred in entering up judgment in favor of Hughes, for the reason that the evidence showed conclusively that his claim was barred by the statute of limitations.

1. A proper decision of the question raised by the cross-bill of exceptions disposes of the case, so far as Hughes is concerned. Whatever may have been his purpose in referring in his petition to the original note for \$15,000 signed by himself, Clark, Funkhouser, Reynolds, and Lamkin, certain it is that he did not show any right to recover thereon. Indeed, the evidence does not disclose to whom this note was made payable, or that

either Hughes or the bank of which he was cashier ever became the legal or equitable holder thereof. Furthermore, if it was still outstanding and unpaid, it was clearly barred by the statute of limitations. In point of fact, the three notes for \$5,000 each, upon which the firm of Lamkin & Funkhouser was bound, were designed to take the place of the \$15,000 note. Only one of these three notes was made payable to Hughes, and, so far as appears, he never acquired title to either of the others. All were dated October 16, 1890, and due, respectively, on February 1, February 10, and February 20, 1891. They were not under seal, and therefore were barred on their face at the time Hughes filed his petition. Presumably, they were discounted at the First National Bank of Rome; for it appears that on "March 2, 1891, R. G. Clark having paid his share of the original note of \$15,000, J. H. Reynolds, Samuel Funkhouser, and B. I. Hughes made to the First National Bank of Rome a demand note for \$11,666.66," with the view, evidently, of releasing Clark from further liability on the three notes of \$5,000 each, and substituting for them a new evidence of indebtedness. At the time this demand note was given, the firm of Lamkin & Funkhouser had been dissolved by the death of Lamkin. Accordingly, Funkhouser, as surviving partner, had no power to bind the firm by a novation of the contract into which it had entered; and he did not in fact undertake, in that capacity, to create a liability against the estate of Lamkin by signing the note for \$11,666.66 in the name of the partnership. "After the dissolution of a partnership, one partner has no power to bind the firm by a new contract, nor to renew or continue an existing liability, nor to change its dignity or nature." *Bank v. Ellis*, 68 Ga. 192. So it is clear that, even if Hughes had been the payee of the note last mentioned,—which he was not,—he could not have held the estate of Lamkin liable thereon. The entry on the back of it, signed by Funkhouser, as executor, that "the balance on this note is due by estate of G. W. F. Lamkin, for value received \$2,500.00," was not, from a legal standpoint at least, true. Nor can this entry by the executor be construed into a new promise to pay the note for \$5,000 signed by Reynolds, Clark, and the firm of Lamkin & Funkhouser, in which Hughes was named as payee. "A written acknowledgment of indebtedness, which does not specify or plainly refer to the particular demand or cause of action to be renewed or created by it, is not sufficient to take the case out of the statute of limitations, where the contract or cause of action sued on is barred." *Kirven v. Thornton*, 110 Ga. 276, 34 S. E. 848, citing previous adjudications to the same effect. Certain it is that the above-quoted entry on the note for \$11,666.66 did not refer to the note for \$5,000, payable to Hughes, or to any other outstanding indebtedness against the Lamkin estate. On the contrary, the executor thereby

undertook merely to acknowledge that the estate he represented was bound to pay on this \$11,666.66 note the amount of \$2,500, which was not true as matter of fact, and his saying so created no liability on the part of the estate to pay that amount on this particular note, nor operated as a new promise to pay any other note or other evidence of indebtedness which was binding upon Lamkin's estate. The parol evidence relied on as connecting the note for \$11,666.66 with the three notes for \$5,000 previously signed in the name of his firm was entirely unavailing; for, under Civ. Code, § 3788, "a new promise, in order to renew a right of action already barred, or to constitute a point from which the limitation shall commence running on a right of action not yet barred, must be in writing, either in the party's own handwriting, or subscribed by him, or some one authorized by him." It is equally clear that the four notes executed by Funkhouser, as executor, on December 31, 1898, payable to "B. I. Hughes, cashier," cannot properly be treated as constituting a new promise to pay any particular outstanding indebtedness on the part of the estate. Each of them purports to be an original undertaking by the executor, and in none of them is there embraced an acknowledgment by him that Hughes held any valid claim against the estate. These four notes were given at the request of the president of the bank of which Hughes was cashier merely in order to get "in better shape" its supposed claim against the estate of Lamkin on the \$11,666.66 note hereinbefore mentioned, the president of the bank being under the impression that the effect of giving these new notes would be "to renew or extend that twenty-five hundred dollar" claim. On the hearing of the case he testified that: "The old notes were not surrendered to Mr. Funkhouser, for the reason that [the execution of the new notes] was not intended as a settlement, but to keep the debt alive." So it will be seen that Hughes was not entitled to recover on any of the notes made payable to him under this arrangement, because (1) there was no consideration for them, and (2) the executor had no power to create against the estate he represented a new and distinct liability. *Printup v. Trammel*, 25 Ga. 242; *McFarlin v. Stinson*, 56 Ga. 396; *Gaudy v. Babbitt*, Id. 642; *Deas v. McRea*, 65 Ga. 531.

2. In order to fix the priority of the claim which Jones set up against the estate of Lamkin, it is necessary to pass upon the question presented by the main bill of exceptions, viz., whether or not the decree of court by which leave was granted to Funkhouser, as executor, to mortgage the property of the estate, was binding upon the creditors of the testator. We have had no difficulty in reaching the conclusion that this question should be answered in the negative. None of the creditors were made parties to the proceeding wherein this decree was rendered. It was the duty of the executor, both under the gen-

eral law of this state and under the express terms of the will whereby he was appointed, to first apply the assets of the estate to the discharge of the indebtedness of his testator. It may have been true, as represented by Funkhouser in his application for leave to mortgage, that, owing to a depression in market prices, the property of the estate could not be sold to advantage; and doubtless a court of equity might very properly, if all parties concerned were before it, have undertaken to pass upon the expediency of meeting the emergency presented by creating a mortgage debt. The creditors of the estate would, however, have an undoubted right to be heard as to this matter, for under the law they were entitled to have their demands satisfied without unusual or unnecessary delay. If they objected to an indefinite postponement of the sale of the property, the court would certainly have no power to grant leave to the executor to place incumbrances upon it, unless provision was made whereby the claims of creditors should be satisfied in full out of the proceeds thus raised. In other words, their legal rights could not, without their express consent, be prejudiced by a decree conferring upon the executor any power or privilege which he could not set up under the general law governing the administration of estates, or by virtue of special authority with which he was vested under the will of his testator.

As has been remarked above, an executor cannot, ordinarily, bind the estate he represents by any original undertaking on his part. (See cases last cited.) A testator may, it is true, confer unusual powers upon a guardian or executor, provided, of course, the rights of creditors are not thereby injuriously affected; and in such a case the will of the testator becomes the law by which his representative is to be guided in managing his estate. *Howard v. Cassels*, 105 Ga. 412, 31 S. E. 562, 70 Am. St. Rep. 44; *Brannon v. G. Ober & Son Co.*, 106 Ga. 168, 170, 32 S. E. 16. But where, as in the case at bar, an executor has no power under a will to mortgage the property of an estate, the only course he can properly pursue, if, in his judgment, the property would be sacrificed if brought to sale, is to apply to a court exercising equity jurisdiction for authority and direction in the premises. He then stands upon the footing of any other trustee who seeks to exercise powers not conferred upon him by the instrument under which he was appointed, and must bring before the court all persons at interest, since he cannot in such a proceeding represent any one save himself. This whole subject was carefully considered and ably discussed by Mr. Presiding Justice Lumpkin in the case of *Wagnon v. Pease*, 104 Ga. 417, 30 S. E. 895, in which prior decisions of this court bearing upon the question in hand were reviewed. In pointing out the absolute necessity of having before the court all of the cestuis que

trustent, he said (pages 430-432, 104 Ga., and page 900, 30 S. E.): "To create a mortgage upon trust property is not within the powers conferred by law upon a trustee, to be exercised at his discretion. If, then, an emergency arises which cannot be successfully met in some other and better way, the trustee may very properly bring to the attention of the judge the necessity which exists of borrowing money, and securing the repayment of the same by mortgaging in whole or in part the trust estate. To this end the trustee may present his petition, fully setting forth the facts, and praying that he be granted the necessary power in the premises. The law does not contemplate, however, that the trustee shall have power to bind the cestuis que trustent by such a statement on his part of the exigencies of the case. On the contrary, section 4865 of the Civil Code, which must be regarded as applicable, since the power to allow a trustee to create a mortgage is included in the power to permit him to make a sale, expressly provides, as to cases of this nature, that, 'where any person is interested besides the applicant, notice to such person must be shown, or its absence accounted for, before the court shall proceed in the cause.' * * * Thus it will be seen that the beneficiaries must themselves be properly before the court, which would be an entirely useless formality, if not an absurdity, if the trustee were authorized to represent them in the proceeding. * * * Doubtless, our statute contemplates that the chancellor shall not regard the trustee as having any power to represent the cestuis que trustent with respect to a matter clearly outside of the scope of his general authority, and shall allow the persons to be affected an opportunity to be heard in resistance to the application whereby the trustee seeks a power which the law, in its wisdom, withholds from his exercise, and vests with the court, to be jealously guarded. * * * The truth of the matter is, an application to a judge for power to mortgage would be a mere empty formality if the trustee were allowed to represent the cestuis que trustent therein and make to appear to the court only such a view of the situation as suited his purpose. In that event the discretion reposed in the judge might oftentimes avail the

beneficiaries nothing, for he could not be expected to exercise this discretion wisely and well if misinformed or imposed upon; and, looking to practical results alone, power to mortgage at pleasure might as well have been in the first instance vested directly in the trustee himself." The reasoning upon which the decision in that case was based applies with equal force and weight to the proposition that, if creditors are to be affected by such a proceeding, they must be served, and given an opportunity to be heard. Clearly, therefore, it cannot be seriously urged in the present case that Jones was bound by the decree authorizing the executor to mortgage the property of the estate, since the former was not made a party to the proceeding wherein that decree was rendered, and was given no chance to voice his objections to the granting of the application which the executor presented to the court. That it was imposed upon, and induced to render an improvident decree, is doubtless due to the very fact that the executor failed to inform the chancellor as to the true condition of affairs, if, indeed, he did not deliberately omit to mention that there were unpaid creditors, knowing full well that the court would not grant his petition if the rights of these creditors were brought to its attention. The persons to whom Funkhouser, acting under this decree, gave mortgages upon the property of the estate were bound to take notice (1) that, under the general law of the land, he had no authority to create a mortgage debt binding upon the estate; (2) that no such authority was conferred upon him under the will of his testator; (3) that there might be unpaid creditors of the testator; and (4), if there were, a decree rendered upon the application filed by Funkhouser would not be binding upon them, they not having been made parties to the proceeding. In other words, these mortgagees are to be treated as having parted with their money with their eyes open, voluntarily taking the chances of creditors of the testator subsequently appearing on the scene and demanding the enforcement of their legal rights.

Judgment on both the main and the crossbill of exceptions reversed. All the justices concurring, except LUMPKIN, P. J., absent.

GOLD REEFS OF GEORGIA, Limited, v. MARTIN.

(Supreme Court of Georgia. Oct. 30, 1902.)

Error from superior court, Lumpkin county; J. B. Estes, Judge.

Action between the Gold Reefs of Georgia, Limited, and John Martin. From the judgment overruling a demurrer, the Gold Reefs of Georgia, Limited, brings error. Reversed.

H. H. Dean, for plaintiff in error. W. A. Charters, for defendant in error.

ADAMS, J. This case is controlled by the decision this day rendered in the case of Mortgage Co. v. Martin, 42 S. E. 796. Under it the judgment of the court overruling the separate demurrer filed by the plaintiff in error is reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

BUNCH v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. Sept. 16, 1902.)

Appeal from superior court, Chowan county; Jones, Judge.

Action by Josiah Bunch against the Elizabeth City Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Pruden & Pruden and Shepherd & Shepherd, for appellant. W. M. Bond, for appellee.

FURCHES, C. J. The facts in this case are substantially the same as those in Monds v. Lumber Co. (at this term) 42 S. E. 334. The two cases were argued together, and it was agreed by counsel that a decision in one case would decide the other. Therefore, for the reasons given in Monds' Case, the judgment below in this case is affirmed.

END OF CASES IN VOL. 42

